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CALIFORNIA REPORTER

Covering Cases Reported in

PACIFIC REPORTER

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266 P.—268 P.

Cite by Volume and Page
of the
PACIFIC REPORTER

Thus:
266 P. 273

ST. PAUL, MINN.
WEST PUBLISHING CO.
1956

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Pacific Reporter, Vol. 266, Nos. 1-4; Vol. 267, Nos. 1-6; Vol. 268, Nos. 1-4.

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Cal.Rep. 266-268 P.
2-1967

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204 Cal. 4

COONEY v. PIRRELLI et al. (S. F. 12274.)

Supreme Court of California. April 11, 1928.

1. Trial ⚷191(11)—Instruction submitting question of damages, in action for injuries in which defendant admitted negligence, held not erroneous as assuming some injuries.

In action for injuries, where defendant's counsel admitted all the allegations of complaint except as to injuries and agreed that there was no issue before the jury except as to the extent of the injuries, instruction submitting question of damages to jury *held* not erroneous as assuming injuries, especially where qualifying term "if any" was applied to the injuries; and in view of counsel's admissions and evidence court could properly have assumed that some injuries were sustained as result of the admitted negligence.

2. Appeal and error ⚷882(8)—Inadvertent direction of jury's attention to fact that plaintiff suing for injuries was overseas man held not prejudicial, where matter was first injected into case by defendant.

In action for injuries, inadvertent direction of jury's attention to fact that plaintiff was an overseas man *held* not prejudicial; especially where the defendant first brought the matter to

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the jury's attention in an attempt to show previous impaired state of plaintiff's health.

3. Appeal and error ⚷=1050(1)—Testimony of plaintiff, suing for injuries, that wife and child were with him in automobile, held not prejudicial.

In action for injuries, permitting plaintiff to answer that his wife and child were with him in automobile at time injuries were sustained *held* not prejudicial, on theory that sympathy was unduly created by showing plaintiff was head of a family.

4. Damages ⚷=132(2)—$7,500 for injuries to truckman's head, ribs, and knee joint and creating possibility of lung infection and weakening knee and for pain and suffering held not excessive (Code Civ. Proc. § 657, subd. 5).

$7,500 damages for injuries consisting of cuts on head, concussion of brain, rib fracture, and injury to knee of truckman, subjecting him to possible lung infection and impairing usefulness of his knee, and for pain and suffering, *held* not excessive under Code Civ. Proc. § 657, subd. 5.

5. Damages ⚷=24—Damages cannot be enhanced by mere remote possibility of future ill effects.

The mere remote possibility of future ill effects will not justify jury in increasing its award of damages for injuries.

Department 1.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Frank Cooney against A. O. Pirrelli and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. Hampton Hoge, of San Francisco, for appellants.

Ford, Johnson & Bourquin, of San Francisco, for respondent.

SEAWELL, J. On the evening of August 2, 1925, respondent Frank Cooney, his wife and child, and William Aspe and wife, respondent's stepfather and mother, respectively, and Mr. and Mrs. William Schnorr, father-in-law and mother-in-law, respectively, of respondent, were occupants of a Stephens seven-passenger automobile returning from a trip to Stanislaus county to San Francisco. When near Livermore, Alameda county, respondent, who was at the wheel, pulled off and clear of the paved portion of the highway by two feet, stopped his car, set his brakes and got out to examine the mechanism, which was not functioning properly. The hour was between 8 and 9 o'clock at night. Both front and rear lights were burning. The automatic starter having failed to work, respondent stepped to the front of the car to crank it, when his car was struck with great violence by a Moon sedan machine driven by appellant, who, from some unexplained circumstance, had left the paved portion of the highway and struck respondent's car from the rear, forcing it forward, with such force as to throw respondent down. The car passed over his body, thereby causing the injuries complained against.

[1] At the trial appellant admitted the allegations of the complaint charging negligence and carelessness on his part and thereby narrowed the issues to the extent of the injuries suffered. The instruction of the court, framed upon the admissions of counsel, is now objected to on the ground that no admission was made that respondent suffered any injuries which were the proximate result of appellant's negligence. The instruction, together with the colloquy that occurred between court and counsel for respondent at the time said instruction was given, follows:

> "You are instructed that by reason of the admissions of negligence made by the defendant, that there is but one issue for you to determine in each of these cases, namely, the amount of damages to be awarded to the respective plaintiffs—I am afraid of that, Mr. Johnson. I will withdraw that instruction.
>
> "Mr. Johnson: The amount of damages, if any, would cure any possible uncertainty.
>
> "The Court: You are instructed that by reason of the admissions of negligence made by the defendant, that there is but one issue for you to determine in each of these cases, namely, the amount of damages to be awarded to the plaintiff Cooney, and the amount of damages, if any, to be awarded to the plaintiff Aspe. In the case of Frank Cooney, in assessing damages that you should award him you should take into consideration the character of the injury sustained by him, the nature, extent and severity of the injury sustained, and whether the same is temporary or permanent in its character. In estimating the amount of such damages you may consider the physical and mental pain suffered, if any, the extent, nature, and character of suffering, mental or physical, if any, and its duration and severity. You may also consider any physical pain or mental pain, if any, which you believe from the evidence the plaintiff Frank Cooney is reasonably certain to suffer in the future."

We have given sufficient of the instruction to show that the court did not assume that the respondent had suffered a compensable injury. The instruction, as shown by the reproduced portion and as appears in the portions we have omitted, in speaking of the alleged injuries, uses the qualifying term "if any" (injuries) were sustained. There was no unqualified assumption by the court of the existence of any fact not proved. We think, however, from the admissions of counsel and in view of the uncontroverted evidence that the court could properly have assumed that the respondent suffered injuries to some extent by reason of appellant's admitted negligence. The following colloquy, which occurred between counsel for appellant and respondent and the court, would justify such an assumption:

> "Mr. Hoge: The defendant admits all of the allegations of the complaint except the allega-

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⚷=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes tions as to injuries. We will place before the jury merely the question as to what injuries these people sustained. I have been so instructed. I desire to make the statement that the admission of the allegations of the complaint is made with the consent and under the direction of my clients who are present in court. I want to say that for my own protection.

"The Court: The allegations as to the accident itself?

"Mr. Hoge: The allegations as to the accident itself. We do not admit the allegations as to the injuries, and we do not admit the truth as to the opening statement made by Mr. Johnson.

"The Court: Then there will be no issue before the jury except as to the extent of the injuries?

"Mr. Hoge: Yes."

That counsel admitted that respondent sustained injuries as the proximate result of the appellant's negligence and disputed merely the extent of the same, as he was compelled to do under the convincing proofs in the case, seems clear.

[2, 3] There is no merit in the complaint that appellant was prejudiced because inadvertently it was brought to the attention of the jury that respondent was an "overseas" man. Appellant, in an attempt to show respondent's previous impaired state of health, first brought to the jury's attention the fact that respondent had performed overseas service in the World War. Nor is there any merit in the claim that appellant suffered prejudice by permitting the respondent, when a witness, to answer that his wife and child were with him at the time the injuries were inflicted. Appellant's objection to this testimony was on the theory that sympathy was unduly created by showing that respondent was the head of a family.

[4, 5] Complaint is made that the award of damages, which was for the sum of $7,500, was excessive and the result of passion and prejudice on the part of the jury. Section 657, subd. 5, Code Civ. Proc. The injuries consisted in three lacerated cuts upon the head, concussion of the brain, fracture of the third rib, resulting in an injury to the lungs by puncture, an injury to the lining of the knee joint, breaking of the bones of the nose and a separation from the nasal plate, and numerous bodily bruises and contusions. One physician testified that he was permanently affected and liable to blood-stream infection, and while he could not testify that respondent was suffering from a serious lung infection at the time he examined him, there was a possibility that the injury to the lung had rendered him more susceptible to lung infection. Respondent was confined to a hospital for a period of two months on account of the knee injury and complained of having suffered pain in and weakness of said knee by reason of said injuries. Respondent was a truck driver by occupation, and naturally a weakened condition of the knee would seriously impede his usefulness in the performance of his labors as a truckman. While the damages were doubtless sufficient, we have no comparative method by which damages for injuries, such as those described in the evidence, can be measured, and must repose much in the conscience of the trial judge, who saw the parties to the action and heard the evidence. Mere remote possibility of future ill effects are not sufficient to justify a jury in enhancing its award. We cannot say, however, in the instant case, that the amount of the award, as a matter of law, was excessive, considered with respect to the injuries actually suffered.

Judgment affirmed.

We concur: CURTIS, J.; PRESTON, J.

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204 Cal. 14

ASPE v. PIRRELLI et al. (S. F. 12274a.)

Supreme Court of California. April 11, 1928.

Damages ⚷132(3)—$500 for pain in back and shoulders, partially incapacitating drayman occupying car, as result of impact with another automobile, held not excessive.

$500 damages to drayman injured in back and shoulders by shock of impact of another car striking that which he occupied *held* not excessive, in view of drayman's testimony as to pain and inability to do certain work which he formerly did in his business.

Department 1.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by William Aspe against A. O. Pirrelli and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. Hampton Hoge, of San Francisco, for appellants.

Ford, Johnson & Bourquin, of San Francisco, for respondent.

SEAWELL, J. This case, by reason of having been tried with case No. S. F. 12274, was not given a number. For purposes of identification it will be numbered S. F. No. 12274a.

William Aspe, respondent herein, was an occupant of the automobile driven by Frank Cooney on August 2, 1925, which was struck from the rear by a Moon sedan driven by said A. O. Pirrelli. The facts are described in the case of Frank Cooney v. A. O. Pirrelli, S. F. No. 12274 (Cal. Sup.) 266 P. 273, this day decided. Said William Aspe and his wife, Louise, were seated on the back seat. The rear end of the car was struck by appellant's car with such force as to wreck it.

This cause, which was also one for personal injuries received by reason of the negli-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

gence of appellant, and S. F. No. 12274, supra, were tried at the same time by stipulation of the parties to both actions, the jury returning separate verdicts. The issues, admissions, and facts were the same in both causes, except as to the character and extent of the injuries received by the respective plaintiffs, in said respective causes. Respondent Aspe alleged in his complaint that he was thrown forward with great force and violence by the impact of appellant's automobile striking the automobile in which he was sitting, and thereby sustained a severe sprain of the back and suffered and continues to suffer much pain and anguish and a severe nervous shock by the negligent acts of appellant as described in said case S. F. No. 12274. The jury returned a verdict in his favor in the sum of $500.

A separate appeal was taken to this court. The decision of the cause last cited is decisive of every issue raised upon this appeal except as to the extent of the injuries suffered by reason of the negligent acts of appellant, which includes the question of excessive damages which are claimed to have been given under the influence of passion and prejudice. The respondent, who was a drayman, testified that, by reason of the shock of the impact heretofore described, he has since suffered pain in the region of the back and shoulders to the extent that he has been incapacitated from doing the work which he formerly did in his business. His testimony is to the effect that he suffered pain as a result of his injuries and that his physician had "strapped" him up quite severely as a part of the medical treatment. There is nothing before us by which we can say that the amount of the award was influenced by passion or prejudice.

Case S. F. No. 12274 necessarily compels an affirmance of the judgment in the instant case. The judgment is therefore affirmed.

We concur: CURTIS, J.; PRESTON, J.

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204 Cal. 9

ASPE et al. v. PIRRELLI. (S. F. 12747.)★

Supreme Court of California. April 11, 1928.

Hearing Denied in Bank May 7, 1928.

1. Damages ⟹222—$2,500 verdict on evidence which failed to show actual physical injuries alleged held unwarranted under complaint based solely upon physical injuries, where there was no finding upon special damages.

In action for injuries by occupant of automobile, struck from rear by another car in which complaint alleged that plaintiff sustained physical injuries without alleging special damages, $2,500 verdict, based upon evidence which failed to show actual physical injuries alleged, but merely showed neurasthenic and hysterical condition and chronic neuritis, possibly aggravated by an assumed blow, *held* unwarranted, where court found all of allegations contained in complaint were true and made no finding upon special damages to which the evidence was directed.

2. Damages ⟹222—Defendant is entitled to findings upon issues of special damages in action for injuries.

In action for injuries defendant is entitled to special findings upon issues made by evidence of special damages, in order that he may point out precise errors of trial court upon motion for new trial and upon appeal.

Department 1.

Appeal from Superior Court, Alameda County; J. J. Allen, Judge.

Action by Louise Aspe and another against A. O. Pirrelli. From an adverse judgment, defendant appeals. Reversed and remanded.

J. Hampton Hoge, of San Francisco (Enid Childs, of Berkeley, of counsel), for appellant.

George K. Ford, of San Francisco, for respondents.

SEAWELL, J. This case and Cooney v. Pirrelli, S. F. No. 12274 (Cal. Sup.) 266 P. 273, and Aspe v. Pirrelli, S. F. No. 12274a (Cal. Sup.) 266 P. 275, this day decided, are companion cases as to the cause of and the circumstances attending the accident, which, it is claimed, resulted in inflicting injuries upon respondent. The facts are fully set out in the first of said cited cases. One or two important propositions of law arise in the instant case which were not present in the other two cases. In the instant case, as in the said other two cases, negligence was admitted by appellant. The main disputed issues here are whether respondent suffered any injuries at all as the proximate result of the negligence of appellant in operating his said automobile and, if it be found that she did, whether the award of the court, to wit, $2,500, was greatly in excess of any damages actually sustained by her.

We have carefully considered the evidence, and feel convinced that the full amount of the award is not, as a matter of law, supported by the evidence. Mrs. Aspe was occupying with her husband, the back seat of said automobile at the time it was struck from the rear by appellant's car. She was not rendered unconscious by the impact, nor was she seemingly unduly disturbed by shock at the time of the accident. She received no cuts, lacerations, bruises, or broken bones. Her testimony is that, immediately after the impact, she looked around to see if all were safe. She discovered her son, Frank Cooney, lying under the automobile, apparently dead. This shock is stressed as one of the contributing causes of the neurasthenic condition which is made the basis of damages herein. Upon seeing her son prone under the automo-

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★Hearing denied in bank.

bile she became greatly excited and bewildered, as she explained herself. Her statement was that her anxiety for his safety so affected her that she was unable to recollect just what was subsequently done at the scene of the accident. She testified that she was struck upon the back of the head, but she was unable to say what had struck her. No person testified to having seen a contusion or bruise of any kind upon her head or to have heard her make any complaint. She also testified that, in some manner, two of her front teeth were loosened. Strictly speaking, these are the only physical injuries which she claimed to have sustained. The after effects, as described by respondent, are in the main attributable to shock and fear. It is claimed that, if the collision did not directly cause the physical condition complained of, it hastened and accelerated the diseases and sclerotic conditions that inevitably accompany advancing years. The age of respondent was about 56 years. Neither the husband nor any of the persons who were at the scene of the injury were aware that appellant had suffered serious injury or shock until some hours thereafter. No physician attended her and at no time did she require hospital attention. Her sister, who was a professional masseuse, testified that respondent came to her room about 1 o'clock a. m. on August 3 in an hysterical condition. She gave her a course of treatments and attention. Respondent's daughter, who is a trained nurse, accompanied her aunt and mother, who was visiting the former at her eastern home, to California about one year after the accident, and has since remained with her mother. She testified that respondent was in a nervous and hysterical condition that rendered her much less efficient in assisting her husband in conducting his business than formerly. The husband was engaged in the business of piano mover and operated five trucks in conducting said business. Respondent wife did the bookkeeping, signed checks, and attended to the three phones installed for the purpose of receiving orders. She put in full hours as his business assistant. After the accident she was easily confused and only able to give part time to the duties which she formerly performed. Her husband finally employed a man to take her place, except that she went to the office on Saturdays to sign checks. Her ailments, as described by her sister, daughter, and husband, were manifested by occasional sleepless nights, forgetfulness, extreme nervousness, and fearfulness. She was given to making outcries at night, which was termed by the witness "nightmares."

The physician called by respondent at the trial made an examination of her physical condition a day or two before he testified. He found her heart, lungs, blood pressure and abdomen to be normal. The sensations over the body as to heat, cold and pain were also normal, as were the reflexes. The reaction of her pupils to light was a little sluggish. There was some hardening of the arteries, the beginning of arterio-sclerosis. The urine was carrying a considerable quantity of albumen. It was this physician's opinion that respondent had a chronic nephritis. He also said that in all probability it was caused by the injury received from an assumed blow. The injury referred to is based upon traumatic injury. The effect of said blow could not be determined without some knowledge of its force. The blow, so far as the evidence goes, appears to be a matter of small significance. It was the opinion of said physician, adopting his language, that respondent's "neurasthenia and hysteria were aggravated by the presence of her diseased kidneys, and I further believe that these kidneys were diseased at the time she was injured and probably long before." It was his opinion, however, as elsewhere expressed, that the symptoms indicated to him some evidence of traumatic injury and that would tend to aggravate her ailments. The defendant called two physicians in his behalf, who testified at considerable length. They were of the opinion that the accident had nothing whatever to do with respondent's condition. No evidence of trauma was discernible. Their examination of respondent convinced them that the cause of respondent's trouble was hypertension (high blood pressure) coincident with kidney disease. Her symptoms were attributable to conditions produced by advancing years.

[1, 2] From our examination of the evidence, we conclude that the full amount of the judgment cannot be sustained. The state of both the proof and the pleadings make it impossible for us to order an affirmance conditional upon respondent consenting to accept a reduced sum. The allegata et probata are absolutely at variance with each other. The complaint alleges one ground of damage and the evidence is directed to an entirely different ground. For example, the complaint alleges that respondent sustained physical injuries, to wit, a sprain of the left shoulder and back and concussion of the spine and a severe nervous shock. These allegations are denied by the answer. No evidence whatever was offered to show that she sustained the physical injuries specifically pleaded. As another ground of damage, it was alleged that respondent did the housework, including the cooking, for herself and family; that since sustaining said injuries she had been only partially able to perform said service. The above allegations were also denied by the answer. Not one word of evidence was introduced in support of said allegations. Indeed, the evidence adduced was directed solely to the assistance rendered to her husband as an assistant in carrying on his business as a piano mover. In fact, her time was so completely occupied with her office duties as to repel the inference that she had time for any other duties. The complaint contained no allegation as to the special damage to which the proofs were directed. Ordinarily it will be held that, where a case is tried on a theory not outlined in the pleadings without objection by the adversary, the losing party will not be permitted thereafter to complain. In the instant case, however, the court found that all of the allegations contained in the complaint were true excepting the amount of damage sustained, which, of course, included alleged but unproved household services and excluded special damages, to which some evidence was directed, but which were not pleaded in the complaint. There is no finding upon the special damages to which the evidence was directed. The appellant was entitled to special findings upon the issues thus made in order that he might point out the precise errors of the trial court upon motion for a new trial and upon appeal. Klein v. Milne, 198 Cal. 71, 243 P. 420.

The situation is somewhat anomalous, and we see no other alternative but to remand the case to the trial court for a new trial.

The judgment is reversed.

We concur: CURTIS, J.; PRESTON, J.

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204 Cal. 23

BOYD et al. v. BENNEYAN et al.

(S. F. 12185.)

Supreme Court of California. April 12, 1928.

1. Mortgages 🔑468(3)—Court may appoint receiver in foreclosure proceeding, where value of premises is less than mortgage debt and mortgagor is insolvent (Code Civ. Proc. § 564).

When foreclosure proceeding is instituted, court has power in its discretion to appoint receiver, under Code Civ. Proc. § 564, where it is shown that value of premises is less than mortgage debt and that mortgagor is insolvent.

2. Mortgages 🔑550—Court cannot appoint receiver to collect rents and profits after foreclosure sale for payment to purchaser (Code Civ. Proc. § 707).

In foreclosure proceeding, court *held* to have no authority to appoint receiver to collect rents, issues, and profits arising from possession of premises after sale and during period of redemption, to be paid to purchaser, notwithstanding that purchaser is entitled to rents of property sold or value of use and occupation during such period, under Code Civ. Proc. § 707.

3. Evidence 🔑84—Price bid by purchasers at foreclosure sale is presumed to be value of property.

Price bid for property by purchasers at sale on foreclosure of mortgage is presumed to be its value.

4. Mortgages 🔑550—In foreclosure proceeding, provision of judgment directing receiver's collection of rents after sale for purchaser held severable from valid provisions and subject to attack by motion to amend judgment.

In proceeding for foreclosure of mortgage, provision of judgment directing that receiver should collect rents and profits after foreclosure sale for payment to purchaser at such sale, though void on its face, was severable from valid provision for appointment of receiver to hold prior to sale and is subject to attack by motion to amend judgment.

5. Mortgages 🔑550—Funds in receiver's possession accruing after foreclosure sale held subject to disposition by court on receiver's discharge.

In foreclosure proceeding, funds in possession of receiver which accrued after sale and during period of redemption *held* subject to disposition by court at time of receiver's discharge as "further order of the court," specified in original order appointing receiver.

6. Mortgages 🔑550—Court held not to abuse discretion in discharging receiver after foreclosure sale and ordering payment of funds accruing after sale to crop mortgagees.

In proceeding for foreclosure of mortgage, court *held* not to abuse discretion in discharging receiver after foreclosure sale and ordering payment of proceeds of crops accruing after such sale and during period of redemption to defendants to apply on their notes secured by crop mortgages.

Department 2.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Laura Jane Boyd and others against Mrs. H. Benneyan, also known as H. Benneyan, and others. From an order made after final judgment, discharging receiver and directing disposition of money in his hands, plaintiffs appeal. Affirmed.

G. L. Aynesworth and L. N. Barber, both of Fresno, for appellants.

L. B. Hayhurst and K. Kuyumjian, both of Fresno, for respondent.

SHENK, J. This is an appeal from an order made after final judgment discharging a receiver and directing the payment of the balance of moneys in his hands to the defendants.

The action was brought to foreclose a mortgage on real property given to secure a promissory note in the sum of $8,750 executed by defendant Mrs. H. Benneyan, in favor of the plaintiffs. The mortgage by its terms also covered the rents, issues, and profits of the mortgaged premises. Before the mortgage was executed, the defendant mortgagor had signed a marketing contract with defendant Sun-Maid Raisin Growers of California, pursuant to which the latter was entitled to receive delivery of the 1925 crop of raisins grown on the mortgaged premises. Subsequent to the execution of the mortgage and prior to the commencement of this action, the defendant Mrs. H. Benneyan gave to each of the defendants Paul Enochian and M. S. Constantian a mortgage on the 1925 crop to secure payment of notes for $1,475.71 and $856, respectively. All of these mortgages were duly recorded. At the commencement of the action a receiver was appointed by the court to take possession of the mortgaged premises, manage, cultivate, and farm the same, harvest, sell, and dispose of the crops, and collect and hold the rents, issues, and profits subject to the further order of the court. The order appointing the receiver was made on a showing that the value of the premises was less than the mortgage debt and that the defendant mortgagor was insolvent. Upon a hearing the trial court found the facts, concerning which there is no dispute, and entered its decree of foreclosure wherein it was adjudged that the plaintiffs were entitled to a sale of the mortgaged premises; that the receivership be continued to carry out the provisions of the decree, and ordered that the rents, issues, and profits received from the property prior to the sale be applied to the payment of any deficiency, and that the rents, issues, and profits arising after the sale and during the period of redemption be paid to the *purchaser* at said sale. Pursuant to the decree, and on April 14, 1925, a sale of the premises was conducted at which plaintiffs became the purchasers. A deficiency judgment in their favor in the sum of $1,435.58 was entered. No appeal was taken from the judgment and no motion was made to set it aside, until the events hereinafter related. The receiver took possession at the time of his appointment and farmed the premises. After the sale, but within the period of redemption, he harvested the crops and delivered them to the defendant Sun-Maid Raisin Growers of California. Out of the proceeds which he received therefor, after deducting his expenditures, he reported a balance on hand of $234.20. There were, however, further sums to be received from the defendant Sun-Maid Raisin Growers, on account of the sale and delivery to that corporation of the crops involved. On February 4, 1926, the report of the receiver was approved, whereupon the court ordered that said balance on hand be paid to the plaintiffs who were the owners and holders of the deficiency judgment.

On the 19th day of February, 1926, pursuant to notice, the defendant Mrs. Benneyan moved the court to modify the decree of foreclosure as to the continuance in office of the receiver during the period of redemption and as to the disposition of the proceeds from the sale of the 1925 crops grown and produced on the mortgaged premises, and to discharge the receiver and order payment of the proceeds from the sale of the crops to defendants to apply on the notes secured by crop mortgages hereinbefore mentioned. The motion was made on the ground that the order continuing the receiver in office was contrary to law and therefore void, and that the defendant mortgagees were entitled to the proceeds from the sale of the crops. The motion was submitted to the court for decision, and several months after the period of redemption had expired the following order was made pursuant to the said motion:

> "It is ordered that the receiver heretofore appointed in the above-entitled action be and he is hereby discharged; and that all moneys received by him since the filing of his last report herein be paid over by him to the said defendants."

From this order the plaintiffs have appealed. They contend that the rights of the parties were established by the decree of foreclosure, and that the motion, pursuant to which the order appealed from was made, was a collateral attack upon the judgment and beyond the power of the court to grant.

[1, 2] It is beyond question that the court, when the foreclosure proceeding was instituted, had the power in its discretion to appoint a receiver where, as here, a proper showing had been made. Section 564, Code Civ. Proc. And the power of the court to continue the receiver in possession until the sale of the mortgaged premises is not here questioned. A sharp dispute has arisen between counsel as to the power of the court to continue the receiver in possession after the sale and during the period of redemption. The plaintiffs contend that the court had such power and cite in support of their contention numerous cases in other jurisdictions where the appointment of a receiver to take or continue in possession of the mortgaged premises during the period of redemption has been upheld, but upon examination we find them to be cases where the purpose of the receivership during the period of redemption was to satisfy a deficiency judgment, if any, entered after the judicial sale. The continuance of the possession of the receiver after the sale and during the period of redemption for the purpose of satisfying a deficiency judgment has likewise been sanctioned in this state. Montgomery v. Merrill, 65 Cal. 432, 4 P. 414. The foreclosure decree in this case, however, did not require that the funds in the hands of the receiver as a result of his operations during the period of redemption be applied to any deficiency, but specifically provided that the rents, issues, and profits arising from the possession of the premises *after* the sale and during the period of redemption be paid to the *purchaser* at such sale. We think that such an order of the trial court, made either in the decree of foreclosure itself or independently thereof, was not only erroneous but was in excess of the power of the court. If it had been provided that the receiver continue in possession for the purpose of the application

of the funds properly coming into his hands during the period of redemption to the satisfaction of a deficiency judgment, if any, the situation would have been different, but we know of no law which authorizes the court to appoint a receiver or to continue a receiver in possession of the mortgaged property during the period of redemption for the purpose of paying the rents, issues and profits to the *purchaser* at the sale. As was said in West v. Conant, 100 Cal. 231, at p. 233, 34 P. 705, 706:

> "We know of no provision of the Codes, of any decision, or of any principle upon which the purchaser is entitled to place a receiver in charge of the property during the period of redemption."

[3] True, the purchaser is entitled to the rents of the property sold or to the value of the use and occupation thereof during the period of redemption under section 707 of the Code of Civil Procedure, but such statutory right affords no sufficient reason for the appointment of a receiver merely to secure to the purchaser the rent or the value of the use and occupation of the premises during the period of redemption and there appears to be no reason at all for the appointment of a receiver to take from the mortgagor his right of possession during the period of redemption for the benefit of the *purchaser* or to appropriate to the use of the *purchaser* the issues and profits arising from such possession during that period. The fact that in this case the mortgagees happened to be the purchasers is of no controlling significance. The purchasers might have been strangers to the mortgage. The price they bid for the property is presumed to be its value and they have no further concern except to see that their rights as *purchasers* are protected and that they receive from those in possession of the property the rents, or the value of the use and occupation during the period of redemption.

[4] The provision of the judgment here assailed does not purport to be for the protection of the owners or holders of a deficiency judgment, but only for the benefit of the *purchasers*, and, as there is no authority in law for the appointment of a receiver for the benefit of the purchaser, as such, we think such provision was void on its face and, being severable from the admittedly valid provision for the appointment of a receiver to hold prior to the sale, is subject to the attack made upon it and could and should be disregarded by the court in its disposition of said motion.

[5, 6] The account of the receiver was approved on February 4, 1926, and the balance then in his possession after the payment of his expenses and fees was ordered paid on account of the deficiency judgment. As to this order there is no objection on the part of any of the parties. The disposition of the collections by the receiver after this report and prior to his discharge forms the basis of this controversy. The period of redemption expired on April 14, 1926, and the receiver was discharged by order of the court on July 30, 1926. As there is no contention by the plaintiff that any moneys in the hands of the receiver and subject to the order of July 30, 1926, came into his hands or that the right thereto accrued prior to the sale, it must be assumed that the right to all funds involved on this appeal and coming into the hands of the receiver accrued after the sale and during the period of redemption. Such being the case, the funds in the possession of the receiver at the time of his discharge were subject to disposition by the court at that time as the "further order of the court" specified in the original order appointing the receiver and made in the exercise of a wise discretion. We cannot say on the record before us that the court abused its discretion in making the order appealed from. It is conceded, of course, by the plaintiffs that the said order of July 30, 1926, in so far as it provided for the discharge of the receiver, was within the power of the court to make.

The order is affirmed.

We concur: RICHARDS, J.; LANGDON, J.

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204 Cal. 28

SARTORI v. GRANUCCI et al. (S. F. 12328.)

Supreme Court of California. April 12, 1928.

1. Automobiles ⟹244(6)—In action by pedestrian, struck by motorist while crossing street, evidence justified jury's finding in favor of plaintiff.

In action by pedestrian, struck by defendant's automobile while crossing street in which defendant did not contradict testimony to effect that he was on wrong side of street when accident happened, evidence *held* to justify jury's finding in favor of plaintiff.

2. Automobiles ⟹246(14)—In action by pedestrian, struck by automobile while crossing street, giving instruction relating to statute requiring driving on right half of highway held proper (Motor Vehicle Act, § 122).

In action by pedestrian, struck by defendant's automobile while attempting to cross street, giving instruction that Motor Vehicle Act (St. 1923, p. 557, § 122) provided that driver of vehicle shall drive same on right half of public highway, and that, if jury found that defendant was not driving automobile on right half of street, and that it was practicable to travel close to right-hand curb of street, he was guilty of negligence as matter of law *held* not error, since statute referred to is for benefit of any one who might possibly be injured as proximate result of its violation, and not only for benefit of overtaking vehicles.

Department 2.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by H. J. Sartori against Esperiano Granucci and others for damages for personal injuries. From a judgment for plaintiff, defendants appeal. Affirmed.

Ford, Johnson & Bourquin and Francis N. Foley, all of San Francisco, for appellants.

Cooley & Gallagher, of San Francisco, for respondent.

LANGDON, J. This is an appeal by defendant from a judgment against it in an action to recover for personal injuries alleged to have been caused by the negligence of the agent of the defendant copartnership, in driving an automobile. The driver is also made a defendant.

Plaintiff was crossing Green street, in the city and county of San Francisco, from the north to the south side, about 50 feet east of its intersection with Columbus avenue, and collided with an automobile operated by defendant Guido Granucci. It is unnecessary to discuss the evidence in its entirety, but it is sufficient to point out that there was some evidence in the record from which the jury might have found that, upon a wet and slippery pavement, defendant Guido Granucci was driving between 20 and 25 miles an hour. Because of the rain and the mist, he could only see 10 or 15 feet ahead of him. He made a left turn from Columbus avenue into Green street. Green street runs in a general easterly and westerly direction. He was on the left side of the street and was attempting to cross to the right side. This defendant did not contradict the testimony to the effect that he was on the wrong side of the street when the accident happened—he merely said that he "could not say" as to that. He did testify, however, that the right-hand side of the street was clear, and that it would have been possible for him to have traveled close to the right-hand curb on Green street—that there was a clear street. Again, in his testimony, said defendant admitted that at the time of the accident his automobile was in a place where it would be struck by an automobile going in the other direction and on the right-hand side of the street.

Plaintiff testified that he stepped off the curb on the northerly side of Green street and looked to the east (the direction from which he might expect vehicles to approach him), and before he could turn to the west, he was struck and became unconscious.

[1] Without further discussion, we may say that the finding of the jury in favor of the plaintiff upon the evidence above recited is fully justified.

[2] The only other point urged upon the appeal is that the court erred in giving the following instruction:

> "The Motor Vehicle Act further provided that, on all occasions, the driver of a vehicle shall drive the same upon the right half of a public highway and close to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway, and except when overtaking and passing other vehicles, in which latter case the vehicle may be driven on the left side of the highway if such left side is clear and unobstructed for at least 100 yards ahead.
>
> "If you find from the evidence in this case that C. Granucci was not driving the Buick automobile upon the right half of the street and close to the right-hand curb of such street and that it was practicable to travel close to the right-hand curb of such street, then you are instructed that he was guilty of negligence as a matter of law."

It is contended that the foregoing instruction was erroneous because the provision of the Motor Vehicle Act (St. 1923, p. 557, § 122) contained therein was not a provision for the benefit of pedestrians, but for the benefit of overtaking vehicles. The position of appellant upon this matter is not sound. The provision in question is clearly for the benefit of any one who might possibly be injured as the proximate result of its violation. An instruction similar to the one just quoted was approved in the case of Weihe v. Rathjen Mercantile Co., 34 Cal. App. 302, 167 P. 287.

There are no other matters requiring discussion, and the judgment appealed from is affirmed.

We concur: RICHARDS, J.; SHENK, J.

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204 Cal. 15

WALLACE et al. v. GREAT WESTERN POWER CO. OF CALIFORNIA.

(S. F. 12359.)

Supreme Court of California. April 11, 1928.

1. **Negligence ⚷136(29)—Contributory negligence of children as to instrumentality causing injury is generally question for jury.**

Question of contributory negligence is generally one of fact for the jury where evidence is in any material degree conflicting, and rule applies in cases where contributory negligence of children of 14 years of age or younger in relation to instrumentality causing injury, is involved.

2. **Appeal and error ⚷973—Trial court's determination as to contributory negligence, on motion for nonsuit, is not disturbed, in absence of clear showing of abuse of discretion.**

Trial court's determination of contributory negligence will not, as a rule, be disturbed by an appellate tribunal, in the absence of clear showing of abuse of discretion in granting or de-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

nial of motion for nonsuit based upon that ground.

3. Electricity ⚷19(12)—Granting of nonsuit on ground of contributory negligence of child in climbing electric tower held not abuse of discretion, in action for death from contact with high voltage wires.

Granting of motion for nonsuit, in action for death of 12 year old child, on ground of contributory negligence of child in climbing up 33 feet on electric tower where he received shock from high voltage wires, causing death, *held* not abuse of discretion.

Department 2.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by Gertrude Wallace and another against the Great Western Power Company of California. Judgment for defendant, and plaintiffs appeal. Affirmed.

Collins, Roan & Collins, of Oakland, and C. K. Bonestell, of San Francisco, for appellants.

Guy C. Earl and W. H. Spaulding, both of San Francisco, and Crosby, Naus & Crosby, of Oakland, for respondent.

RICHARDS, J. The plaintiffs commenced this action for damages for the death of their minor son, a boy of a little over 12 years of age, caused by his coming in contact with a high voltage cable located upon and passing through an electric tower within the limits of the city of Oakland, which cable and tower were being maintained by the defendant for the purpose of the transmission of an electric current of high voltage along its power lines and into said city. The tower in question was one of a series of steel-framed towers which the defendant had constructed, and was maintaining to about the number of seven to a mile, from its power producing plant to said city. This particular tower was situated upon the slope of a hill in the open country which lies in the outskirts of the city of Oakland, and which is used quite generally by outing parties and for picnic purposes, the land upon which it was located not being inclosed nor the public being excluded from its use. At the time of the injury to the plaintiffs' son which caused his death he, with a companion of about the same age, was playing in the vicinity of this tower, and it was suggested by one of them that they climb the tower. There was no ladder or other means of ascending the tower except that of "shinnying" up its vertical supports to reach its horizontal braces, which begin about 8 feet from the ground and form a series of from 6 to 8 feet apart to the summit. The lowest wires which are supported by this tower rest upon cross-arms 33 feet from the ground. Plaintiffs' son climbed this distance of 33 feet up the tower until he arrived at said cross-arms, and either crept to or came sufficiently near one of said high voltage wires to receive the shock which caused his death. The cause was tried before a jury, but at the conclusion of the plaintiffs' case the defendant moved for a nonsuit upon a number of grounds, among which was that the deceased boy was guilty of contributory negligence as a matter of law. The trial court granted the motion for nonsuit upon all grounds and entered judgment accordingly in the defendant's favor, from which the plaintiffs have prosecuted this appeal. While the appellants undertake to discuss a number of questions involved in the defendant's motion for nonsuit, and which relate to the negligence of the defendant in the maintenance of the structure in question, practically the only question which is presented upon this appeal is the question as to whether or not the trial court was in error in granting the motion for nonsuit upon the ground that the deceased boy was guilty of contributory negligence as a matter of law.

[1-3] In determining this question, it may be conceded that the question of contributory negligence, especially where the evidence is in any material degree conflicting, is a question of fact for the jury, and it may also be conceded that the question as to whether children of the age of about 14 years or younger have been guilty of contributory negligence in relation to the instrumentality which has caused their injury or death is, as a general rule, a question of fact for the jury. The determination of this question, however, depends upon what the evidence discloses as to the degree of intelligence of the minor and as to his opportunity for knowing or being aware of the danger which attends his coming or bringing himself in contact with such dangerous instrumentalities or agencies as are high power electric wires. Assuming the defendant herein to have been guilty of negligence in the maintenance of this electric tower in an open and unguarded state within the limits or vicinity of a populous city and without the presence of signs or devices which would give warning to persons who might be tempted to play upon or ascend the tower, the trial court was still in a position, upon motion for nonsuit, to determine from all of the circumstances of the case whether the deceased boy, though a minor, was sufficiently intelligent and sufficiently familiar with the dangers incident to contact with high power electric wires that his action in ascending this tower by the difficult means of ascent afforded and to the height and place of danger to which he did thus succeed in climbing, was to be held guilty of negligence as a matter of law. The courts of the country have quite generally held that the action of the trial court in determining this question either way will not, as a rule,

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

be disturbed by an appellate tribunal, in the absence of a clear showing of abuse of discretion on the part of the trial court in the granting or in the denial of a motion for nonsuit based upon that ground. Mayne v. San Diego Elec. Ry. Co., 179 Cal. 173, 175 P. 690, and cases cited. We are unable, in the light of the facts as presented in the instant case, to determine that there was such abuse of discretion on the part of the trial court, and this being so we are unable to declare that the action of the trial court in granting the defendant's motion for nonsuit upon that ground was reversible error.

The judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.

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203 Cal. 787

PARKER v. PARKER. (S. F. 12078.)

Supreme Court of California. April 10, 1928.

1. Divorce 🔑255—Default divorce decree granting wife alimony under complaint which merely prayed for divorce and custody of minor child and for general relief held not void as against collateral attack (Code Civ. Proc. §§ 473, 580, and § 585, subd. 2).

Prayer for relief in complaint in wife's suit for divorce, seeking divorce decree and care and custody of minor child and "for such other and further relief as to the court may seem proper," *held* to give court jurisdiction to award alimony on default, as against attack on motion to vacate order for issuance of execution, notwithstanding alimony was not specifically asked for, since Code Civ. Proc. §§ 473, 580, and section 585, subd. 2, do not render default judgment in excess of amount prayed for void, but merely subject to modification.

2. Divorce 🔑263—Court's ex parte order for execution to collect unpaid alimony held not void, notwithstanding facts which if disclosed might have required notice to judgment debtor (Code Civ. Proc. § 685).

Order obtained by divorced wife for issuance of execution to require payment of alimony under decree *held* not void for failure to give notice to defendant under Code Civ. Proc. § 685, which is a continuation of Practice Act, § 214, though, on account of plaintiff's remarriage, facts were such that notice of motion might have been required had the court been informed of them.

3. Divorce 🔑263—Remedy of judgment debtor to prevent execution to collect alimony is by motion to vacate and recall execution (Code Civ. Proc. § 685).

Remedy of defendant as judgment debtor in divorce suit, after plaintiff has obtained ex parte order for issuance of execution to collect alimony under Code Civ. Proc. § 685, is to move to vacate the order and recall the execution.

4. Divorce 🔑263—Divorced wife who remarried is presumed to have been supported by second husband (Code Civ. Proc. § 685).

Divorced wife who remarried is presumed to have been supported by her second husband in proceedings under the original divorce judgment to require issuance of execution to recover unpaid alimony, under Code Civ. Proc. § 685.

5. Divorce 🔑263—Averment in divorced wife's affidavit that second husband's earnings were insufficient to support herself and child held mere conclusion (Code Civ. Proc. § 685).

Averment in divorced wife's affidavit to require issuance of execution to collect unpaid alimony under Code Civ. Proc. § 685, that second husband's earnings were insufficient to support herself and child *held* merely a conclusion and not controlling as against averments concerning amount of income of second husband.

6. Divorce 🔑263—Divorced wife who married second husband, earning $300 per month, and who failed to show second husband's inability to support herself and child, held not entitled to collect unpaid alimony (Code Civ. Proc. § 685).

Divorced wife who almost immediately after obtaining divorce married second husband, earning salary of $300 a month, and who failed to show that second husband was unable to support her or her child during their marriage, *held* not entitled to order directing issuance of execution to recover unpaid alimony under divorce decree under Code Civ. Proc. § 685; allowance being given for support of wife and child jointly.

7. Divorce 🔑245(1), 309—Court may modify alimony and child's support and may make modification operate prospectively (Civ. Code, §§ 138, 139).

Court has jurisdiction in an original proceeding for divorce upon proper pleadings and evidence to award support to the wife and minor child, and court retains jurisdiction to modify its order from time to time, and such modification may upon a proper application operate prospectively under Civ. Code, §§ 138, 139.

8. Divorce 🔑245(1), 309—In proceedings for execution to collect unpaid alimony and support money for child, who had since attained majority, court had no jurisdiction to modify judgment as to payments already accrued (Code Civ. Proc. § 685; Civ. Code, §§ 138, 139).

In proceedings by divorced wife under Code Civ. Proc. § 685, for issuance of execution to enforce payments of alimony and for support of minor child, who had since attained majority and married, court had no power to modify the divorce judgment so as to affect payments which had already accrued thereunder, since modification may only operate prospectively and not retroactively under Civ. Code, §§ 138, 139.

Department 2.

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by Emma Parker against J. W. Parker for divorce. Having secured a divorce, the plaintiff after a lapse of time applied for an order directing issuance of execution to collect unpaid alimony. Defendant's motion to vacate the order was denied, and defendant appeals from the order, and plaintiff appeals from that portion of the order reducing and modifying the judgment and execution. Order denying defendant's motion to vacate order directing issuance of execution reversed, with directions and order reducing and modifying judgment and execution reversed.

Reisner & Deming, of San Francisco, for plaintiff.

Howe, Hibbitt & Johnston and O. F. Meldon, all of Sacramento, for defendant.

SHENK, J. The plaintiff and the defendant herein were married in November, 1902. In 1912 the plaintiff sued the defendant for divorce on the sole ground of willful neglect. The complaint alleged the weekly earnings of the defendant, and that there was, as the issue of said marriage, a minor child, Gladys Madeline Parker, aged seven years. The prayer was for a decree dissolving the bonds of matrimony; that the plaintiff have the care and custody of the minor child and "for such other and further relief as to the court may seem proper." There was no specific prayer for alimony or for maintenance of the child. On May 21, 1912, the default of the defendant was entered for failure to answer after his demurrer had been overruled. The cause came on for hearing as a default matter on June 10, 1912, whereupon an interlocutory decree was granted. This decree contained the usual provisions entitling the plaintiff to a final decree of divorce upon the expiration of one year from the entry of the interlocutory decree and provided that the plaintiff have the custody of the minor child. In addition, the interlocutory decree set forth the following:

> "It is further ordered that the defendant pay to plaintiff the sum of forty dollars ($40.00) per month for the support of plaintiff and Gladys Madeline Parker, the minor child of said marriage."

On May 28, 1914, a final decree of divorce was made and entered incorporating the same provisions for the custody of the minor child and for the support of the plaintiff and said child as were contained in the interlocutory decree. On June 5, 1914, or eight days after the entering of the final decree, the plaintiff married one E. W. Pappert at the city of Visalia. The plaintiff and said Pappert lived together as husband and wife until May, 1923, when they separated. On May 15, 1923, the plaintiff instituted an action for divorce against said Pappert and obtained an interlocutory decree therein on October 24, 1925. Prior to the commencement of the second divorce action the plaintiff and said Pappert entered into a property settlement wherein and whereby certain real property in the city of Oakland was set apart to the plaintiff, from which she received an income of $75 per month. In addition to the property settlement the court, upon the institution of the second divorce action, awarded temporary alimony to the plaintiff in the sum of $50 per month, the said payments to continue to May 1, 1925. The temporary alimony was paid by Pappert as required. On the 27th day of May, 1925, the plaintiff, under the name of Emma Parker, made an affidavit and presented the same to a judge of the superior court in and for the city and county of San Francisco, in which the original decree of divorce had been granted. In this affidavit she set forth the entry of the judgment in the original divorce action and the requirement therein that the defendant, J. W. Parker, pay to the plaintiff the sum of $40 per month "for the support of plaintiff and Gladys Madeline Parker." It was further averred that none of said payments had been made except the sum of $480, and that there was then due and owing to the plaintiff on account of said judgment the sum of $4,360 and interest thereon, said sum being the amount claimed to be due from June 10, 1913, to and including July 10, 1922. The affiant prayed for an order directing execution to issue for the sum of $4,360 and interest. The application, made ex parte, was granted, and the judge made an order directing that execution issue. Pursuant to said order the clerk of the court, on May 27, 1925, issued the execution directed to the sheriff of Sacramento county where the defendant herein was engaged in business.

On June 5, 1925, the defendant made a motion, duly noticed in the superior court at San Francisco, to vacate the order of May 27, directing execution to issue and to recall the execution issued on that day. This motion was supported by the affidavit of the defendant and was made on numerous grounds, some of which are and others of which are not now urged on this appeal. The plaintiff filed a counter affidavit on the hearing of the motion at which both parties were represented. The matter was taken under submission, and under date of September 23, 1925, the court made an order denying said motion. In this order it was recited that the court, on the hearing of the motion, had received evidence, "oral and documentary adduced by the parties respectively," and the court found from such evidence that the sum of $560 had been paid by the defendant on account of the judgment in said action; that on the 5th day of June, 1914, the plaintiff intermarried with said E. W. Pappert and ever since said date and up to on or about the 24th day of October, 1924, the plaintiff and said Pappert had lived together as and continued to be husband and wife, and that the minor child became of age on the 10th day of August, 1922. It was then ordered as follows:

"It is therefore ordered, adjudged and decreed that said judgment and execution be and the same are hereby modified so that the plaintiff may recover under said judgment the sum of $20 per month for the period of five years immediately preceding the 10th day of August, 1922, to wit: the total sum of $1200 exclusive of the amount heretofore paid by the defendant to the plaintiff."

The order also authorized and directed the sheriff of Sacramento county to amend said execution so that the plaintiff should recover the sum of $1,200 in lieu of the amount stated in said execution. The motion of the defendant to vacate the order directing the issuance of execution and to recall the same was denied.

The defendant has appealed from the whole and each part of said order of September 23, 1925, and the plaintiff has appealed from that portion of said order modifying and reducing said judgment and execution to the sum of $1,200.

[1] The appeal of the defendant will first be considered. It is contended by him that the court was without jurisdiction to direct an execution on said judgment. It is insisted that the said judgment is void on its face, for the reason that the relief therein granted was in excess of the relief demanded in the complaint. The claim is based on the fact that the complaint did not demand support for the plaintiff or the minor child and that the judgment included a provision for such support in alleged contravention of section 580 of the Code of Civil Procedure which provides, "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint;" also of subdivision 2 of section 585 of the Code of Civil Procedure, which provides that in such cases the plaintiff may, on the default of the defendant, "apply to the court for the relief demanded in the complaint." The defendant also cites numerous cases in support of his contention, including Brooks v. Forington, 117 Cal. 219, 48 P. 1073; Foley v. Foley, 120 Cal. 33, 52 P. 122, 65 Am. St. Rep. 147; Staacke v. Bell, 125 Cal. 309, 57 P. 1012; Bennett v. Bennett, 50 Cal. App. 48, 194 P. 503; and Von Der Kuhlen v. Hegel, 51 Cal. App. 416, 196 P. 913. He also cites Staacke v. Bell, supra, to the effect that the prayer for general relief does not enlarge the power of the court to grant relief not prayed for against the defaulting defendant. None of the cases relied upon go to the length of holding that the granting of relief in excess of that demanded by the complaint renders the judgment void on its face. They do, however, uniformly hold that the granting of such excessive relief is erroneous, from which relief may be granted under section 473 of the Code of Civil Procedure or which may be corrected by appeal, either by a reversal or by a modification of the judgment, neither of which courses was pursued by the defendant in this case. It was held by this court in Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 11 Ann. Cas. 520, which case has not been overruled or criticized so far as we are advised, that a judgment by default for alimony in a divorce action under a prayer for general relief, but where no alimony was specifically demanded, was not void and was not subject to a collateral attack such as is here attempted to be made. See Harlan v. Harlan, 154 Cal. 341, 98 P. 32; Stone v. Stone, 58 Cal. App. 415, 208 P. 993.

It is also insisted that the judgment is void on its face for the reason, so it is claimed, that the judgment for the support of the plaintiff and said minor child was not of the same character as the relief specifically demanded, namely, for the dissolution of the bonds of matrimony and for the custody of the child; that the relief specifically demanded is for a judgment in rem affecting the marital status and the custody of the minor child and that the alleged excessive relief is a judgment in personam or a money judgment against the defendant. Here again it was held in Cohen v. Cohen, supra, that an award of alimony is so germane to the cause of action for divorce as that, under a prayer for general relief, the court would have jurisdiction to make it even though error might thereby be committed in exercise of such jurisdiction.

[2, 3] It is further urged that the original order for the issuance of the execution is void as having been made without notice to the defendant. It has been the law of this state since 1861 that the court, under section 685 of the Code of Civil Procedure (which was a continuation of section 214 of the Practice Act), has power ex parte to order the issuance of an execution on a judgment which has become final more than five years before the application. Bryan v. Stidger, 17 Cal. 270; Harrier v. Bassford, 145 Cal. 529, 78 P. 1038; Doehla v. Phillips, 151 Cal. 488, 91 P. 330; Creditors' Adjustment Co. v. Newman, 185 Cal. 509, 197 P. 334; 11 Cal. Jur. 50. Although the court may in proper cases direct that notice of the motion be given (McAuliffe v. Coughlin, 105 Cal. 268, 38 P. 730) and in some cases it might be an abuse of discretion not to require notice (Harrier v. Bassford, supra), in the present case, if the court had been apprised of the facts in the affidavit of the plaintiff on which the application for the issuance of the execution was based, a notice of the motion might well and probably would have been required. In fairness to the court, at least, the plaintiff should have set forth the facts with reference to the parties at the time. The plaintiff made the application as Emma Parker, when, in fact, her name at the time was Emma Pappert. The court was not informed of the fact that she had remarried within a few days after the entry of her final decree of divorce from the defendant Parker.

had lived with her second husband for more than ten years thereafter; that the minor child had lived with the plaintiff and the stepfather for most of the time during her minority, had become of age, and had married prior to said application. All of these matters would have been pertinent in the consideration by the trial court of the application and in the determination as to what extent, if at all, the relief should have been granted in the exercise of a wise discretion. But the failure of the plaintiff to disclose the true situation did not go to the jurisdiction of the court to act on the ex parte motion. If the defendant, as judgment debtor, had good cause to show against the issuance and enforcement of process, he had his remedy by a motion to vacate the order and to recall the execution. This motion was made and denied, which brings us to the point of considering whether the court abused its discretion in denying that motion when on the hearing thereof the true situation of the parties was presented.

[4-6] During the marriage of the plaintiff with Pappert she was presumptively supported by him. Cohen v. Cohen, supra; McKay v. McKay, 125 Cal. 65, 57 P. 677. She attempted to show on the hearing of the motion to vacate that during the time she lived with Pappert the latter's earnings were wholly insufficient to support herself and the child; but this averment in her affidavit was merely a conclusion and could not be controlling as such in the light of her additional averment that said Pappert was earning a salary of $300 per month and that the court in the second divorce action had actually awarded her $50 per month as alimony, which had been paid. The court in the present proceeding made no finding that Pappert was unable to support his wife during their marriage, and the record does not present facts from which it may be reasonably said that such a finding could be implied. Such a showing and a finding based thereon, we think, were essential to a valid order requiring a former husband to continue to support his former wife during her marriage to another man. Furthermore, the fact that the plaintiff waited for over ten years before the original judgment was sought to be enforced by her, and during which she was the wife of another man, furnished a cogent reason which should have appealed to the discretion of the trial court in determining whether the order for execution should issue. The showing made on the motion to vacate the order and recall the execution was sufficient to compel the granting of the motion. The subsequent order of the court made in an endeavor to modify the original judgment so as to provide therein for the sum of $20 per month for the support of the plaintiff and the minor child for a five-year period immediately preceding the 10th day of August, 1922, when the child became of age, and to amend or modify the execution accordingly, is persuasive to the effect that the court realized that the amount for which the execution was first directed to issue, to wit, the sum of $4,360, was excessive. The denial of the motion to vacate the order and recall the execution must therefore be deemed to have been an abuse of discretion requiring a reversal of the order denying the motion unless it may properly be held that the subsequent order, in so far as it directs that execution be amended so as to provide for the collection of $1,200, be valid and effective notwithstanding such denial.

[7, 8] It is contended by the plaintiff that the portion of the order of September 25, 1925, directing the modification of the original judgment so as to provide that the plaintiff recover $20 per month, instead of $40 per month as in said judgment originally provided, was beyond the power of the court. The original judgment had long since been final. No appeal was taken therefrom and in the intervening years no application ever was made by the defendant for a modification thereof. It is beyond question that the court had jurisdiction in the original proceeding for divorce upon a proper pleading and evidence to award support to the wife and to the minor child, and that the court retained jurisdiction to modify its order for such support from time to time also upon a proper application and showing, the said modification to operate prospectively (sections 138, 139, Civ. Code; Harlan v. Harlan, supra), but no authority has been cited and we have discovered none which would authorize or justify the court merely on an application under section 685 of the Code of Civil Procedure for the issuance of an execution to enforce payments theretofore accrued on a final judgment to modify said judgment and give the same retroactive effect. Section 138 of the Civil Code authorizes the court, in the divorce action, to provide for maintenance and support of the child "during the minority" of the child, and the court is given power to modify or vacate the order "at any time." But the phrase "at any time" must necessarily refer to any time "during the minority" of the child specified in the earlier part of the section. Then, too, the order of modification must, we think, have a prospective effect and apply to payments thereafter to be made during such minority. Where, as here, the minor became of age and married prior to such order of modification, such order could not disturb the accrual of payments under the original judgment. But whether such payments should be enforced and the manner of the enforcement of the same require separate consideration. The order of the court which is here assailed provides for the payment of the full sum to the plaintiff, Emma Pappert, formerly Emma Parker, and to cov-

er a period of time during which she was the wife of a man other than the defendant, with no showing that she was entitled to the same during that period. If the amount ordered paid was intended by the court to constitute a proper payment for the benefit of the daughter during a period before she became of age, it must be said that such a conclusion may be reached only by speculation and not from a consideration of the language of the order.

On the showing developed during the proceeding in the trial court, it is clear that the plaintiff was not entitled to the order directing execution to issue, and the court should have granted the motion to set aside said order and to quash the levy under the execution. The order denying that motion should therefore be reversed, with directions to the trial court to grant the same. Likewise, the order modifying the judgment from which the plaintiff has taken an appeal should be reversed, for the reason that it was beyond the power of the court to modify said judgment so as to make said modification operative on payments already accrued under the judgment. It is so ordered.

We concur: RICHARDS, J.; LANGDON, J.

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204 Cal. 19

CAVANAGH et al. v. KEPLINGER et al.★
(S. F. 11730.)

Supreme Court of California. April 12, 1928.

Rehearing Denied May 7, 1928.

Contracts ⟹232(4)—Contractors held entitled to recover for extras installed under subsequent agreement with owners, notwithstanding written contract called for architect's order.

Where extras under construction contract were ordered and installed and counsel stipulated that the construction work had been completed, the contractors were entitled to recover for extras thus installed, notwithstanding contract called for furnishing extras solely on order of architect; since under the circumstances the written contract had been modified by executed oral agreements.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Thomas A. Cavanagh and Frank H. Cavanagh, copartners doing business under the name and style of Cavanagh Bros., against Martha Q. Keplinger and husband, to foreclose a mechanic's lien. Judgment for plaintiffs, and defendants appeal. Affirmed.

Superseding opinion of District Court of Appeal (262 P. 470).

Knight, Boland & Christin and Knight, Boland, Hutchinson & Christin, all of San Francisco, for appellants.

J. E. McCurdy, of San Mateo, for respondents.

PRESTON, J. This is an action to enforce a mechanic's lien for a balance claimed for extras due upon the construction of a building.

The complaint alleges the furnishing of materials and the performance of labor in connection therewith under a contract for the construction by plaintiffs for defendants of a combined residence and garage. It also alleges the completion of the work, the filing of a notice of completion by one of the defendants, and the filing thereafter of the claim of lien here sued upon.

The answer admits the filing of the notice of completion, the filing of a lien by plaintiffs, and pleads a written contract asserted to be the full and sole measure of the rights of the parties. This written contract was what is known as a guaranteed maximum cost contract with commission attached for the contractor, and providing with respect to extras that the same should be calculated upon a cost plus 10 per cent. basis, said extras to be furnished solely upon order of the architect. But the evidence abundantly shows that, although the written contract was executed, the parties, in a very large measure, disregarded its provisions, among other things dispensing with the architect therein provided for and dealing directly with each other throughout the building operations. Scarcely a provision of the contract was left in full operation. Plaintiffs claim 73 items of extras and a balance due therefor of $3,089.26. The court held with plaintiffs as to all of said items except 18, which were held to have been included in the original contract price, and accordingly made findings in favor of plaintiffs, fixing the amount due them at $1,878.44. Defendants have appealed.

The findings, except as to the amount claimed, are in the language of plaintiffs' complaint. The duty of defendants to pay for said extras, many of which were ordered in writing by them, and admitted to be such, seems too clear for controversy. Wyman v. Hooker, 2 Cal. App. 36, 41, 83 P. 79; Bavin v. Bard (Cal. App.) 255 P. 200.

Plaintiffs' testimony showed that these extras were charged for at cost or less. The issue that the original purchase price as named in the contract had not been properly earned was never made at any time by the defendants and is contrary to the stipulations made upon the trial and to the necessary inferences from all the testimony. In fact, written statements were rendered by plaintiffs to defendants claiming the whole of the purchase price to have been earned, to which statements there was no protest. This conclusion is also aided by the notice of completion according to the contract given by defendants themselves.

★Rehearing denied.

The whole matter may be summed up in the observation that admittedly many extras were ordered and installed and the written contract was thus modified by executed oral agreements. The entire issue tried and submitted was whether the items claimed as extras were in fact such and whether the charge for any such extras was the proper amount. The court allowed certain of these items and disallowed others.

No good purpose can be served by a prolonged discussion of the evidence. Considered in connection with their admissions, oral and written, the stipulation of counsel for defendants to the effect that the work was done, along with statements of plaintiffs, gives ample support to the findings of the court.

No other questions raised require discussion.

Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; LANGDON, J.

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204 Cal. 47

GRAVEM v. GRAVEM et al. (S. F. 12362.)★

Supreme Court of California. April 13, 1928.

Hearing Denied in Bank May 7, 1928.

Partnership ⚬226, 242(1)—Retiring partner retained interest in partnership under agreement providing for payment of profits to assignee, and could sue on agreement for accounting (Code Civ. Proc. § 2055).

Contract by retiring partner, assigning interest in partnership to brother on condition that accounting be had in usual manner and profits to which he should be entitled should be paid to his brother, *held* not an unqualified assignment of all interest in partnership, including right as retiring partner to accounting, though profits were to be paid to brother but retained in retiring partner beneficial interest in profits of partnership, and hence complaint on contract for accounting was sufficient to enable retiring partner to offer evidence in support of allegations thereof, and entitled him under Code Civ. Proc. § 2055, to examine defendant partner as an adverse witness.

Department 2.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Lars B. Gravem against Nicholas L. B. Gravem, individually, and others. From a judgment of the Superior Court, City and County of San Francisco, in action for accounting, plaintiff appeals. Reversed.

Sherman & Peters, of San Francisco, for appellant.

Clarence A. Shuey, J. R. Pringle, and Oliver Dibble, all of San Francisco, for respondents.

SHENK, J. Prior to October 20, 1920, the plaintiff was a partner to the extent of a one-eighth interest in the partnership of Otis, McAllister & Co. The other partners, to wit, the defendants Otis and Bee, desired the plaintiff to retire from the partnership, to which the plaintiff consented. To that end the plaintiff entered into an assignment and retirement agreement with the defendants under date of October 20, 1920, wherein and whereby the plaintiff assigned his interest in the partnership assets to his brother, the defendant Nicholas L. B. Gravem, and the latter assumed the position of his brother as partner in the firm. This agreement recited the existence of the former partnership contract between the plaintiff and the defendants Otis and Bee, and that the plaintiff desired to assign to his brother "all his rights and privileges as contained in said agreement, said Otis and Bee consenting thereto, as herein provided." It was then provided that the plaintiff "may, and does hereby, assign unto Nicholas L. B. Gravem all his rights and privileges in and to the above-mentioned agreement. * * * The parties hereto do and each of them does further covenant and agree that the above transfer of interest shall be subject to the following provision, to wit: Following the termination of the year 1920, the partnership books of Otis, McAllister & Co. shall be closed and in due course and by partnership determination in the manner pursued in previous years the profits and losses for the year 1920 determined. If as a result of such determination it shall appear that the partnership business has been conducted at a profit, the one-eighth part of said profits that would have been paid to said Lars Gravem by virtue of paragraph 3 of said agreement had said Lars Gravem not made this assignment shall be paid to the said Nicholas L. B. Gravem in the manner and as and when the partnership profits for the year 1920 are paid to the other members of the partnership and those entitled to share in the partnership profits of Otis, McAllister & Co. * * *"

The foregoing agreement was signed by the plaintiff and by all of the defendants individually and by Otis and Bee on account of the partnership.

Three counts are set forth in the complaint. The first count alleges the execution of the contract of October 20, 1920; that the said agreement was executed at the request of the defendants upon representations by and promises of the defendants and each of them that the books of the partnership would be closed as of December 31, 1920, in the usual manner, and that the value of the assets, including the value of the accounts, accounts receivable, and the profits for the year 1920 be determined as of the 31st day of December, 1920, properly and accurately and in the man-

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★Hearing denied in bank.

ner employed in previous years, and that the plaintiff would receive from the defendant Nicholas L. B. Gravem immediately upon such determination the purchase price of said plaintiff's interest in the partnership, to wit, the sum of $37,500, and in addition should receive one-eighth of the profits of the partnership for the year 1920, which profits are alleged to have been in excess of $500,000; that the defendants had failed and neglected to close the books of the partnership to determine the profits for the year 1920 as agreed, although demand had been made upon them so to do; that no part of the amounts due to the plaintiff has been paid except the sum of $37,500, representing the original interest of the plaintiff, and the further sum of $2,500 on account of profits; that the defendant Nicholas L. B. Gravem has failed to pay the one-eighth of the profits as agreed with the knowledge and at the instance of the other defendants.

The second cause of action, in addition to the allegations of the first count, averred that the defendants had entered into a conspiracy to prevent the plaintiff from obtaining the sum of $60,000 due him as his share of the profits. The third cause of action, also in addition to the allegations of the first count, set forth that the defendants and each of them had failed, refused, and neglected to make an accounting to the plaintiff as agreed, and that the defendant Nicholas L. B. Gravem had failed, refused, and neglected to obtain an accounting from the partnership, in violation of his agreement with the plaintiff.

A general and special demurrer was interposed to the complaint and was overruled. The defendants answered separately, denying generally the allegations of the complaint and setting forth in hæc verba the contract of October 20, 1920. No affidavit was filed denying the due execution of the contract. The cause came on regularly for trial, whereupon the plaintiff called the defendant Otis as his first witness under section 2055 of the Code of Civil Procedure. The defendants objected to the examination of the witness as to the condition of the affairs of the partnership during the year 1920 on the ground that under the agreement of October 20, 1920, on which all parties were relying, the plaintiff had assigned all of his interest in and to the assets and business of the partnership to his defendant brother and had therefore parted with all of his interest therein. The court sustained the objection, ruled in effect that the plaintiff had not and could not state a cause of action under the contract, refused to permit the plaintiff to introduce any evidence in support of the allegations of his complaint, and granted a motion for judgment for the defendants made on the ground that there was no evidence in the record to support a judgment for the plaintiff. Counsel for the defendants expressly declined to make a motion for a nonsuit or for a judgment on the pleadings, and made a motion for judgment for the defendants on the ground that "there is no evidence to support a judgment for the plaintiff," at the suggestion of the court that counsel for defendants "make a motion." The motion was granted, judgment was entered in favor of the defendants, and this appeal was taken.

The error of the trial court was in concluding that, under the contract of October 20, 1920, the plaintiff had made an unqualified assignment of all of his interest in the property and business of the partnership, including his right as a retiring partner to an accounting. An inspection of the contract discloses that such was not the case. On the contrary, the plaintiff assigned his interest in the partnership upon the condition and with the qualification that an accounting be had in the usual manner at the end of the year 1920 and the profits to which he should be entitled be paid to the defendant brother. All of the defendants and the partnership itself agreed to this provisional assignment. It would seem to be quite immaterial that in this instance the profits to which the plaintiff might be entitled should be paid to the plaintiff's brother and that such agreement had been made between the brothers for a disposition of the fund. If the contract had provided that the plaintiff's share of the profits be paid to a bank or trust company or to any other stranger to the assignment and retirement agreement, it would perhaps be clearer that the plaintiff retained a beneficial interest in the partnership profits for the year 1920. The fact that the profits were to be paid to the brother of the plaintiff would lead to no different result. The fair and we think the only reasonable intendment of the agreement was that the plaintiff was not relinquishing his interest in the profits for the year 1920, but that after an accounting should be had the plaintiff's share should be paid to his brother, who was his nominee in the transaction. We think the first cause of action as a pleading was sufficient, to enable the plaintiff to offer evidence in support of the allegations thereof, and that under section 2055 of the Code of Civil Procedure the plaintiff was entitled to call and examine the defendant Otis as an adverse witness.

After the ruling of the court on the effect of said contract the plaintiff requested permission to amend his complaint to the end that the plaintiff "would not be foreclosed from some remedy." This the court refused, and such refusal is assigned as an abuse of discretion. In view of the fact that the plaintiff would seem to be entitled to all the relief which he seeks under the allegations of his first cause of action, it is deemed unnecessary to pass on this point.

The judgment is reversed.

We concur: RICHARDS, J.; LANGDON, J.

204 Cal. 21

HEIDEL v. CALIFORNIA TRANSIT CO.
(S. F. 12185.)

Supreme Court of California. April 12, 1928.

1. Venue 🔑75—Notice of motion to change place of trial to county of defendant's residence will not support change to another county (Code Civ. Proc. § 395).

Notice of motion to change place of trial to county of defendant's residence, under Code Civ. Proc. § 395, will not support a motion for a change to some other and different county such as that in which injury sued on occurred.

2. Corporations 🔑503(3)—Motion for change of place of trial held properly denied for failure of affidavit to show residence corporation's principal place of business at time of commencement of action (Code Civ. Proc. § 395).

Where affidavit for change of place of trial to county of defendant's residence merely alleged that defendant was a corporation having its principal place of business in Alameda county, motion was properly denied, under Code Civ. Proc. § 395, for failure of affidavit to show residence or principal place of business of defendant at time of commencement of action.

Department 2.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Laura Heidel against the California Transit Company. From an order denying defendant's motion to change the place of trial, defendant appeals. Affirmed.

Earl A. Bagby, of Oakland, for appellant.

Burns & Watkins, of Fresno, for respondent.

LANGDON, J. This is an appeal by the defendant from an order denying its motion for change of place of trial. The action was brought in the county of Fresno, state of California, the residence of the plaintiff, to recover for personal injuries alleged to have been sustained by reason of the negligence of defendant. The defendant appeared by demurrer and at the same time served and filed an affidavit of merits and a written demand for a change of place of trial to the county of Alameda. That affidavit, as well as the complaint on file, showed that the injury had occurred in the county of Sacramento, state of California. It was set forth in the affidavit:

"That said defendant is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, and having for its principal place of business the city of Oakland, county of Alameda, state of California."

It was further alleged that:

The defendant was served with summons in the said county of Alameda, and "that said defendant is a resident of said county and is not and never has been, during any of the times mentioned in the complaint, a resident of the county of Fresno, and that said county of Fresno is not and never has been the principal place of business of said corporation."

[1, 2] It will be noted that the affidavit contains no allegation as to the residence or principal place of business of the defendant corporation at the time of the commencement of the action, as required by section 395, Code of Civil Procedure. Under said section of the Code, the defendant might have moved to have the action tried at the county where the injury occurred, but it did not see fit to do so. A notice of motion, such as was given in this case, to change the place of trial to the county of appellant's residence will not support a motion for a change to some other and different county.

It appears, therefore, that the affidavit did not support the motion made under section 395, Code of Civil Procedure, and that the trial court properly denied the motion. The order appealed from is affirmed.

We concur: RICHARDS, J.; SHENK, J.

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204 Cal. 2

WILSON v. PEDERSEN. (S. F. 12348.)

Supreme Court of California. April 10, 1928.

1. Appeal and error 🔑1011(1)—Trial court's finding on conflicting evidence will not be disturbed on appeal.

Finding of trial court on conflicting evidence will not be disturbed on appeal.

2. Damages 🔑188(1)—Allowance of $5 per day loss of use of automobile by reason of collision held supported by evidence.

In action for damages resulting from injury to plaintiff's automobile in collision, evidence *held* sufficient to sustain trial court's finding that $5 a day was proper allowance for plaintiff's being deprived of use of car.

Department 2.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by A. P. Wilson against Jens J. Pedersen. Judgment for plaintiff, and defendant appeals. Affirmed.

J. C. Hammel, F. W. Docker, and R. E. Norton, all of Fresno, and G. E. Sandford, of San Francisco, for appellant.

Hebert F. Briggs, of Fresno, for respondent.

RICHARDS, J. The plaintiff commenced this action to recover a judgment for damages for personal injuries and for damages to his automobile and for the loss sustained by reason of his deprivation of it in his business, occurring as a result of a collision between the defendant's and plaintiff's automobiles at a street intersection in the city of Fresno, alleged to have occurred through the defendant's negligence. The defendant answered, denying negligence on his part, and also disputing the item of damages alleged by the plaintiff to have been sustained. The defendant did not affirmatively plead contributory negligence on the part of the plaintiff, but upon the trial of the cause this issue appears to have been litigated. The trial court found thereon that the plaintiff was not guilty of contributory negligence; that the injuries to plaintiff personally entitled him to an award of $50 damages; and that he was entitled to $350 damages to his automobile and $100 damages for deprivation of its use in his business for a period of 20 days. Judgment was entered accordingly. Defendant moved for a new trial, which was denied, and he thereupon appealed from the judgment.

[1, 2] The appellant makes three contentions upon this appeal, none of which has any substantial merit. As to his first contention, that the evidence showed plaintiff to have been guilty of contributory negligence, the question of the plaintiff's guilt in that regard was a question of fact upon which the evidence was clearly conflicting. The findings and conclusions of the trial court thereon will not therefore be disturbed. As to the appellant's second contention, that the evidence was not sufficient to sustain the finding of the court that plaintiff's car was damaged to the extent of $350, the evidence is also in substantial conflict, and such finding will not, for the same reason, be disturbed. As to the appellant's third contention, that there was no evidence as to the reasonable or any other value of the loss suffered by plaintiff by the deprivation of the use of his automobile during the period it was undergoing repairs the evidence, it is true, is slight, but we think it is sufficient to sustain the finding of the court in that regard. The plaintiff testified that he was a real estate agent and was obliged to have the use of a car in his business, and that he had used his said car daily therein and had been deprived of its use for a period of approximately 30 days, for which he claimed damages at the rate of $10 a day. Another witness for plaintiff testified that automobiles were rented for such use at so much a mile or so much a day. The trial court cut down plaintiff's claim from 30 to 20 days and allowed him $5 a day. We think the allowance in that respect was reasonable and was supported by the evidence in the case.

Finding no merit in this appeal, the judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.

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90 Cal. App. 602

BELL v. LOS ANGELES COUNTY.

(Civ. 3402.)

District Court of Appeal, Third District, California. April 3, 1928.

1. Taxation 🔑821(2)—Tax purchaser of government land cannot recover amount paid without paying all taxes, penalties, and costs (Pol. Code, §§ 3771a, 3785b, and § 3898, subd. 5[b]).

Tax purchaser not paying all taxes, penalties, and costs, as required by Pol. Code, §§ 3771a, 3785b, to be entitled to conveyance, cannot recover amount paid for land belonging to federal government under section 3898, subd. 5(b), which applies only when land has been "sold and conveyed."

2. Constitutional law 🔑70(1)—Judiciary cannot determine whether plain and unambiguous statute meets situation.

Whether the Legislature has met the situation by statute is not for the judicial branch of the government to determine, where language is plain and unambiguous.

3. Statutes 🔑47, 49—Statute authorizing refund to tax purchaser of government land only when "sold and conveyed" held not uncertain or ambiguous or impossible of performance (Pol. Code, § 3898, subd. 5[b]).

Pol. Code, § 3898, subd. 5(b), authorizing refund of amount paid at tax sale for land belonging to federal government only when "sold and conveyed," *held* not uncertain, ambiguous, or impossible of performance.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Chester A. Bell against the County of Los Angeles. Judgment for defendant, and plaintiff appeals. Affirmed.

Emmet H. Wilson, of Los Angeles, for appellant.

Edward T. Bishop and Woodward M. Taylor, both of Los Angeles, for respondent.

PULLEN, Justice pro tem. This is an action to recover from the respondent county of Los Angeles the sum of $370 paid to the tax collector of said county.

A parcel of real property was assessed for taxes in the name of Herman Heacker for the years 1917, 1918, 1919, 1920, 1921, and 1922. The taxes for the year 1917 were not paid, and in 1918 there was noted on the assessment roll opposite the property: "Sold to the State."

In July, 1922, the tax collector, pursuant to the provisions of section 3771a of the Political Code, offered the property for sale at public auction. In the course of the bidding appellant bid the sum of $370, and the property was struck off to him. Appellant bid this amount to the tax collector, who in due course paid the money into the county treasury. After the sale and after the money was so paid to the tax collector appellant learned that the property attempted to be sold to him by the tax collector was vacant public land, and that in the year 1917 and at all times thereafter title to the property was vested in the United States government. The records of the United States Land Office show that between 1916 and 1923 no person had any interest in the land in question by reason of any filing of record in that office, and that no patent was ever at any time issued by the United States to any person whomsoever for the property, and that at no time during the years 1917 to 1922, inclusive, did Herman Heacker hold any possessory right, title, or interest in any of the real property.

After the discovery of the foregoing facts appellant in proper time made and filed a demand against the county of Los Angeles for the refund of said sum, which was by the board of supervisors rejected. Respondents alleged and it is found that appellant did not within 30 days after his bid or at any time pay to the tax collector the amount of taxes purported to have been levied upon the property for the years 1918 to 1922, inclusive, with the penalties and costs thereon. For that reason no certificate of sale or deed for the property was issued by the tax collector. Respondents maintain that in the absence of statute a purchaser at a tax sale has no remedy against the county or state to recover money paid at a tax sale. Since appellant has not placed himself within the terms of a statute authorizing a refund, he is a mere volunteer and not entitled to recover.

It is the contention of appellant: That the assessment of the property in question made in 1917 was absolutely void for the reason that the property at that time belonged to the United States, and neither Herman H. Heacker nor any other person had any possessory right or assessable interest therein. If the assessment itself was void, all subsequent proceedings thereunder are void. The assessment being void, the tax collector had no right or authority to give notice of the sale of the property under section 3771, had no right to offer the property for sale, and his action in accepting the plaintiff's bid and accepting the plaintiff's money was contrary to law. That the amount paid by the plaintiff to the county tax collector was received by the county without consideration. That the tax collector had no authority to accept the money, and that he acted outside the law in so doing.

Prior to 1917 there was no statutory provision concerning the attempted sale of government lands for state taxes, and the Supreme Court in Brooks v. County of Tulare, 117 Cal. 465, 49 P. 469, had a situation in which the facts were quite analogous to the case at bar. There an action was brought under section 3804 of the Political Code to recover from the county of Tulare taxes erroneously assessed and illegally collected upon government land of the United States. As expressed in the syllabus:

> "A purchaser at a delinquent tax sale of government land of the United States, which was not subject to taxation, is a mere volunteer, and cannot recover of the county the money so paid by him on the ground that it had been erroneously and illegally collected. Section 3804 of the Political Code does not apply to such a case."

The reason of the court was that plaintiff knew or might have known when he made his bid and paid his money whether the land was vacant public land or not. Some one may have had a possessory claim on the land which was subject to assessment. At any rate, his bid was voluntary and he should not be permitted to recover back the money paid.

Thus stood the law prior to 1917, and in the absence of some statutory remedy a purchaser at a tax sale had no remedy against the county or state to recover money paid at a tax sale.

The principle announced in Brooks v. County of Tulare, supra, accords with the majority of the states which hold that the rule of caveat emptor applies. Lisso & Bro. v. Police Jury, 127 La. 283, 53 So. 566, 31 L. R. A. (N. S.) p. 1141. Section 3898, subd. 5(b) of the Political Code as amended, now provides as follows:

> "Whenever it shall be determined to the satisfaction of the board of supervisors of the county in which the land is situated that any land belonging to the United States government or to this state, a municipality or other political subdivision of this state has been erroneously sold and conveyed under the provisions of this or the preceding section, or section three thousand seven hundred seventy-one of this code, and the said land should not have been so sold, the purchaser at said sale may present a claim against the county in the manner provided by law for a refund of the amount so paid into the county treasury by reason of such sale."

[1-3] It is the contention of respondent that, this remedy being purely statutory, appellant must strictly comply with the terms of the statute. Appellant did not complete his option to purchase the property and pay the amount of the taxes which had been levied against the property and obtain a conveyance from the tax collector. The remedy applies only when land has been *sold and conveyed*, and until appellant has complied with section 3785b of the Political Code the tax collector could not issue a deed, and therefore there could be no conveyance. Whether the Legislature has met the situation or not, is not for the judicial branch of the government to determine, for the language is plain and unambiguous. Appellant to have completed the sale must, under section 3771a of the Political Code, pay the amount bid, together with all taxes, penalties, and costs due, before being entitled to

a conveyance. He has failed to comply with the plain provisions of the law, and the court cannot say the provisions of section 3898, subdivision 5(b) are uncertain, ambiguous, or impossible of performance.

The judgment is therefore affirmed.

I concur: HART, J.

90 Cal. App. 552

THOMPSON v. O. W. CHILDS ESTATE CO. et al. (Civ. 5823.)★

District Court of Appeal, Second District, Division 1. California. April 2, 1928.

Hearing Denied by Supreme Court May 31, 1928.

1. Partnership 🔑15—Partnership may be organized for prosecution of one or two adventures (Civ. Code, § 2395).

Partnership as defined by Civ. Code, § 2395, may be organized for prosecution of one or two adventures, as well as for conduct of general and continuous business.

2. Partnership 🔑28—It is not essential that partners should know that contract created partnership.

It is not of the essence of a partnership that parties to it should have known that their contract in law created partnership.

3. Partnership 🔑20—Partnership may arise under agreement giving one of parties management of enterprise (Civ. Code, § 2395).

Fact that, by agreement between parties, one of them is given management of partnership enterprise does not prevent partnership from arising, under Civ. Code, § 2395.

4. Mines and minerals 🔑97—Purported assignment of oil lease under which parties operated lease together dividing profits and losses was partnership agreement, rendering "assignor" liable for trespass by "assignee's" servants in operations under lease.

Purported assignment of oil lease under which parties were to operate lease together as business and divide profits *held* partnership agreement, under which "assignor" was liable for acts of trespass by persons employed by "assignee" as part of operations under lease.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Mabel Butner Thompson, as administratrix with the will annexed of Alfred Thompson, deceased, against the O. W. Childs Estate Company and another. Judgment for plaintiff, and defendant J. M. Danziger appeals. Affirmed.

Morgrage, Stanley & O'Brien, of Los Angeles, for appellant.

Hazlett & Albee, Geo. H. P. Shaw, and C. E. McDowell, all of Los Angeles, for respondent.

SHAW, Justice pro tem. This action was originally brought by plaintiff's testator to recover damages for a trespass on his land. Upon his death, plaintiff, as his personal representative, was substituted for him, and judgment was given in her favor against the defendant J. M. Danziger only, who appeals. Appellant concedes that the acts complained of were wrongful, and that plaintiff is entitled to recover damages therefor to the amount of the judgment, but denies that he is legally responsible therefor. The persons who actually did the acts in question were employed by one C. W. Whitley to do them as a part of his operations under an oil lease on the above-mentioned land, and the only question presented by this appeal is whether appellant was a partner with Whitley in this matter and therefore liable for his acts.

Appellant had at one time been the owner of the oil lease above mentioned. Prior to the doing of the acts complained of he had executed an instrument by which he purported to assign this lease to Whitley. This instrument is signed by both appellant and Whitley and is much more than a mere assignment of the lease. It provides for payment to appellant of an overriding royalty of 4⅙ per cent. of all oil and gas produced, and, also, that in consideration of the instrument, Whitley shall pay to appellant the sum of $12,500 upon the execution of the instrument, and appellant shall receive the further sum of $37,500 out of the proceeds of oil produced under the lease. The agreement further provides that Whitley shall have sole charge of all operations under the lease, with authority to purchase and hire materials and labor and contract bills therefor; that he shall drill three wells upon the leased land, the cost of the first two wells to be paid by him, and the cost of the third well to be paid from the proceeds of oil produced, if sufficient, otherwise by him. All sums paid by Whitley on the cost of these wells are to be refunded to him out of the proceeds of oil produced. After appellant has received the sum of $37,500 to be paid him and Whitley has been reimbursed for all drilling and operating expenses paid by him, the agreement provides that all further net proceeds shall be shared by appellant and Whitley, 40 per cent. thereof going to appellant and 60 per cent. to Whitley, and all funds needed for developing and operating the lease shall be furnished by the parties in the same proportions. There is also a provision that, except as to expenses to be advanced by Whitley, all moneys necessary for development and operation of the lease and for paying and discharging any and all obligations of Whitley incurred by, or resulting from said development or operation, shall be contributed and paid by the parties in the proportions above mentioned, and that any and all obligations that shall result or

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★Hearing denied by Supreme Court.

arise by operation of law or otherwise, by reason of operations under the agreement, shall be paid by the parties in the same proportions. There are still other provisions for sharing expenses, which we forbear to quote.

[1-4] "Partnership is the association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them." Civ. Code, § 2395. "A partnership may be organized for the prosecution of one or two adventures, as well as for the conduct of a general and continuous business. It is not of the essence of a partnership that the parties to it should have known that their contract in law created a partnership." Westcott v. Gilman, 170 Cal. 562, 569, 150 P. 777, 780 (Ann. Cas. 1916E, 437). The fact that by agreement between the parties one of them is given the management of the partnership enterprise does not prevent a partnership from arising. Westcott v. Gilman, supra. The indicia of a partnership are at least as definite and clear in the agreement before us as in that construed in the case just cited, regarding which the court there said:

> "It is plain from the very terms of the agreement between these defendants that it measures up to the definition of a partnership as declared by section 2395 of the Civil Code. It was an association of two persons to carry on a definite business and to divide the profits and losses of that business."

We think the agreement between appellant and Whitley constituted them partners in all operations thereunder. By its terms they were to operate the lease together as a business and divide its profits and losses. There was no other substantial evidence of the relations between them. Appellant's own testimony tended to indicate that they were operating under the agreement, and there was nothing in conflict therewith. It is clear, therefore, that the question of appellant's liability for the acts complained of depended solely upon the legal effect of that agreement. The judgment of the trial court is based upon the same construction which we have given to the agreement, and we find no error in it.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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90 Cal. App. 387

MILLER et ux. v. FIRST SAV. BANK OF COLUSA. (Civ. 3419.)★

District Court of Appeal, Third District, California. March 26, 1928.

Hearing Denied by Supreme Court May 24, 1928.

1. Appeal and error 🔑1011(1)—Trial court's findings on conflicting evidence are conclusive.

Trial court's findings on conflicting evidence are conclusive on appeal.

2. Appeal and error 🔑931(1)—All reasonable inferences must be indulged in support of trial court's findings on conflicting evidence.

All reasonable inferences are to be indulged on appeal in support of trial court's findings on conflicting evidence.

3. Appeal and error 🔑901—Burden is on appellant to show error.

Burden is on appellant claiming error to show its existence.

4. Evidence 🔑460(5)—Parol evidence held admissible to show that land contained less than number of acres recited in deed.

Quantity of land, conveyed by deed particularly describing land and reciting that it contained "9.29 acres, more or less," being undetermined and uncertain, parol evidence was admissible to show that land contained less than 9.29 acres.

5. Vendor and purchaser 🔑334(7)—Principles of action in assumpsit apply, where defendant has amount paid by plaintiffs in excess of agreed price of land actually conveyed.

Where plaintiffs paid defendant $400 per acre for 9.29 acres of land actually containing only 7.44 acres, so that defendant had in its hands $740 rightfully belonging to plaintiffs, general principles of ordinary action in assumpsit apply.

6. Evidence 🔑419(2), 432—True consideration, or failure or want of consideration, for deed may be shown by extrinsic evidence (Code Civ. Proc. § 1962, subd. 2; Civ. Code, §§ 1614, 1615).

The true consideration, or failure or want of consideration, for a deed may always be shown by extrinsic evidence, under Code Civ. Proc. § 1962, subd. 2, and Civ. Code, §§ 1614, 1615.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by Carl M. Miller and wife against the First Savings Bank of Colusa to recover overpayment for land. Judgment for plaintiff, and defendant appeals. Affirmed.

U. W. Brown, of Colusa, for appellant.

Seth Millington, of Gridley, for respondents.

PRESTON, Justice pro tem. This is an appeal by the defendant, First Savings Bank of Colusa, from a judgment entered against it in the sum of $740.

The facts are briefly these: The defendant owned a small tract of land in Colusa county, and through its cashier entered into an oral agreement to sell the same to plaintiffs for $3,716. Plaintiffs paid defendant this sum, and defendant executed and delivered to them its deed particularly describing the land purchased, and reciting that it contained "9.29 acres, more or less." Some time after receiving the deed, the plaintiffs had the land resurveyed and found that it contained only 7.44 acres, or 1.85 acres less than that men-

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★Hearing denied by Supreme Court.

tioned in the deed. Thereupon, demand was made upon defendant for the return of the overpayment, and, said demand being refused, this action was brought to recover the alleged overpayment.

Plaintiffs contend, and the court found, that plaintiffs purchased the land upon the understanding that they were to receive 9.29 acres of land, for which they were to pay $400 per acre, or a total of $3,716. On the other hand, defendant contends that it sold the land to plaintiffs en masse for the sum of $3,716, and did not sell it on an acreage basis, and did not represent or guarantee that said land contained 9.29 acres.

[1-3] The evidence therefore, upon the vital issue in the case, is decidedly conflicting, but there is ample substantial evidence to support the conclusions of the trial court. The law is, of course, well established that the findings of the trial court upon conflicting evidence are conclusive on appeal, and all reasonable inferences are to be indulged in support of the findings, and the burden is upon appellant, who claims error, to show its existence. A few of the cases laying down this doctrine are as follows: Wilbur v. Wilbur, 197 Cal. 7, 239 P. 332; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Gjurich v. Fieg, 164 Cal. 429, 129 P. 464, Ann. Cas. 1916B, 111; Miller v. Lynn, 59 Cal. App. 685, 211 P. 466; Perham v. First National Bank of La Verne (Cal. App.) 261 P. 1064.

[4] The appellant contends that the court erred in admitting parol evidence to vary the terms of the deed, when no fraud, mistake, or accident was alleged or proved; or, in other words, appellant contends that the court erred in admitting parol evidence to show that the land conveyed by the deed did not in fact contain 9.29 acres.

There is no merit in this contention. There was no attempt made by the plaintiffs, either in the complaint or in the proof, to vary or change the terms of the deed. Indeed, it was wholly unnecessary to change or vary the terms of the deed in any respect as far as the case at bar was concerned. The deed did not purport to state the precise quantity of land conveyed. The expression used in the deed, "9.29 acres, more or less," is openly determinative and uncertain and shows that it was not of the essence of the contract, and that reliance, so far as the quantity of land is concerned, was not placed upon that, but upon the description in the deed that preceded that expression, which was:

> "Farm No. 332 of the River Garden Farms subdivision No. 5, as per the map or plat thereof filed July 7, 1913, in Liber 1 of Records of surveys, page 100, Records of Colusa County, Cal." Danielson v. Neal, 164 Cal. 748, 130 P. 716; Commissioners v. Younger, 29 Cal. 179.

This being true, the quantity of land conveyed by the deed was undetermined and uncertain; therefore, in view of the guarantee made by defendant that the tract of land contained 9.29 acres, parol evidence was admissible to show just how many acres was actually in the tract.

[5, 6] Upon the evidence adduced, the court found that said tract of land actually contained 7.44 acres, and that plaintiffs had paid defendant $400 per acre for 9.29 acres. Therefore, defendant had in its hands $740 which rightfully belonged to plaintiffs. Under such circumstances, the general principles of an ordinary action in assumpsit apply. There is no attack upon the deed; the only attack is upon the consideration, and the law is well settled that the true consideration, or failure of consideration, or want of consideration may always be shown by extrinsic evidence. Section 1962, subd. 2, Code Civ. Proc.; sections 1614 and 1615, Civ. Code; Field v. Austin, 131 Cal. 379, 63 P. 692; Shepard v. Hunt, 43 Cal. App. 630, 185 P. 677; Chaffee v. Browne, 109 Cal. 220, 41 P. 1028; National Hardware Co. v. Sherwood, 165 Cal. 7, 130 P. 881; Royer v. Kelly, 174 Cal. 70, 161 P. 1148; Braselton v. Vokal, 53 Cal. App. 582, 200 P. 670.

All the other contentions made by appellant go to the sufficiency of the evidence to support the findings of the court and, as we have seen, the evidence is conflicting and there is ample substantial evidence to support the findings and judgment; therefore, we are powerless to interfere.

We think the judgment should be affirmed, and it is so ordered.

We concur: HART, Acting P. J.; PLUMMER, J.

90 Cal. App. 590

PEOPLE v. RICE. (Cr. 1602.)★

District Court of Appeal, Second District, Division 2, California. April 3, 1928.

Hearing Denied by Supreme Court May 31, 1928.

1. Criminal law 🔑1159(2, 4)—Jury's verdict is conclusive as to weight of evidence and credibility of witnesses.

Jury's verdict is conclusive as to the weight of the evidence and the credibility of witnesses.

2. Criminal law 🔑651(1)—Ordering inspection of premises is discretionary with trial judge.

Ordering inspection of premises is matter peculiarly within discretion of trial judge.

3. Criminal law 🔑728(2)—Court's request that argument be limited to half hour on each side held not abuse of discretion, where no additional time was asked.

Court's request that arguments of counsel should be limited to half an hour on each side *held* not abuse of discretion, as unreasonably limiting argument, where no request for additional time was made.

★Hearing denied by Supreme Court.

4. Witnesses ⚷274(2)—Character witness may be examined as to his knowledge of reports of specific acts inconsistent with reputation testified to.

Character witness may be examined as to his knowledge of reports of specific charges of acts inconsistent with the reputation to which he has testified.

5. Witnesses ⚷274(2)—Cross-examination of defendant's character witnesses, in prosecution for offense against child, as to whether they had heard of little girl's complaint against defendant, held not improper (Pen. Code, §§ 288, 288a).

In prosecution under Pen. Code, §§ 288, 288a, for an offense against a child, cross-examination of witnesses who testified concerning defendant's good reputation, as to whether they had heard that a certain little girl had complained of defendant's taking liberties with her person, *held* not improper.

6. Criminal law ⚷730(13)—Statement of prosecutor that complaint of a little girl against defendant could not proceed because she was too young to make a good witness, though improper, held cured by court's instruction (Pen. Code, §§ 288, 288a).

In prosecution of defendant for an offense against a child under Pen. Code, §§ 288, 288a, statement of prosecutor concerning another alleged offense "that the authorities were unable to proceed because the little girl was too young to make a good witness," though highly improper, *held* not error, in view of instruction to disregard the statement.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Claude Rice was convicted of an offense against a child under Pen. Code, §§ 288, 288a, and he appeals. Affirmed.

Harry S. Harper, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

CRAIG, J. The defendant was convicted on each of two counts of an information charging him with violations of section 288 and 288a of the Penal Code, respectively. The appeal is from the judgment and an order denying motion for new trial. The victim of the felonious acts of the defendant was a boy eight years of age. It would serve no useful purpose to recite the testimony, which is sharply conflicting on several matters, and the complaining witness is contradicted by a number of witnesses for the defendant, but believing and accepting the boy's story as true, which the jury evidently did, a complete case was made upon both counts.

[1] The brief of counsel for the defendant is mainly occupied with a discussion of the weight of the evidence and a comparison of the testimony. If there is any principle of law that is elementary, it is that such considerations have no place in the presentation of an appeal of a defendant found guilty of crime, unless some exceptional issue, not here suggested, is present; for example, where it is doubtful if the error committed prejudiced the substantial rights of the defendant. The jury saw the witnesses, and heard them testify, and its verdict as to the weight of the evidence and credibility of the witnesses is final.

[2] There is no merit to the contention that the trial court committed error in not ordering an inspection of the premises by the jury. This is a question peculiarly within the discretion of the trial judge, and there is nothing in the record to show any abuse of that discretion.

[3] It is charged that the trial court abused its discretion, in that it unreasonably limited the time for argument by counsel for the defendant. The record does not sustain this claim. It shows that the court merely indicated its desire that the arguments should not last more than half an hour on each side, but that more time would be permitted if a longer period were required. No request for additional time was made, nor is there anything to substantiate the assertion now put forth, apparently for the first time, that the period suggested by the court was not sufficient.

[4, 5] A number of witnesses were called to testify to the good general reputation of the defendant in the neighborhood of his residence. On cross-examination each of these witnesses was asked if he had heard that a certain little girl had made complaint that the defendant had taken liberties with her person. That a character witness may be examined as to his knowledge of reports of specific charges of acts inconsistent with the reputation as to which he has testified is well recognized. People v. Hightower, 65 Cal. App. 331, 224 P. 110. That such a complaint had been made was testified by the defendant himself, and so it cannot be doubted that the district attorney was acting in entire good faith in asking the questions. There was no error in the ruling of the court in this regard.

[6] However, this cannot be said of another question asked by the deputy district attorney. Following the one to which we have just adverted, a witness was asked if he had not heard "that the authorities were unable to proceed with the case because the little girl was too young to make a good witness." This question was calculated, and doubtless intended, not to qualify the evidence which the witness had given, but to explain why the defendant had not been prosecuted upon another charge, and therefore to suggest to the jurors that the defendant was probably guilty of such other offense. This was highly improper. However, the trial court at once sustained an objection to the question, and said:

"The jury is instructed to disregard the expression of counsel, and I will instruct you, as I will further instruct you before submitting the case, that, when a question is asked and the court sustains an objection, you have no right to assume that the facts for which the question calls would or would not be the facts; in other words, you have no right to assume that the facts would come as implied by the question, and the entire matter must be disregarded by you."

It is true that in exceptional instances the harm done by misconduct of counsel cannot be cured by any instruction from the court, but under the circumstances here presented we think this admonition was sufficient to safeguard the rights of the defendant and that the misconduct of the deputy district attorney was not of such a nature or extent as to be incurable through this timely and clear instruction.

The judgment and order denying new trial are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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90 Cal. App. 555

KILGORE v. BROWN et al. (Civ. 5052.)★

District Court of Appeal, Second District, Division 2, California. April 2, 1928.

Hearing Denied by Supreme Court May 31, 1928.

1. Negligence 🔑121(1)—Burden of proceeding with proof shifts to defendant under res ipsa loquitur rule, but burden of proving whole case remains on plaintiff.

The burden of going forward with proof shifts to defendant under application of res ipsa loquitur doctrine, but burden of proving whole case rests on plaintiff at all times.

2. Negligence 🔑138(2)—Instructions that burden of proof shifted to defendants under res ipsa loquitur rule and that burden remained with plaintiff held not inconsistent or misleading.

Instructions that burden of proof shifted to defendants under res ipsa loquitur rule and that burden of proof remained with plaintiff throughout case *held* not inconsistent nor misleading, as burden of going forward with proof shifts to defendant, but burden of proving whole case rests on plaintiff throughout.

3. Carriers 🔑321(21)—Term "slightest negligence" in res ipsa loquitur instruction held not erroneous in action for injuries to motorbus passenger (Civ. Code, § 2100).

In action against motorbus carrier for injuries to passenger, use of term "slightest negligence" in instruction on res ipsa loquitur doctrine *held* not erroneous, in view of Civ. Code, § 2100, requiring that carrier for hire use utmost care and diligence for safety of passengers.

4. Carriers 🔑316(4)—Testimony as to plaintiff's status as passenger, speed and collision of bus and automobile, and objects in vicinity held not to preclude application of res ipsa loquitur rule.

In action for injuries to motorbus passenger, testimony as to plaintiff's status as passenger for hire, collision between bus and automobile, warning posts, buildings, etc., in vicinity of accident, and speed of cars shortly before collision *held* not necessarily to cover negligence causing accident, nor to establish such negligence beyond doubt, so as to preclude application of res ipsa loquitur rule, where plaintiff alleged negligence in general terms, and plaintiff's counsel stated that he would rely on such rule as against defendant's owner and driver of bus, but could not do so as against defendant automobile driver.

5. Negligence 🔑121(1)—That plaintiff discloses cause of accident in testifying as to details does not preclude reliance on res ipsa loquitur rule.

That plaintiff, alleging negligence generally, hits on cause of accident in explaining details of case on witness stand, so far as she knows them, or offers some testimony tending to show specific acts of negligence, does not preclude her from relying on res ipsa loquitur rule.

6. Carriers 🔑315(3)—Result of negligence must be alleged and proved, even where res ipsa loquitur maxim applies.

Even where res ipsa loquitur maxim applies, result of negligence, that is, the happening, if not the reason therefor, by which injury was sustained, must be alleged and proved, and burden thereof sustained throughout by plaintiff; mere allegation and proof of relation of carrier and passenger and injury not being sufficient.

7. Negligence 🔑121(2)—Manner and circumstances of injury, not injury itself, justify application of res ipsa loquitur maxim.

It is not the injury, but the manner and circumstances thereof, that justify application of res ipsa loquitur maxim and inference of negligence.

8. Trial 🔑296(7)—Res ipsa loquitur instruction held not erroneous as warranting conclusion that bus owner and driver, sued for injuries to passenger, were liable to cross-complainant automobile driver for slightest negligence, in view of another instruction.

Res ipsa loquitur instruction, in action for injuries to motorbus passenger, *held* not erroneous as warranting conclusion that bus owner and driver owed highest degree of care, and would be liable for slightest negligence, to automobile driver filing cross-complaint for injuries to him in collision with bus, in view of instruction that burden was on him to establish cross-defendants' negligence directly and proximately causing accident, and that verdict should be for them on cross-complaint, though they were negligent, if cross-complainant was guilty of any negligence directly and proximately contributing to accident in any degree, however slight.

★Hearing denied by Supreme Court.

9. Appeal and error 🔑977(3)—Trial court's discretion in granting new trial is legal one which must rest on sound reason in case (Code Civ. Proc. § 657).

While trial court is clothed with large discretion in granting or denying motion for new trial, under Code Civ. Proc. § 657, and appellate court will not disturb its ruling if it can be supported at all, such discretion is a legal one and must rest on sound reason to be found in the case itself.

Appeals from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Eleanore C. Kilgore against E. B. Brown, doing business as Brown's Auto Tours & Taxi Service, Robert A. Wickersham, and another, in which defendant Wickersham filed a cross-complaint against codefendants. Judgment for plaintiff and cross-complainant, and, from an order granting such codefendants' motion for a new trial, plaintiff and cross-complainant appeal. Reversed.

Harry K. Sargent, of Los Angeles, for appellant Kilgore.

Cruickshank, Brooke & Evans, of Pasadena, for appellant Wickersham.

W. I. Gilbert, of Los Angeles, for respondents.

STEPHENS, Justice pro tem. Plaintiff brought an action in damages against defendants for personal injuries received by reason of an automobile collision, and the jury awarded damages in the sum of $7,815 as against the defendants Brown and Armstrong. Robert A. Wickersham filed a cross-complaint against those named in the title as his codefendants for personal injuries received in the same accident, and the jury awarded damages to him in the sum of $1,000. Judgment was duly entered upon these verdicts and thereafter a motion for new trial was made by defendants Brown and Armstrong as to each verdict on all of the grounds provided for in section 657 of the Code of Civil Procedure except only subdivision 2, relating to misconduct of the jury, and subdivision 3, relating to accident or surprise. The trial court granted the motion without specification of the ground upon which the order was based. Plaintiff and cross-complainant appeal.

Defendant Brown was the owner and operator of a motorbus line between the cities of Riverside and Los Angeles, and plaintiff was a passenger for hire in one of the busses at the time of the accident. Defendant Armstrong was in Brown's employ and was driving the bus at the time of the collision. The bus was traveling easterly on a boulevard, and defendant and cross-complainant Wickersham was driving his automobile southerly on a cross street. The two vehicles collided just south and west of the street intersection center. Both vehicles were upset, and plaintiff and cross-complainant were both injured.

The parties all agree that the only two points urged for a new trial were: (1) Error in instructing for the plaintiff on the doctrine of res ipsa loquitur as against the defendants Brown and Armstrong, for the reason that the plaintiff, by her evidence, having fully explained the cause of the accident, was not entitled to an instruction on that doctrine (citing Connor v. Atchison, etc., Ry. Co., 189 Cal. 1, 207 P. 378, 26 A. L. R. 1462, and Marovich v. Central Cal. Tr. Co., 191 Cal. 295, 216 P. 595); (2) conflicting instructions, in that the jury was informed, in effect, that under the rule res ipsa loquitur the burden of proof shifted to the defendants and also that the burden of proof remained with the plaintiff throughout the case.

[1-3] As to the second point, the trial court gave an instruction covering the res ipsa loquitur rule, applying it specifically to the issues between plaintiff and defendants Brown and Armstrong. It also gave a proper instruction to the effect that the burden of proof rested throughout the case upon the plaintiff. This same point was unsuccessfully urged in Lawrence v. Pickwick Stages, 68 Cal. App. 495, 498, 229 P. 885, under essentially the same circumstances. It is too elemental to consume time and space to elaborate upon the principle that the burden of going forward with proof shifts to the defendant under the application of the res ipsa loquitur doctrine, but that the burden of proving her whole case at all times rests upon the plaintiff. We see no inconsistency nor possible misunderstanding in the two instructions referred to. Atkinson v. United Railroads, 71 Cal. App. 87, 234 P. 863, quoting from Osgood v. Los Angeles Traction Co., 137 Cal. 280, 70 P. 169, 92 Am. St. Rep. 171. In this connection, and incidentally, though not having presented the point to the trial court, appellant seems to question the correctness of the res ipsa loquitur instruction in the use of the term "slightest negligence." Section 2100 of the Civil Code reads:

> "A carrier of persons for reward must use the *utmost care* and diligence for their safe carriage. * * *"

The terms mean the same as used. There could not be the *slightest negligence* if the *utmost care* were taken. Almost the identical question was raised in Osgood v. Los Angeles, etc., Traction Co., supra, and it was there held against appellant's contention.

[4] As to the first point, we understand appellant contends that, since the plaintiff herself and three other witnesses explained all they knew about the happening of the accident, which explanation defendants contend covered the cause thereof, it was not a proper case for the application of the rule at all. We do not think the testimony referred to

necessarily covered the negligence that caused the accident. The testimony referred to covered the fact that plaintiff was a passenger for hire; that the two cars came together, wrecking the car in which she was riding; and that she was jostled and injured. It also described the vicinity of the accident as to condition and objects such as warning posts, trees, buildings, etc., and the speed of the cars shortly before collision. plaintiff did not attempt to plead the negligence which caused the wreck, but alleged negligence in general terms and gave the jury relevant information—perhaps all she had—about the occurrence. It should also be recalled that there was another defendant, and that to all objections to questions of plaintiff's counsel upon every subject not relevant directly to the injury counsel explained that he would rely upon the res ipsa loquitur rule as against Brown and Armstrong, but that he could not do so as against the other defendant.

[5] Appellant relies on Connor v. Atchison, etc., Ry. Co., 189 Cal. 1, 207 P. 378, 26 A. L. R. 1462. We do not read this case as authority for the position taken. The learned Justice (Mr. Justice Wilbur) who wrote the opinion in that case states that a complete explanation of the cause of the accident was pleaded, and that:

> "The general rule is that where the plaintiff in his complaint gives the explanation of the cause of the accident, that is to say, where the plaintiff, instead of relying upon a general allegation of negligence, sets out specifically the negligent acts or omissions complained of, the doctrine of res ipsa loquitur does not apply" (citing authorities).

Later in the same opinion the Justice says:

> "In this case if the plaintiff had alleged negligence in general terms [and plaintiff did so in the instant case], and had merely proved the happening of the accident, a prima facie case would have been established under the doctrine res ipsa loquitur. But where the plaintiff went further and showed that the accident was caused by a cloudburst, the question of whether or not the defendant was negligent in failing to inspect the track was to be determined by the jury without reference to the prima facie case resulting from the mere happening of the accident. * * * However, where the explanation leaves it doubtful as to whether or not the ultimate cause of the injury is the negligence of the party charged, it is proper to instruct the jury as to the res ipsa loquitur doctrine."

We do not think this language can be taken as authority for the proposition that, if the plaintiff, after a general allegation of negligence, explains the details of the case on the witness stand so far as she knows them, and hits upon the cause of the accident, this deprives the plaintiff of the res ipsa loquitur instruction to the jury. The fact that some testimony is offered which tends to show specific acts of negligence does not preclude the plaintiff from relying on the presumption. Freeman v. Foreman, 141 Mo. App. 359, 125 S. W. 524. This does not seem to be the doctrine in Osgood v. Los Angeles, etc., Co., supra, nor in Tompkins v. Clay Street Ry. Co., 66 Cal. 163, 4 P. 1165, wherein the court said that no presumption of negligence arises from the mere fact of injury resulting from the collision as against the proprietor of the vehicle not occupied by the plaintiff, but that the rule clearly applies to the proprietor of the vehicle occupied by plaintiff. It would be difficult, indeed, to imagine how, under the rule as contended for by appellant, the case could ever be proved against the other defendant without forfeiting the benefit of the res ipsa loquitur rule as to the defendant carrying the plaintiff as a passenger. And even if it did, it cannot be said that the evidence given by plaintiff and her witnesses established the act of negligence that caused the wreck and injury beyond doubt, and therefore the instruction would be proper under the exception mentioned in Connor v. Atchison, etc., Ry. Co., and in Mansfield v. Pickwick Stages, 68 Cal. App. 507, 229 P. 890.

The case of Atkinson v. United Railroads of San Francisco, 71 Cal. App. 82, 234 P. 863, collates and distinguishes the California cases on the general subject of res ipsa loquitur. In the cited case as well as in the instant case the action was for damages against two independent defendants. In each case two vehicles, one a passenger carrier and one not a passenger carrier, collided. In each case testimony was introduced upon the subject of negligence as alleged in the complaint against two defendants. In each case the trial court gave the jury instructions upon the doctrine of res ipsa loquitur applying alone to the passenger carrier. In the cited case the court, in holding that the maxim did apply, said:

> "The case was presented to the jury, so far as the evidence was concerned, in the same manner as if it were an ordinary action for damages based upon negligence, the plaintiff having assumed the burden of proof upon all affirmative allegations set forth in the complaint, and the trial court having fully instructed the jury that the burden was upon plaintiff to prove those allegations before she was entitled to a verdict. However, along with the other instructions given, the court instructed the jury, in effect, that the doctrine of res ipsa loquitur applied, and gave two instructions upon that subject, one being general in form and the other applicable to the particular acts of negligence pleaded. Appellant contends that the doctrine of res ipsa loquitur did not apply and that it was therefore error for the court to instruct the jury that it did. This contention is grounded upon the claim that respondent, in her complaint, pleaded specific acts of negligence; that consequently she excluded from the case the doctrine of res ipsa loquitur, and lost the right to have the jury instructed upon that subject."

See, also, Marovich v. Central California Tr. Co., supra; Koskela v. Albion Lumber Co., 25 Cal. App. 12, 142 P. 851; Houghton v. Market Street Ry. Co., 1 Cal. App. 576, 82 P. 972; and Housel v. Pacific Electric Ry. Co., 167 Cal. 245, 139 P. 73, 51 L. R. A. (N. S.) 1105, Ann. Cas. 1915C, 665. Perhaps the latest California case squarely and very clearly deciding the point under consideration is Burke v. Dillingham (Cal. App.) 258 P. 627.

[6, 7] The court gave four instructions prepared from the provisions of the California Motor Vehicle Act, St. 1923, p. 517, as amended. No criticism is made as to the instructions themselves, but appellant complains that they show that respondent, plaintiff below, relied "upon specific proof of negligence in submitting her cause to the jury." We see no point in appellant's argument, as even in a case wherein the maxim res ipsa loquitur is applicable the result of the negligence, to wit, the happening, if not the reason for the happening, by which the injury was sustained, must be both alleged and proved and the burden thereof sustained throughout the case by the plaintiff; and, of course, it follows that instruction as to the law should be given. It is not sufficient merely to allege and prove the relation of carrier and passenger and the injury. "It is not the injury, but the manner and circumstances of the injury, that justify the application of the maxim and the inference of negligence." Davis v. Galveston, etc., Co., 42 Tex. Civ. App. 55, 93 S. W. 222.

[8] Although the point seems not to have been touched upon by appellants in argument to the trial court for a new trial, it is here contended that the res ipsa loquitur rule as given in the instruction might well have been misunderstood by the jury as applying to the defendant Wickersham also; but we do not see how its application could have been made clearer, since the instruction specifically and very plainly limits it to the defendants Brown and Armstrong. Respondents also state in their reply to Wickersham's brief that, although it is not included in points 1 and 2:

> "Nowhere was there an instruction on the degree of care required of Brown and Armstrong as to Wickersham, and under the res ipsa loquitur instruction they might well have concluded that Brown and Armstrong owed the highest degree of care to Wickersham and would be liable for the slightest negligence."

We think the following instruction, which was given, effectually answers this suggestion:

> "In so far as the cross-complainant's cross-complaint against the defendants Brown and Armstrong is concerned, you are instructed that the burden of proof is upon him to establish that the defendants Brown and Armstrong were negligent and that such negligence directly and proximately caused the accident to his car. And in this connection you are instructed that, if you shall find from the testimony that the cross-complainant Wickersham was guilty of any negligence directly and proximately contributing to the happening of the accident in any degree, however slight, your verdict will be for the defendants Brown and Armstrong on the cross-complaint, notwithstanding you may believe that they were guilty of negligence at the time and place of the accident."

[9] We appreciate the rule that this court should not disturb the ruling of a trial court in granting or refusing to grant a motion for a new trial if it can be supported at all. Houghton v. Market Street Ry. Co., supra. The trial court is clothed with a large discretion, but this discretion is a legal one. It must rest upon a sound reason to be found in the case itself, and no such reason has been here pointed out, nor have we, in generally reviewing the whole record, discerned any.

The order granting a new trial is reversed.

We concur: WORKS, P. J.; THOMPSON, J.

90 Cal. App. 436

PEET v. PEOPLE'S TRUST & SAVINGS BANK et al. (Civ. 5787.)

District Court of Appeal, Second District, Division 1, California. March 28, 1928.

1. Chattel mortgages 🔑176(1)—In conversion action for mortgagee's wrongfully retaining cattle taken under mortgage, tender of part of cattle to mortgagor held insufficient defense.

In action against bank, mortgagee, and another for conversion of plaintiff's cattle mortgaged to bank as security for debt, that defendant, rightfully taking cattle under mortgage on nonpayment but wrongfully retaining them without sale, tendered part of cattle to mortgagor on condition mortgagor would pay for rounding up and caring for them, *held* insufficient defense, where a number of the cattle had died or had been lost.

2. Chattel mortgages 🔑176(4)—Evidence held to show conversion of cattle by mortgagee bank and transferee, where cattle were not disposed of as statute required.

Evidence *held* to show conversion of cattle by bank to which they had been mortgaged and by bank's transferee, where cattle, though rightfully taken, were not disposed of under mortgage in conformity with statute, but had been turned over to bank's transferee on disposal of bank's assets.

3. Banks and banking 🔑112—Bank held liable for officers' tort in failing to sell, within reasonable time, cattle taken under mortgage.

Bank having mortgage on cattle *held* liable for tort of its officers, who rightfully took possession of mortgaged cattle on nonpayment of debt, but failed to sell them, in accordance with statutory provisions, within a reasonable time, against objection that a bank is not liable for torts of its officers, since officers were acting within scope of authority in taking cattle for purpose of protecting loan.

4. Banks and banking ⚷67—Bank taking over assets of another bank and selling converted cattle could not defend conversion action on ground original bank's tort was committed by department not taken over (Banking Act, § 31).

Banking taking over assets of another bank pursuant to Banking Act, § 31 (St. 1909, p. 95), and selling converted cattle as part of assets, could not successfully defend conversion action on ground of nonliability because original bank's tort was committed by department thereof which had not been taken over.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

Action by Jay Peet against the People's Trust & Savings Bank and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Page, Nolan, Rohe & Hurt and Arthur F. Coe, all of Los Angeles, for appellants.

Lee R. Taylor, C. A. Stutsman, and D. B. Chapin, all of Los Angeles, for respondent.

HAHN, Justice pro tem. This action was brought by the plaintiff to recover damages for the alleged conversion of a herd of cattle by the defendants. In a previous trial of the case judgment was rendered for the defendant People's Trust & Savings Bank, a corporation, which in that trial was the sole defendant in the case. Upon an appeal taken by the plaintiff the judgment was reversed in Division 2 of this court. Peet v. People's Trust & Savings Bank, 56 Cal. App. 46, 204 P. 413.

Prior to the second trial, which resulted in a judgment for the plaintiff and which occasioned the present appeal, plaintiff filed an amended and supplemental complaint making the Hellman Trust & Savings Bank a codefendant with the People's Trust & Savings Bank.

The original complaint was filed February 4, 1919, and the supplemental complaint on March 16, 1923. In this discussion we will refer to the amended and supplemental complaint as the complaint. Plaintiff alleges that on or about the 20th day of April, 1918, he was the owner and in the lawful possession of 147 head of cattle, situate in Riverside county, of the aggregate value of $15,000, and that on said date the defendant People's Trust & Savings Bank unlawfully took possession of these cattle and converted them to its own use and benefit. The complaint further alleges that subsequent to the filing of the original complaint, to wit, on May 21, 1920, the People's Trust & Savings Bank executed with the Hellman Trust & Savings Bank two contracts, copies of which are set forth in the complaint; that the said agreements were entered into pursuant to the provisions of section 31 of the Banking Act of the state of California (St. 1909, p. 95), and by this arrangement the Hellman Bank acquired from the People's Bank all of the assets of its commercial and savings department, and as consideration therefor agreed to assume and pay its deposit liabilities; that by reason of the aforesaid transactions the plaintiff as creditor of the People's Trust & Savings Bank was deprived of recourse to any of the assets of said bank in order to satisfy its claim; also, that by the terms of said agreements the Hellman Bank assumed and became liable for plaintiff's claim for damages arising out of the alleged conversion.

The answer admits the execution of the contract set out in the complaint, but denies that by reason of said contracts or otherwise the Hellman Bank became in any way liable for plaintiff's alleged claim. Also, upon information and belief, the answer denies the ownership of the cattle in the plaintiff and denies the values placed upon the cattle in the complaint. Defendants also allege that plaintiff's claim did not arise out of the business of the commercial or saving department of the People's Bank, but rather out of the transactions of the trust department; that the Hellman Bank did not purchase either the business or assets of the trust department, nor did it assume any of its trust department liabilities. The case proceeded to trial before a jury and resulted in a verdict for the plaintiff in the sum of $3,000.

The presentation in statement and argument by appellants in their brief indicate that they rely upon four points for a reversal of the judgment. These may be stated as follows:

First, that there was in fact no conversion of the cattle by the defendants.

Second, that even if an officer or representative of the defendant corporations wrongfully took cattle belonging to the plaintiff, neither of the defendant corporations can be held liable for the tort of its agent or officer.

Third, that there was no competent evidence presented in the trial to support the finding of the jury that the cattle taken were worth the sum of $3,000.

Fourth, that if any legal liability attached to the appellant People's Trust & Savings Bank by reason of the acts of any of its officers, such liability cannot attach to the Hellman Trust & Savings Bank.

There is a marked conflict in the evidence on certain material matters involved in the case. There is, however, sufficient evidence to have justified the jury in accepting a view of the facts in the case which the following statement fairly portrays.

On September 1, 1917, and for several years prior thereto, the plaintiff was the owner of a herd of dairy cattle near Blythe, Riverside county. This herd consisted of a number of milk cows, and a lesser number of calves and heifers. On September 1, 1917, plaintiff, in order to secure the payment of a loan of $2,500 made by appellant People's Trust & Savings Bank to one Joseph W. Hopkins, executed a chattel mortgage to the People's Trust & Savings Bank covering 60 head of cows and 20 calves of plaintiff's herd. Prior to the spring of 1917 a portion of this herd was pastured on lands known as "Brown's slough," while the remainder of the herd, which were used in the production of milk, constituted plaintiff's dairy near Blythe. Some time in the spring of 1917, the dairy business not proving profitable, plaintiff turned all of his milk cows out to pasture with the remainder of his herd in Brown's slough. In February, 1918, plaintiff caused a roundup to be made of his cattle, and found that he had 147 head, including his milk cows, young calves, several bulls, and some steers. All of his cattle were branded with his brands so as to distinguish them from other cattle then pasturing on the common range.

In April, 1918, J. O. Phillips, who was then assistant trust officer of the People's Bank in charge of the Blythe branch of the bank, under general instructions from J. C. Odell, president of the bank, to look after its affairs in the vicinity of Blythe, ordered all of plaintiff's cattle pasturing in Brown's slough rounded up and taken to a corral, where they were fed for several weeks and then shipped over to Arizona, where they were pastured for a number of months. Shortly after taking possession of the cattle, Phillips reported his having done so to Odell. Odell approved his action and counseled with him concerning the subsequent shipment of the cattle to Arizona. Phillips testified that at the time he took possession of the cattle he did not know whether the note was due or not; that he was moved to round up the cattle because he feared they would be destroyed by the overflow waters of the Colorado river. The fact is the note fell due by its terms on January 1, 1918, and at the time the cattle were rounded up had not been paid.

There was a marked dispute as to the number of cattle taken under Phillips' orders. Plaintiff claims practically all of his herd of 147 cattle were taken, while defendants contended only 57 were rounded up. It appears that Phillips' orders were to round up all of the herd marked with plaintiff's brands, and testimony was offered to the effect that none of the cattle with plaintiff's brands were left in Brown's slough after the roundup ordered by Phillips. It further appears that although plaintiff was living near Blythe, no notice of any kind was given him of the bank's intention to remove the cattle from Brown's slough, nor even later of its decision to ship the cattle to Arizona. There is some dispute as to when the bank officials notified plaintiff that they had taken possession of the cattle. In any event, it was after the cattle were shipped to Arizona.

[1] It is admitted that Phillips and Odell had an interview with plaintiff in October, 1918, concerning the cattle, although again there is a dispute as to what was said in the conversation. Phillips testified that on this occasion Odell offered to return what was left of the herd (it appears without conflict that at this time some 20 to 25 head of the cattle had died or were lost) to plaintiff if he would reimburse the bank for its outlay in rounding up the cattle and caring for them. This part of the conversation is denied by plaintiff. Conceding such a proposal was made, it could not be regarded as a good tender for the reason that a substantial portion of the herd taken could not be returned. It is interesting, although not necessarily important, to note that on October 7, 1918, some days prior to the time of the proposal to return the cattle to plaintiff, Hopkins had paid in full the $2,500 note as security for which the chattel mortgage on the cattle had been given.

In any event, the cattle were retained in the possession of the People's Bank until the assignment of May, 1920, when the Hellman Bank evidently took over the cattle as a part of the assets of the People's Bank, for in October, 1920, one Carrol, then in charge of the activities of the Hellman Bank in Riverside county, sold the cattle remaining from the herd taken for $1,600. There is nothing in the record to indicate what disposition was made of this money.

With the foregoing facts in mind, we will now turn to a consideration of the points urged by appellants in the order of their presentation.

[2] As to the first contention, which is urged as the most important of the issues involved, we are of the opinion that the evidence clearly shows a conversion of at least 57 head of plaintiff's cattle. There is evidence that would justify a finding that a larger number of cattle were rounded up and taken, but the admitted number, in our opinion, is sufficient to sustain the respondent's position. Unquestionably, the defendant People's Bank had the right under the terms of the chattel mortgage, there being a default in the payment of the note, to take possession of the mortgaged cattle in April, 1918, for the purpose of selling them in the manner provided by law. No further steps were taken by the People's Bank at any time to accomplish a sale of the cattle as provided by statute. When the Hellman Bank took possession of the assets of the People's Bank it evidently dealt with the cattle as though belonging to the bank, for no pretense of any kind was made by the Hellman Bank to sell the cattle under the provisions of law relating to mortgaged chattels. When the representative of the Hellman Bank sold the cattle the trans-

action was apparently that of an owner selling to a buyer.

Probably a complete answer to appellants' contention on this point is that the decision of this court on the first appeal established the law of the case on the question of conversion, and hence at this time there is no necessity for any discussion of this point. Peet v. People's Trust & Savings Bank, 56 Cal. App. 46, 204 P. 413.

[3] It is next contended that even if the acts of Phillips in taking possession of the cattle and the ratification by Odell, the president of the bank, constituted a conversion, the People's Bank did not become liable, for these acts were in the nature of a tort, and a bank is not liable for the torts of its officers. There is no merit in this contention. Phillips and Odell were acting well within their scope of authority in taking the cattle for the purpose of protecting their loan to Hopkins. Their failure to proceed with the disposition of the cattle within a reasonable time in accordance with the provisions of the statute is what furnished the basis for plaintiff's claim against the bank. Peet v. People's Trust & Savings Bank, supra.

As to the point urged, that there was no competent evidence to support the valuation of $3,000 put upon the cattle taken, we cannot agree with appellants. The evidence on this issue was in conflict, and while that offered on behalf of plaintiff was not as strong as usually is presented in cases of this character, it nevertheless was sufficient to support the jury's verdict.

The last contention presented by appellants, that in any event the Hellman Bank is not liable for the wrongful conduct of the officers of the People's Bank, is based upon the theory that the chattel mortgage was a transaction of the trust department of the People's Bank as distinguished from the savings and commercial departments; and, inasmuch as the contracts under which the Hellman Bank took over the affairs of the People's Bank related solely to the savings and commercial departments, the Hellman Bank cannot be affected by anything arising out of this particular transaction.

[4] Unfortunately for appellants' theory, the evidence in the record does not support the view that the chattel mortgage was a part of the assets—particularly of the trust department. The note was made payable to the People's Trust & Savings Bank, and the chattel mortgage made to the People's Trust & Savings Bank, as mortgagee. In the absence of any testimony upon the point, it is a fair inference that the funds loaned to Hopkins were funds of the commercial or savings department. Furthermore, it clearly appears without conflict that Carrol, who was in charge of the Hellman Bank activities in Riverside county accomplishing the liquidation of the affairs of the People's Bank under the contracts of May, 1920, took possession of the cattle and sold them, taking the proceeds for such purposes as the Hellman Bank saw fit; and it would clearly lead to the conclusion that they were regarded by both banks as a part of the assets of the commercial and trust department of the bank.

To permit the Hellman Bank to take and retain possession of the proceeds derived from the sale of cattle which neither it nor the People's Bank had any right to the possession of at the time of the sale, and relieve the bank from obligation to recompense the owner of the cattle for the wrong done, would do violence to the very primary considerations of justice.

For the reasons indicated, the judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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90 Cal. App. 450

WRIGHT & HOGAN, Inc., v. HEIDE.
(Civ. 5018.)

District Court of Appeal, Second District, Division 1, California. March 28, 1928.

1. Frauds, statute of 🔑116(5)—Contract for sale of land signed for owner by alleged agent is not binding, in absence of written authority of agent (Civ. Code, § 1624, subds. 5, 6; Code Civ. Proc. § 1973, subd. 5).

Under Civ. Code, § 1624, subds. 5, 6, and Code Civ. Proc. § 1973, subd. 5, contract for sale of land signed with name of owner by his alleged agent was not binding on owner, in absence of evidence that alleged agent was ever authorized in writing to make any sales contract on behalf of owner.

2. Quieting title 🔑44(3)—Evidence that defendant had knowledge that agent could not bind plaintiff by alleged contract of sale held to warrant judgment for plaintiff.

In action to quiet title wherein defendant alleged that plaintiff, through an agent, entered into contract of sale of land with defendant, evidence that defendant was informed that agent could not bind plaintiff, and of agent's limited authority, *held* to sustain judgment for plaintiff.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action to quiet title by Wright & Hogan, Inc., against Charles R. Heide. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. A. Spill, of Pasadena, for appellant.

MacDonald & Thompson and L. W. Frankley, all of Los Angeles, for respondent.

YORK, J. Appeal from a judgment quieting title in plaintiff and for costs.

The only matter to be considered is whether or not an examination of the record discloses sufficient facts to substantiate all of the material findings of the court. An investigation does disclose, contrary to appellant's statement, sufficient evidence to support all of these findings.

[1] The facts found bring the case within the provisions of section 1624, subds. 5 and 6, of the Civil Code, and section 1973, subd. 5, of the Code of Civil Procedure. The only claim of the defendant to the property was his claim of a right to purchase under an alleged contract of sale and purchase in which respondent is mentioned as the owner, and which contract was signed with the name of the plaintiff, by H. H. Steiner, and there is no evidence whatever in this record to show that Steiner was ever authorized in writing to make any sales contract on behalf of plaintiff.

[2] The evidence as to the agency of Le Roy and Steiner being sufficient to justify the trial court in finding that they were the agents to find purchasers only for the property in question and other properties, and there being sufficient evidence to show that the appellant was fully informed of the fact that Steiner, who signed the contract as agent, could not bind his principal, and being actually notified that Steiner could not make a deal excepting only for all cash, and there being sufficient evidence to show that Steiner at the time he signed the contract as agent for plaintiff so notified appellant, appellant cannot be now heard to complain of the judgment of the trial court.

The defendant raises the question of estoppel, and urges that the plaintiff is estopped from denying the authority of Steiner to bind it, and in support of this contention cites Karns v. Olney, 80 Cal. 90, 22 P. 57, 13 Am. St. Rep. 101. Appellant's reliance upon the case of Karns v. Olney is evidently based upon a misunderstanding of the facts of that case. Quoting from pages 97, 98 (22 P. 59) of that opinion, we find:

> "But here the sale was in legal effect made by the principals. * * * It was made in their actual presence, and at the request of one of them the money paid was handed to the other immediately. * * * The facts show that the only reason for the finding that they [principals] did not knowingly or intentionally ratify or affirm the contract of sale was, that they did not know the location of the lot. * * * The findings further show that the purchaser took possession under his contract, and made valuable improvements on the property with the knowledge of these parties."

Thus we see that in the Olney Case there was an absolute estoppel, as clear a case of estoppel as can ever be shown. Quoting from this case further:

> "In this case the vendors stood by and saw the sale made, and accepted the purchase money in the presence of the vendee, and the court finds that they 'by their acts and conversation aforesaid induced the said Bayles to purchase said lot from them by their said agent, Hall,' which, it seems to us, presents the strongest possible case against them. * * *"

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

90 Cal. App. 481

ORMSTON v. LANE et al. (Civ. 4869.)

District Court of Appeal, Second District, Division 2, California. March 29, 1928.

1. Parent and child 🔑13(1)—Parenthood does not alone make parent liable for tort of minor child committed while in parent's control and custody.

The mere fact of parenthood does not make a parent liable for the tort of his child, even though the child be a minor and in the custody and control of the parent when the tort in committed, and this rule is only modified in cases of direct statutory provision.

2. Automobiles 🔑191—Father held not liable for minor son's negligence in driving automobile against father's command, where father had not signed son's application for license (Motor Vehicle Act, § 24, as amended by St. 1919, p. 224, § 14).

Where father did not indorse 18 year old adopted son's application for motor vehicle operator's license held by son, as required by Motor Vehicle Act (St. 1915, p. 397), § 24, as amended by St. 1919, p. 224, § 14, he was not liable for injuries to pedestrian caused by son's negligent operation of automobile belonging to partnership of which father was member, where son was driving car in direct violation of father's command, since relation of agency did not exist on part of son.

Appeal from Superior Court, Los Angeles County; Merle J. Rogers, Judge.

Action by Fanny Ferrari Ormston against R. H. Lane and another, doing business under the fictitious firm name of Sunset Planing Mill, and T. W. Lane, sued herein as F. W. Lane. From so much of the judgment as was in favor of defendant R. H. Lane, and from an order denying her motion for a new trial as against him, plaintiff appeals. Affirmed, and appeal from order denying new trial dismissed.

John C. Miles and Bertrand J. Wellman, both of Los Angeles, for appellant.

Geo. W. Fenimore, of Los Angeles, for respondents.

HAZLETT, Justice pro tem. Plaintiff, Fanny Ferrari Ormston was given judgment by the trial court against defendant T. W. Lane for $3.200 on account of personal injuries she suffered when struck by an automobile operated by him while she was walking from a sidewalk to board a street car, but she was denied relief against the other defendants. Plaintiff made a motion for a new trial, which was denied, and her notice of appeal herein recites that she appeals from the order denying the motion and "from the judgment * * * in favor of the plaintiff and against the defendant T. W. Lane, Jr., for the sum of $3,200 and from the whole of said judgment." However, in her brief on appeal appellant states that she appeals from that portion of the judgment which is in favor of respondent R. H. Lane, and from the order denying her motion for a new trial as against him.

As the order is not one from which an appeal lies, the attempted appeal from the order denying a new trial should be dismissed, but consideration will be given the appeal from that portion of the judgment which denied appellant relief against respondent R. H. Lane.

The only question for determination here is whether respondent R. H. Lane is liable for the damages suffered by appellant by reason of the negligence and carelessness of his adopted son, the defendant T. W. Lane.

The uncontroverted evidence showed and the court found the following facts existing at the time of and shortly prior to the occurrence complained of: Defendant T. W. Lane was a minor of the age of 18 years. During more than the 10 years next prior to April 5, 1922, he was the stepson of defendant R. H. Lane, and lives with and was in the custody and under the control of defendant R. H. Lane and of his wife, mother of defendant T. W. Lane. During that time he was known and treated as the son of defendant R. H. Lane, and on that date he was legally adopted as the son of defendant R. H. Lane. The relationship, custody, and control existed on April 12, 1922, when plaintiff's injuries occurred. (For the purpose of brevity defendant R. H. Lane will be hereinafter referred to as "the father" or "respondent" and defendant T. W. Lane as "the son." The father and defendant C. A. Knowles were copartners, doing business under the fictitious name of Sunset Planing Mill Company. At the time of and for some time prior to the occurrence complained of the son was employed by them, and in the course of his employment the son drove a Ford roadster belonging to them. On several occasions prior to the occurrence the father had instructed the son not to use the roadster for his own pleasure or purposes without the father's express permission, but at several prior times the son had used the roadster for his own pleasure pursuant to such permission. Defendant C. A. Knowles had warned the son never to use the roadster for his own purposes. On January 3, 1922, the son procured an operator's license from the motor vehicle department upon an application signed by his mother but which the father did not sign, and this license was in effect at the time of the occurrence complained of. Just preceding that occurrence and after his day's work was finished, the son took the roadster out and was driving it for his own pleasure without the father's knowledge or consent and contrary to his instructions, and while proceeding on a public highway the son so carelessly and negligently drove the roadster that he struck plaintiff and ran her down, causing her serious personal injuries on account of which the judgment against him was given.

Appellant contends that under the provisions of section 24 of the Vehicle Act then in force (Stats. 1915, pp. 397, 411, as amended in 1919, Stats. 1919, pp. 191, 224), it was the duty of the father as well as the mother to have signed the application of the minor son for the operator's license permitting him to operate a motor vehicle on the public highways, the section requiring "the parent or parents having the custody of such applicant" to sign the application; also that section 33 of the act made any violation of the act a misdemeanor, and that the father was guilty of a misdemeanor in permitting the son to so use the roadster without having first signed the son's application for the license, the act further providing, in section 24 that:

> "Any negligence of a minor, so licensed, in operating * * * a motor vehicle upon the public highway, * * * shall be imputed to the person or persons who shall have signed the application," and they "shall be jointly and severally liable with such minor for any damages caused by such negligence."

Appellant further contends that, therefore, as it was the father's duty to have signed such application, he, also, shall be held to respond to plaintiff on account of her injuries, even though he had not signed it.

In support of these contentions appellant cites Whitworth v. Jones, 58 Cal. App. 492, 209 P. 60, in which it appeared that a minor son of the defendant who was in the defendant's custody, had an operator's license, and, while driving his father's automobile, injured the plaintiff, who sued the father for damages. The evidence was silent on the question whether the father had signed the application for the license as provided in the Vehicle Act. On appeal the court held that, under these facts, certain presumptions may be indulged in to sustain the judgment against the father, and those were that:

> "Necessarily, * * * he would be the proper person to have indorsed the application. * * * There are two pertinent presumptions declared to exist under section 1963 of the Code of Civil Procedure: (15) 'That official duty has been regularly performed'; (33) 'that the law has been obeyed.' The trial judge was warranted in assuming that the father did indorse the son's application and that the officers in charge of the motor vehicle department would

not have issued the operator's license without such indorsement being supplied."

Judgment against the father was affirmed. However, in this case, the presumptions mentioned in the Whitworth Case are rebutted by the proof of the fact that the father had not indorsed the son's application for the license.

Appellant argues that the father cannot take advantage of his own wrong in failing to indorse the application and permitting the son to drive the roadster without first having indorsed the application, and cites Walsh v. Flatland, 36 Cal. App. 819, 173 P. 596, and Buelke v. Levenstadt, 190 Cal. 684, 214 P. 42, in support of the proposition as related to the facts in this case. Neither case is an authority here. In the Walsh Case it appeared that the father had permitted his minor son, who had no license, to drive his automobile, and, while driving recklessly the son injured the plaintiff. It was held that the father was liable for the reason that the son was "acting in furtherance of and not apart from the service and control of these defendants" and that the liability rested upon a showing of agency, which need not be a business agency. Reference was made to the Vehicle Act as amended in 1917 (St. 1917, p. 382). The foregoing is taken from Crittenden v. Murphy, 36 Cal. App. 803, 173 P. 595 (referred to in the Walsh Case). Agency is not shown in the case at bar.

In the Buelke Case it appeared that the defendant signed the application of a minor to whom he stood in loco parentis, representing that he was the minor's father. The operator's license to the minor was issued on the application. The court held that defendant was liable for damages caused by the death of another resulting from the negligence of the minor in operating defendant's automobile, although defendant was not present and the minor was on a mission of his own. The court said that this liability was based upon the rules of negligence rather than upon the relation of parent and child, and that "the liability rests not alone upon the fact of ownership, but upon the combined negligence of the driver in the operation of the automobile, and of the owner in intrusting the machine to an incompetent driver," and that the defendant was liable under the provisions of section 24 of the Vehicle Act. This decision was cited with approval in Bosse v. Marye (Cal. App.) 250 P. 693, and Lackey v. Olds and Stoller Interexchange (Cal. App.) 252 P. 672.

[1] The mere fact of parenthood does not make a parent liable for the tort of his child, even though the child be a minor and in the custody and control of the parent when the tort is committed. Buelke v. Levenstadt, supra; Spence v. Fisher, 184 Cal. 209, 193 P. 255, 14 A. L. R. 1083; Perry v. Simeone, 197 Cal. 132, 138, 239 P. 1056; Arrelano v. Jorgensen, 52 Cal. App. 622, 623, 199 P. 855; Hudson v. Von Hamm (Cal. App.) 259 P. 374; Rocha v. Garcia (Cal. Sup.) 263 P. 238; Lane v. Bing (Cal. Sup.) 262 P. 318. "It is only by direct statutory provision that the rule is relaxed or modified. An example thereof may be found in section 24 of the Motor Vehicle Act (Stats. 1915, pp. 397, 411, as amended by Stats. 1919, pp. 191, 223)." Perry v. Simeone, supra, page 136, 239 P. 1057. See, also, Buelke v. Levenstadt, supra; Rocha v. Garcia, supra, and cases cited.

Appellant's contention that the father violated the law by failing to indorse the son's application for the license and by reason of the violation became liable for the son's tort does not find support in the decisions of the courts. Assuming that the father's failure to indorse the application was a violation of the Vehicle Act, the general rule is that the violation of law must have contributed directly to the injury, and without regard to how improper or illegal it may have been in the abstract, no action for damages can be founded upon it. Arrelano v. Jorgensen and Rocha v. Garcia, supra. In the Arrelano Case a minor son and his parents were sued for damages suffered by the plaintiff resulting from an automobile collision upon a public highway carelessly caused by the son, who owned an automobile and operated it in the course of his employment. He had no operator's license, having permitted his license to lapse. He was in the custody and control of his parents, and they knew he so operated the automobile and that he had no license. "By no stretch of the imagination could it be said that the plaintiff would have been saved these injuries had the operator of the automobile renewed his operator's license." The court held that the parents were not liable. See, also, Spence v. Fisher; Perry v. Simeone; and Rocha v. Garcia, supra.

The statute made the parents liable only when they had indorsed the application upon which the minor child's operator's license was issued, and the child so negligently operates an automobile that he injures another person. Buelke v. Levenstadt; Lackey v. Olds & Stoller Interexchange; Bosse v. Marye; Whitworth v. Jones; and Rocha v. Garcia, supra.

In the Rocha Case it was held that parents are not liable, even though they had indorsed their minor son's application for an operator's license and, during the interim between the time of the indorsement and the issuance of the license, the son, in violation of the parent's explicit command, drove their automobile and so negligently operated it that he collided with and injured plaintiff, a pedestrian, on a public street, and that:

> "It is only for the negligence of a minor 'so licensed' that the parents are liable. * * * Willis Garcia [the minor] was not 'so licensed' or licensed at all, and hence the provisions of

the statute imposing a liability upon parents of minor licensed drivers do not apply."

On the other hand, when a father permits his minor child to use his automobile, knowing the minor is a careless and reckless driver, the father is liable for injuries caused another person by the reckless operation of the automobile by the minor. Rocca v. Steinmetz, 61 Cal. App. 102, 104, 214 P. 257, and cases cited. But in the absence of any showing that the parents or either of them had signed an application to the state motor vehicle department for the issuance of an operator's license to their minor son, and in the absence of a showing that the minor was either in fact or to the parents' knowledge a careless or incompetent driver, and, in the absence of any evidence that he was in any business or affair on behalf of the parents, they cannot be held for damages resulting from the carelessness or incompetence of the minor. Lane v. Bing, supra.

Where a father keeps an automobile for the convenience and use of his family, and members of the family drive it solely for their own convenience or pleasure or on their own missions, and the father has no direction or control in those particular uses, he is not liable for torts committed by them in operating the automobile. Spence v. Fisher and Perry v. Simeone, supra; Sanfilippo v. Lesser, 59 Cal. App. 86, 88, 210 P. 44.

[2] It clearly appears in this case that the father—whether standing in loco parentis or as father by adoption of the son—did not indorse the son's application for the operator's license held by the son; that when plaintiff was injured the son was driving the roadster in direct violation of the father's command; and that the relation of agency did not exist on the part of the son. For those reasons the father is not liable to plaintiff.

The judgment is affirmed. Appeal from order denying new trial is dismissed.

We concur: WORKS, P. J.; CRAIG, J.

BOYER v. UNITED STATES FIDELITY & GUARANTY CO (two cases.) (Civ. 5795.) ★

District Court of Appeal, Second District, Division 1, California. March 27, 1928.

Hearing Granted by Supreme Court May 24, 1928.

1. Evidence 🔑506—Experts' opinions that statements in application for life policy, that insured was brother of female beneficiary, were material to acceptance of risk, held inadmissible.

Insurance experts' opinions, that statements in applications for life insurance policies, that insured in one of them was a brother of woman named as beneficiary, were material to acceptance of risk and hazard assumed by insurer, *held* properly stricken.

2. Insurance 🔑124—Insurance policies are governed by same general rules as all contracts.

Insurance policies are governed by the same general rules which pertain to all contracts.

3. Insurance 🔑124—Meeting of minds is prerequisite to valid insurance policy.

To execute a valid insurance policy, there must be a meeting of the minds.

4. Insurance 🔑138(1)—Parties to insurance contract may make any agreements they see fit, and courts will enforce terms thereof, if not against public policy or specific law.

Subject to rule that provisions of insurance policy must not be against public policy or in contravention of specific provisions of law, parties to contract may make such agreements as they see fit, and courts will enforce terms mutually agreed upon.

5. Insurance 🔑151(2)—Life policy and application constitute contract.

Life insurance policy and the application therefor constitute the contract.

6. Insurance 🔑298—Words "Relationship Brother" in application for life policy, held "statement" within agreement that any false statement with intent to deceive would bar recovery.

In woman's application for life insurance policy, naming man as beneficiary, words "Relationship Brother," first of which was printed and second typewritten, *held* a "statement" within preceding agreement that recovery would be barred "if any one of the following statements * * * is false and made with intent to deceive."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Statement.]

7. Contracts 🔑143—Court can enforce only agreements made by parties.

Court can enforce only such agreements as were made by the parties to the contract.

8. Insurance 🔑298—False statement in woman's application for life policy that male beneficiary was her brother held made with intent to deceive within agreement barring recovery in such case (Civ. Code, § 1709).

Statement in woman's application for life insurance policy that male beneficiary, who was only a friend, was her brother, *held* not a mere mistake, but made "with intent to deceive" within preceding agreement that recovery would be barred if any of following statements were false and made with such intent, though not made with intent to injure insurer; latter's position being altered to its risk within Civ. Code, § 1709.

9. Insurance 🔑298—Materiality of false statement intended to deceive is immaterial, where policy bars recovery if false statement is material to acceptance of risk "or" made with intent to deceive.

Where woman's application for life insurance policy provided that any false statement would bar recovery, if material to acceptance

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★Superseded by opinion of Supreme Court, 274 P. 57.

of risk "or" made with intent to deceive, materiality of false statement that male beneficiary was applicant's brother is immaterial, if made with such intent.

10. Evidence ⟹28—It is common knowledge that one cannot obtain policy on life of another, in whom applicant has no insurable interest, but not that rule is otherwise where applicant obtains policy on his own life.

It is a matter of common knowledge that one may not obtain an insurance policy on the life of another, in whom applicant has no insurable interest, but not that rule is otherwise where applicant obtains policy on his own life.

11. Trial ⟹136(3)—It is court's duty to construe written instruments.

It is the duty of the court to construe written instruments as a matter of law.

12. Insurance ⟹668(6)—Materiality of statements in applications for insurance policies is generally for jury, unless evidence is so clear and uncontradicted as to make it matter of law.

Generally, materiality of statements in applications for insurance policies is a question for the jury, unless evidence is so clear and uncontradicted as to make it a matter of law.

13. Insurance ⟹256(1)—One inducing issuance of void policy by deceitfully false statement cannot compel insurer to accept risk and revive policy by changing beneficiary (Civ. Code, § 2612).

One practicing deceit on insurance company by making false statement in application, thereby inducing issuance of policy, which is void from beginning under Civ. Code, § 2612, cannot thereafter compel company to accept risk and revive policy by merely changing beneficiary.

14. Appeal and error ⟹1177(8)—New trial will not be granted on reversal of judgments against insurer because of false statements intended to deceive in applications for policies (Code Civ. Proc. § 956a [added by St. 1927, p. 583]).

Under Code Civ. Proc. § 956a (added by St. 1927, p. 583), authorizing appellate court to amend trial court's findings, new trial will not be granted on reversal of judgments for plaintiff in actions on life insurance policies because of false statements, made with intent to deceive, in applications, but cause will be remanded with directions to render judgments for defendant on fact findings as amended in appellate court.

Appeals from Superior Court, San Diego County; W. P. Cary, Judge.

Actions, consolidated for trial, by G. M. Boyer, as administrator of the estate of Dora Mockabee Rose, deceased, against the United States Fidelity & Guaranty Company. Judgments for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Joe Crider, Jr., of Los Angeles, and H. W. B. Smith, of San Francisco, for appellant.

L. N. Turrentine, of San Diego, and Perry F. Backus, of Los Angeles, for respondent.

WOOD, Justice pro tem. Defendant issued to Dora M. Rose an accident insurance policy on August 16, 1920, in the principal sum of $15,000. Dr. C. E. Calm was named as beneficiary in the policy. On August 19, 1920, Charles Emil Calm, the same Calm named as beneficiary in the Rose policy, applied for and obtained from the defendant an accident policy in the principal sum of $15,000; the beneficiary being Dora M. Rose. At the expiration of one year from the receipt of her policy, Dora M. Rose, by rider attached thereto, changed the beneficiary to her estate. On May 22, 1923, Dora M. Rose and Dr. C. E. Calm were killed in an automobile accident; Dora M. Rose surviving Dr. Calm by two hours. The administrator of the estate of Dora M. Rose filed two actions to recover the policies. By stipulation, the actions were tried together before the court without a jury, and the same evidence was received in both cases. Appeals by defendant in both actions are now before us. The determination of the cases depends upon the construction to be given to the written applications for the policies signed by the insured in view of the stipulated facts and uncontradiced testimony. At the head of each of the applications, we find these words:

> "I hereby apply to the United States Fidelity & Guaranty Company for a policy to be based upon the following representation of facts: I understand and agree that the right to recovery under any policy which may be issued upon the basis of this application shall be barred in the event that any one of the following statements, material either to the acceptance of the risk or the hazard assumed by the company is false, or in the event that any one of the following statements is false and made with intent to deceive. I agree that this application shall not be binding upon the company until accepted either by the secretary at the home office or by an agent duly authorized to issue policies."

Then follow fifteen items, all in narrative form except the eighth. In these items the applicants set forth personal data such as is usually found in applications for insurance policies, the first giving the name of the insured, the second, the residence, etc. Item 8 of the Rose application is as follows:

> "Policy to be paid in case of death by accident under its provisions to Dr. C. E. Calm. Resident California Club. Relationship Brother. Age, 55."

After the fifteenth item, the date appears, followed by the signature of the applicant. In the application signed by Dr. Calm three days later, the same words are found, except for the variations occasioned by supplying the personal data of the applicant. In item 8, Dr. Calm named Dora M. Rose as the beneficiary, and gave the relationship as that of sister. It was stipulated at the trial that Dr. Calm and Dora M. Rose were not brother and sister. By the testimony of Ruby Aikman, the driver of the automobile at the time of the accident, it was shown that the witness knew Dr. Calm and Dora M. Rose for some time before either of them made application to the defendant; that they introduced themselves to her, and represented to her that they were friends and not brother and sister. It was further shown that, at the time the applications were presented to defendant, Dr. Calm was a married man. The administrator of the estate of Dora M. Rose promptly furnished defendant with written proof of the accidental deaths; whereupon defendant investigated the facts and learned that Dr. C. E. Calm and Dora M. Rose were not brother and sister. Defendant then tendered to the administrator the amount of the premiums paid, and served written notice that the policies were void. The tender was refused.

[1] At the trial, defendant produced two witnessess, Warren Griffith and George A. Calkins, who qualified as experts in matters of insurance, and testified that, according to the usage and custom of insurance companies, in August, 1920, applications for insurance would not be accepted if made under the circumstances shown in evidence. They further testified that they were of the opinion that the statements contained in the applications to the effect that Dr. Calm was a brother of Dora M. Rose were material to the acceptance of the risk and to the hazard assumed by the defendant. At the close of the evidence, that part of their testimony giving their opinion on the subject of the materiality of the statements was stricken out by the court upon motion of plaintiff. The court did not err in so doing. 25 Cyc. 937. In Penn Mutual Life Ins. Co. v. Mechanic's Savings Bank & Trust Co. (C. C. A.) 72 F. 413, 38 L. R. A. 33, 70, it is said:

> "The great weight of authority in this country, however, is against the view that an insurance expert may be asked his own opinion whether the undisclosed or misrepresented facts were material to the risk. * * * The better authorities, however, seem to sustain the rule that the insurance experts may testify concerning the usage of insurance companies generally in charging higher rates of premium or in rejecting risks, when made aware of the fact claimed to be material."

[2-5] Insurance policies are governed by the same general rules which pertain to all contracts. There must be a meeting of the minds. Subject to the rule that their provisions must not be against public policy or in contravention of specific provisions of law, parties to the contract may make such agreements as they see fit, and the courts will enforce the terms mutually agreed upon. The policy and the application therefor constitute the contract. In McKenzie v. Scottish U. & N. Ins. Co., 112 Cal. 556, 44 P. 924, the court said:

> "Parties may contract as they please. When a condition precedent is adopted by them in their contract, the courts will not inquire as to its wisdom or folly. * * * In Wood v. Hartford Ins. Co., 13 Conn. 533, 35 Am. Dec. 92, a leading case on the subject of warranty, Sherman, J., said: 'If a house be insured against fire, and the language of the policy is "warranted, during the policy, to be covered with thatch," the insurer will be discharged if, during the insurance, the house be covered with wood or metal, although his risk is diminished; for a warranty excludes all argument in regard to its reasonableness, or the probable intent of the parties.'"

In Jeffries v. Life Ins. Co., 22 Wall, 47, 22 L. Ed. 833, this language is found:

> "It is the distinct agreement of the parties, that the company shall not be deceived to its injury or to its benefit. The right of an individual or a corporation to make an unwise bargain is as complete as that to make a wise bargain. The right to make contracts carries with it the right to determine what is prudent and wise, what is unwise and imprudent, and upon that point the judgment of the individual is subject to that of no other tribunal."

[6] In her application for the policy, Dora M. Rose agreed that recovery would be barred "if any one of the following statements * * * is false and made with intent to deceive." If the words "Relationship Brother" constitutes a "statement," and were made "with intent to deceive," plaintiff cannot, in view of the rule just set forth and the stipulation of the parties, prevail in the action. It is not necessary to decide whether the words amount to a warranty or representation, since the contract uses the word "statement." The entire application consists of fifteen items, preceded by the agreement hereinabove set forth and followed by the signature of the applicant. Item 8 appears in the midst of the others, all of which contain statements of fact. If it were in narrative form, there could be no doubt but that a statement was made. For instance, if the language used were "the relationship is that of brother," it could not possibly be contended that a statement was not made. Manifestly the two words "Relationship Brother" were used for the sake of brevity. Plaintiff has attached to his brief an exact copy of the application. It appears therefrom that the word "Relationship" is printed and the word "Brother" is in typewriting. By filling in the space following the word "Relationship" as she did, the applicant doubtless meant to state to defendant that Dr. Calm bore the relation of brother to her. It was clearly the intention of the defendant to obtain, and of the applicant to impart, information on the subject of the relationship between the insured and the beneficiary. Considering the application as a whole, we are of the opinion that the applicant intended that all of the matter set forth over her sig-

nature was given to the defendant as information and as such was to be treated as statements.

[7, 8] Next is presented the question whether the statement concerning the relationship of the beneficiary was made "with intent to deceive." Plaintiff argues that, in order to bar a recovery, there must be shown an intent to injure defendant. It was not so provided in the contract, and as has been seen, the court can enforce such agreements only as were made by the parties. If the parties had agreed that the intent referred to in the application was an intent to deceive the company to its injury, it would have been a simple matter to add to the application appropriate language to that effect after the word "deceive." Such language, embracing a different idea and an additional condition, cannot be supplied by the court. Doubtless the parties meant to agree that, if the false statement were made knowingly and intentionally, the recovery would be barred. If, on the other hand, the statement were made inadvertently, it would not bar recovery, even though false, because there would be no intent to deceive. An example of such a false statement could be found in an error on the point of the age or the residence of the beneficiary. Erroneous statements by Dora M. Rose in her application that Dr. Calm was 54 rather than 55 years of age, and that he lived at a club other than the California Club, would doubtless be false statements, but not necessarily made with intent to deceive. They might be mistakes resulting from incorrect information on the part of the applicant. The statement on her part, however, that Dr. Calm, a married man and only a friend, bore the relation of brother to her could not possibly have been a mere mistake. There could be no inadvertence here. She must have intentionally stated as true that which she knew to be untrue. Section 1709 of the Civil Code provides:

> "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable. * * *"

[9-11] Here the position of defendant was altered to its risk, and this was brought about by the false statement of the applicant, which must have been intentionally and willfully made. Plaintiff cannot escape the result of the provision of the application by claiming that the false statement was not material, if indeed it be held that the statement in question was immaterial, since the contract provided that a false statement would void the policy in either of two events, if the false statement should be material to the acceptance of the risk, *or*, if made with intent to deceive. By the plain agreement of the parties, the materiality of the false statement is of no consequence if it was made with the intent to deceive. It is a matter of common knowledge that one may not obtain an insurance policy upon the life of another in whom the applicant has no insurable interest. It is not so generally known, however, that the rule is otherwise where the applicant obtains the policy on his own life. 14 Cal. Jur. 468; 14 R. C. L. 920. It can be well argued that the applicant in the case at bar made the false statement in question in the fear that the application would be refused if the truth were known. Such action on her part would certainly be taken with intent to deceive. Our conclusion on this point will necessitate a reversal of the judgment, notwithstanding the finding of the trial court:

> "That the description of the beneficiary Dr. C. E. Calm as a brother of the insured, Dora M. Rose, when he was not a brother was not a statement material either to the acceptance of the risk or to the hazard assumed by the defendant, or a false statement made with intent to deceive the defendant."

It is the duty of the court to construe written instruments as a matter of law. The facts, which are extremely simple, were established by stipulation or by undisputed testimony. There was nothing for the trial judge to do as a trier of fact. His duty was to draw a legal conclusion from the instrument before him and the stipulation as to the relationship between the insured and the beneficiary. That a false statement was made with intent to deceive is the only reasonable conclusion that can be drawn therefrom. What has been said with reference to the application for the Rose policy applies with equal force to the application of Dr. Calm.

[12] Counsel for defendant contends that a reversal should be ordered on the further ground that the false statement was material to the acceptance of the risk or to the hazard assumed. He points to the testimony of the expert witnesses that, according to the usage and custom of insurance companies, an application would be rejected if the company should discover that a false statement as to relationship had been made. He argues that, since no evidence in conflict appears, the finding on the subject of materiality is not sustained. The witness Calkins testified:

> "Well, the question would immediately come into my mind, which would influence me as to the issuance of that policy, that the character of a person who would deliberately lie to me on an important matter of that kind, that there might be certain relationships that would increase the hazard—and to make you understand it, if I can put it that way a little more clearly just what I mean—there is possibilities, strong possibilities, under these conditions, those certain ones, perhaps relations are not what they should be, and the character of such a person is not just as clearly good as it should be, it would be. I would judge, from making such statements to me, there might be third and fourth parties come in there that might cause a hazard there that I would not look on favorably for the issuance of the policy; do you get what I mean?
>
> "Q. What would such a hazard be, for ex-

ample, have you got any concrete idea of what such a hazard would be? A. Well, I know of such hazards that have been carried out in life more than once, where a jealous wife or husband or relative have appeared on the scene and there has been trouble."

Section 2565 of the Civil Code provides:

> "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

The authorities on this angle of the case are not harmonious. Defendant cites the case of Gaines v. Fidelity & Casualty Co. of New York, 93 N. Y. App. Div. 524, 87 N. Y. S. 821, in support of its contention, while plaintiff cites Lampkin v. Travelers' Ins. Co., 11 Colo. App. 249, 52 P. 1040, which appears to support his view. There is also a lack of entire harmony in regard to the respective functions of court and jury in determining the materiality of statements in applications for insurance policies. The prevailing rule seems to be, however, that the materiality of such statements is a question for the jury, subject to the qualification that the evidence may be so "clear and uncontradicted" that the materiality is a matter of law. Everett v. Standard Accident Ins. Co., 45 Cal. App. 332, 187 P. 996; Union Indemnity Co. v. Dodd (C. C. A.) 21 F.(2d.) 709, decided September 24, 1927. We do not consider it necessary for us to pass upon the questions involved in defendant's contention concerning the asserted materiality of the false statements, since the judgments must be reversed on the ground that the statements were made with intent to deceive.

[13] It cannot be successfully argued that the situation of the parties was changed by the act of Dora M. Rose in changing beneficiaries a year after the policy was issued. Section 2612 of the Civil Code is as follows:

> "A breach of warranty, without fraud, merely exonerates an insurer from the time that it occurs, or where it is broken in its inception prevents the policy from attaching to the risk."

In Wolverine Brass Works v. Pacific Coast Casualty Co., 26 Cal. App. 183, 146 P. 184, it is said:

> "The above-mentioned warranties being false, the policy issued in reliance upon them was in our opinion, void ab initio."

One who has practiced deceit upon an insurance company by making a false statement and thus has induced the issuance of a void policy cannot thereafter, by merely changing the beneficiary, compel the company to accept her as a risk and give life to the void policy.

[14] A new trial will not be necessary. By section 956a of the Code of Civil Procedure (added by St. 1927, p. 583) we are authorized to amend the findings of the trial court. It is ordered that the following be stricken from finding XV of the findings of fact in the action on the policy of Dora M. Rose, No. 41611 of the superior court:

> "That the description of said Dr. C. E. Calm as her brother was not material to the acceptance of the risk and to the hazard assumed by the defendant, and that it was not material to the acceptance of the risk or to the hazard assumed by the defendant; that the fact that said beneficiary was described as the brother of the insured did not increase the risk and hazard or risk or hazard assumed by defendant; that defendant did not rely upon the description in said application concerning the relationship of the beneficiary to the insured; and that the said beneficiary was not described as a brother of the insured with the intent to deceive the defendant, and that defendant was not thereby deceived or injured."

It is further ordered that the following be stricken from the findings of fact in the action on the policy of C. E. Calm, No. 41612 of the superior court:

> "That said Charles Emil Calm did not deceive or defraud defendant in any manner or particular in obtaining said contract or policy of insurance" in finding XVI, and "that the description of said Dora M. Rose, as his sister, was not material to the acceptance of the risk and to the hazard assumed by the defendant, and that it was not material to the acceptance of the risk or to the hazard assumed by the defendant; that the fact that said beneficiary was described as the sister of the insured did not increase the risk and hazard, or risk or hazard assumed by defendant; that defendant did not rely upon the description in said application concerning the relationship of the beneficiary to the insured, and that the said beneficiary was not described as a sister of the insured with the intent to deceive the defendant, and that defendant was not thereby deceived or injured" in finding XVII.

The judgments are reversed. It is further ordered that the cause be remanded to the superior court, with directions to render judgment for the defendant in both actions upon the respective findings of fact as herein amended and upon the payment into court for the plaintiff of the sum of $720, the total amount of the premiums received by defendant on the two policies.

I concur: CONREY, P. J.
I concur in the judgment: HOUSER, J.

MILWAUKEE BLDG. CO. v. WETZEL.★

(Civ. 3388.)

District Court of Appeal, Third District, California. March 30, 1928.

Rehearing Granted April 28, 1928.

1. Contracts 🔑28(3)—Evidence held to support finding that parties entered into contract to furnish material and labor for building being constructed by plaintiff.

In action for damages for breach of alleged contract, whereby defendant agreed to perform labor and furnish materials for store fronts and iron doors and elevator doors for passenger elevators and other iron work for plaintiff, a general contractor, in construction of building, evidence *held* sufficient to support finding that parties entered into contract for alleged breach of which plaintiff asked damages.

2. Contracts 🔑28(3)—Evidence supported finding that plaintiff contractor accepted defendant's bid to furnish labor and materials for store fronts and other parts of building.

In action by general contractor for damages for breach of alleged contract, whereby defendant agreed to furnish materials and labor for store fronts and other parts of building being constructed by plaintiff, evidence *held* sufficient to support finding that there was an acceptance of defendant's bid.

3. Appeal and error 🔑1011(1)—Trial court's findings on conflicting evidence were conclusive on appellate court.

Trial court's findings on conflicting evidence were conclusive on appellate court, there being nothing in plaintiff's evidence marking it as inherently improbable, or such as would justify court in holding as matter of law that it was not of sufficient probative force to uphold decision.

4. Contracts 🔑349(4)—In action for breach of contract to furnish materials and labor, excluding blank form plaintiff sent defendant for submitting bid held not error.

In action by general contractor for damages for breach of contract, whereby defendant agreed to furnish material and labor for store fronts and other parts of building, denying admission in evidence of printed form which plaintiff sent to defendant for purpose of inserting and so specifying therein his proposal or bid for work *held* not error, where defendant's bid and acceptance thereof by plaintiff through or by means of purchase orders were introduced in evidence.

5. Contracts 🔑349(1)—In action for breach of contract to furnish materials for building, excluding evidence regarding whether certain item appeared on plans as recorded in county recorder's office held not error.

In action by general contractor for breach of contract, whereby defendant agreed to furnish material and labor for store fronts and other parts of building, excluding evidence on cross-examination of plaintiff's witness as to whether "iron frames and sash" as contained in plans and specifications on which defendant framed and tendered his bid appeared on plans as recorded in county recorder's office *held* not error, where defendant undeniably based his bid on plans and specifications which contained words, "iron frames and sash."

6. Appeal and error 🔑931(5)—Presumption is court considered all relevant testimony received and incompetent testimony received without objection.

Presumption is that court in deciding case considered all relevant and material testimony received, and even incompetent testimony if it was received without objection.

7. Evidence 🔑158(27)—In action for breach of contract to furnish materials, excluding evidence regarding similarity between plaintiff's exhibit and plans from which defendant made up bid held not error; plans being best evidence.

In action by general contractor for breach of contract, whereby defendant agreed to furnish material and labor for store fronts and other parts of building, excluding answer to question, "Have you determined whether or not they (Plaintiff's Exhibit 8) are similar plans to those from which you figured in order to submit your bid?" which was designed to establish that words, "iron frames and sash," which were in Exhibit 8, were not in plans from which defendant made up his bid, *held* not error, since plans themselves were best evidence of facts sought to be shown.

8. Evidence 🔑129(6)—In action for breach of contract, evidence regarding B.'s first bid in comparison with other bids held competent to show bid was substantially same as successful bid on reletting contract after breach and on damages.

In action by general contractor for breach of contract whereby defendant agreed to furnish material and labor for store fronts and other parts of building, evidence regarding B.'s first bid for work in comparison with other bids then made *held* competent to show that B.'s bid was substantially same as its successful bid on reletting of contract after defendant's breach, and also, on matter of measure of damages, to show that B.'s bid on reletting involved reasonable price for same work.

9. Trial 🔑105(1)—Evidence admitted without objection was in record for purposes of decision.

Where question objected to was elsewhere fully gone into without objection, it was in record for all purposes of decision.

10. Appeal and error 🔑1058(1)—Rulings on evidence held harmless, where testimony excluded was elsewhere admitted without objection.

Where testimony sought to be brought out by one of questions and testimony excluded by ruling as to the other were elsewhere permitted to go into record without objection, rulings, if erroneous, were harmless.

★Superseded by opinion, 270 P. 382.

11. Damages 🔑120(3)—For breach of contract to furnish material and labor for building, measure of damages was amount which would compensate party aggrieved for all detriment proximately caused thereby (Civ. Code, § 3300).

For breach of defendant's contract to furnish plaintiff, a general contractor, with labor and materials for store fronts and other parts of building, measure of damages was amount which would compensate plaintiff for all detriment proximately caused thereby, or which in ordinary course of things would be likely to result therefrom, under Civ. Code, § 3300.

12. Damages 🔑189—Evidence supported finding that plaintiff's cost of having contract performed after defendant's breach was reasonable value of work.

In action by general building contractor for damages for breach of contract, whereby defendant agreed to furnish material and labor for store fronts and other parts of building, evidence *held* sufficient to support finding that cost to plaintiff for having work called for by contract performed represented reasonable value or price of work.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by the Milwaukee Building Company against Kurt O. Wetzel, doing business as the K. O. Wetzel Company, for damages for breach of contract. From a judgment for plaintiff, defendant appeals. Affirmed.

Newlin & Ashburn, of Los Angeles, for appellant.

Isaac Pacht and Clore Warne, both of Los Angeles, for respondent.

HART, J. This is an action by the plaintiff to recover from the defendant damages for the alleged breach of a certain contract. Judgment passed for the plaintiff in the sum of $3,131, the amount prayed for in the complaint. The defendant moved for a new trial, the same being denied. This appeal is from the judgment upon a bill of exceptions.

The plaintiff, a corporation organized and existing in pursuance of the laws of California, prior to and at the time of the commencement of this action, was and is engaged in the business of general contractor for the erection and construction of buildings, with its principal place of business in the city of Los Angeles.

The defendant, Kurt O. Wetzel, prior to and at the time of the commencement of this action, was doing business in said city under the fictitious firm name of K. O. Wetzel & Co.

At some time prior to and at the time of the commencement of this action the plaintiff was, "and still is, engaged, as the general contractor, in the erection, building and construction of that certain building * * * at No. 806 South Broadway, in the city of Los Angeles, commonly known as the Carleton F. Burke building, according to plans and specifications provided" in the contract for the erection and construction of the same. "Said plans and specifications provided for the furnishing and construction of * * * certain store fronts and iron doors to store and iron front, iron doors and iron grille on the wood doors to the building lobby and iron elevator doors for two passenger elevators and other iron work to be furnished in and about said premises." On October 31, 1922, the defendant entered into a written agreement with plaintiff to furnish said iron or metal, and to perform all work, labor, and materials necessary therefor, for the sum of $4,752, and further in said contract agreed to complete said work on or before the 8th day of February, 1923.

The complaint, from which the foregoing statement is taken, alleges that the defendant breached said contract by failing and refusing to comply with the terms thereof; that, in order to complete said building in compliance with the terms of its contract, the plaintiff "was forced to and did secure from other persons and firms engaged in the same line of business, to wit, in the furnishing of iron and metal work and doing labor with regard thereto, such as required by the plans and specifications to be followed by this plaintiff, bids and estimates of the best price at which they would furnish the materials and do and perform the labor necessary to install the same as per the original agreement with the defendant; * * * that the lowest bid or estimate for said materials and work was the sum of $7,883; * * * that plaintiff has by its contract duly made become indebted in said sum for the iron and metal work which was to have been furnished by defendant under his said contract aforesaid." It is alleged that by reason of the defendant's failure to comply with and perform his said contract, the plaintiff has been damaged "in a sum equal to the difference between the sum of $7,883 and the sum of $4,752, the first-named sum being the amount which plaintiff was compelled to pay for the material and the work because of defendant's breach of his contract with plaintiff to furnish said material and work and the last named sum the amount defendant agreed to furnish said material and work for, the difference between said sums being the sum of $3,131. It is further shown by the complaint that the contract of plaintiff to erect said building provided that for its noncompletion within the time specified therein the plaintiff shall be penalized in the sum of $100 for every day until completed.

The defendant's answer first specifically denies the material averments of the complaint and then sets up a special defense. The brief of counsel for the plaintiff correctly epitomizes the averments of said special defense, and we will therefore adopt the same herein, as follows:

> "As a second and separate defense defendant alleged substantially that: He had received requests for the submission of a bid for certain work, designated as item No. 1 and item No. 2, said request being accompanied by certain plans and specifications. That defendant submitted bids therefor, but that neither of said bids was ever accepted. The plaintiff delivered to defendant a certain 'purchase order' calling for defendant to 'furnish and install complete ornamental wrought iron and cast iron front entrance and doors, except the lobby door and frame, which are omitted as per our plans and specifications and your bid 10/31/22, $2,952.' That said work order called for other and different work and material. That defendant returned said work order and requested that it be changed to conform to request for bid, but that plaintiff refused to change said purchase order. That defendant was ready, willing, and able to perform work called for in bid, and plans and specifications submitted to him at time of making, but plaintiff refused to allow him to so complete the contract. That as to item No. 2, plaintiff never accepted bid of defendant, but that plaintiff delivered to defendant a 'purchase order,' calling upon defendant to 'furnish and install complete passenger elevator frames and doors, as per our plans and specifications and your bid 10/31/22, $1,800.' That the original request for bid did not include any elevator 'frames.' That defendant demanded correction and elimination of item of 'frames,' but that plaintiff refused. That defendant was ready, willing and able to perform as per his bid, but plaintiff refused to allow him so to do."

The court found that the allegations of the complaint were true, and specifically found that the averments of the special defense were untrue.

The defendant contends that the findings derive no support from the evidence, and that the court, in certain rulings upon the question of the legal propriety of certain evidence, were prejudicially erroneous.

[1] The defendant first declares and contends that the finding that the parties entered into the contract for the alleged breach of which damages are asked by plaintiff in this action is afforded no support by the evidence. The finding so attacked, of course, constitutes the primary foundation of the judgment and without which the judgment, of course, could not stand.

It is not conceived to be necessary to enter herein into a minute examination and consideration of the evidence to show, as a careful review of the record has convinced us is true, that the above-mentioned findings, as well as the specific finding that the defendant breached his contract with plaintiff, are sufficiently supported. As is true in the general run of cases taken to the appellate courts, there is here a substantial conflict in the evidence upon the vital questions of fact. The presentation herein of a general statement, in synoptical form, of the testimony which supports the findings should be made, and even with such a statement considerable space in this opinion will be required.

It appears, as the complaint alleges and the court finds, that the defendant, on the 31st day of October, 1922, submitted a bid to the plaintiff for performing the metal and iron work described in the findings hereinabove set forth for the building mentioned in the complaint, and also for the furnishing of the materials necessary for such work. The submission of this bid, it appears from the testimony of defendant (who was called as a witness for examination by the plaintiff under section 2055 of the Code of Civil Procedure), was submitted to plaintiff in response to an invitation therefor by the latter some two weeks prior to said 31st day of October. At the time said invitation was made, the defendant (so he testified) and M. C. Montgomery, "estimator" of the plaintiff, together "went over the plans and specifications." Defendant testified that, on said 31st day of October, he and Montgomery again jointly examined the plans and specifications, and that immediately thereafter on that day he (defendant) signed his bid. Wetzel further testified that his bid was reduced to writing by Montgomery in the office of the plaintiff in his (defendant's) presence; that the "figures" set forth in the bid "as they were marked down in prices had been given to them by myself over the telephone some days previous to this meeting and making out of this written document as to the price of this work." Wetzel stated that, after he was solicited to make a bid on the work and prior to submitting his bid, he prepared shop drawings of a part of the work. He stated that on the 31st day of October, 1922, he went to the office of Montgomery in response to a telephone call from some party connected with the plaintiff. At that time, after stating to defendant that he had certain work for the performance of which he desired a bid from him (defendant) Montgomery proceeded to explain the character of the work to be done. Defendant testified that "in order to make it possible to make any bid at all on his work, Montgomery had a set of architectural plans * * * for the Burke building * * * and pointed out on these plans what kind of work was to be done. Then Mr. Montgomery, having absolutely no details of any kind referring to this work, had to explain to me in a positive way in what manner and in which way we should make this bid and what work was to be done and how this particular work was to be treated." Wetzel said that his business was that of a manufacturer of wrought iron and cast iron, and that he had followed that work for 20 years; that it was not possible to determine from the architectural plans "the class of cast-iron store front to be used in that building." Wetzel proceeded to testify that "in order to have a complete understanding of the class of work to be incorporated in a cast-iron store front it is necessary besides the set of architectural plans to have full size details * * * which carry the exact conditions of the work as it is carried out in its actual form, size, and appearance and ornamentation." Such details, he stated, were not shown by the specifications to which he subscribed his name and upon which he submitted his bid. Continuing, he testified:

> "Referring to the conversation with Mr. Montgomery held prior to October 31, 1922, Mr. Montgomery explained to me just in what manner they expected this front to be designed by them in time, in detail work, and in order to make a bid for it he explained what parts of the work they expected to be furnished and what parts of the work should not be considered. And as for the questions, which I have asked very many, Mr. Montgomery he has answered me. * * * In consequence of this conversation I based my price and all on this conversation. * * * At the time of this conversation with Mr. Montgomery he gave me a written paper or order, whatever you might call it, that indicated just what was wanted. There was more conversation on other work also if that is necessary to state. This is not all. And Mr. Montgomery conversed with me on this matter perhaps more than one hour and brought out all detail work about the thing and the conversation to more than one hour. He also asked me how long this work should take and all such things like that. We discussed the elevator doors, and as to what particular plans should be followed. * * * At the time that I submitted the estimate, Plaintiff's Exhibit 1, or prior to that, I had examined the plans and specifications. I had a set of architectural plans given to me for figuring and I had my instructions as to the extent of the work from Mr. Montgomery and on this I made my estimate. The plans that I had were supposed to be the architectural plans, either the set in evidence or one just like it."

The bid of Wetzel was dated October 31, 1922, was addressed to "Meyer & Holler, Milwaukee Building Co.," and was in form as follows:

> "Gentlemen: I, we proposed to furnish, as per plans and specifications, all labor and materials for the iron front & doors work on Burke job.
>
> "State alternate figures, additions, omissions or discrepancies between plans and specifications:

Cast-iron front complete	$3,452 00
Deduct for store doors only	280 00
Deduct for store doors frame	385 00
Deduct for lobby doors only	160 00
Deduct for lobby doors frame	340 00
Elevator doors as per Wetzel's details using Elevator Supply Co's hangers	1,800 00
Elevator doors as per M. B. Co. detail per sheet No. 13 using Elevator Supply Co.'s hangers	1,800 00

Time limit 3 mo.

> "K. O. Wetzel Co., signed by Kurt O. Wetzel."

Wetzel testified that either on the 11th or 12th day of November, 1922, he received from plaintiff two written documents addressed to him (defendant) called "purchase orders," which contained a specification, in somewhat general language, of the work which he was to perform in pursuance of the terms of his bid. The first of these orders, as they are identified as exemplars in the record (Exhibit 2), called for the furnishing and installation of "complete elevator 'frames and' doors as per our plans and specifications and your bid, 10/31/22, $1,800." This document was signed by "J. O. Graham, Manager of Construction" of plaintiff. The second (Exhibit 3) likewise addressed and signed, read:

> "Furnish and install complete ornamental wrot and cast-iron front entrance and doors, except the lobby door and frame which are omitted as per our plans and specifications and your bid 10/31/22, $2,952."

Accompanying the above when sent to defendant was a letter from the plaintiff, by "E. A. Waugh, Manager of Construction," in which it was stated:

> "We hand you herewith drawings Nos. 1, 2 & 3 of the Baker Iron Works covering the elevator door frames which they are furnishing on the Carleton F. Burke Bldg.; also your drawing of elevator doors which is approved by us."

At the time Wetzel received said orders, Wetzel signed the specifications and plans.

Wetzel did not, after receiving the "purchase orders," proceed with the carrying out of his agreement, and refused to do so. Wetzel claimed that the matter of the ornamentation of the iron work as given in the specifications was too indefinite to justify any attempt to figure on definitely or safely even by estimate, and that the character thereof when finally given in detail deviated materially from the specifications as they were explained and interpreted by Montgomery in the conversation between him and the latter on October 31, 1922. There were other objections made by Wetzel to the order (Exhibit 3) for "passenger elevator frames and doors," in that his bid did not contemplate elevator "frames." But these matters are explained by other witnesses for the plaintiff, and their testimony will now be considered in its application to all the disputed questions of fact herein, and which, as above stated, affords strong support to all the vital findings. Before doing this, however, it is well here to say that Wetzel stated that "ordinarily the giving of an order is an acceptance of the bid—an authorization to go ahead with the work. We took those as orders."

M. C. Montgomery, referred to above, testified—

> to the details of the conversation with Wetzel on October 31, 1922, when the plans and specifications for the work on the Burke building on which he (witness) had asked Wetzel to submit a bid were fully discussed; that before submitting his bid, Wetzel examined the plans and specifications (marked in the record as Exhibit 8), "and after doing so he submitted a bid

and signed it. The words 'iron frames and sash' (claimed by Wetzel not included within his bid) were on the plans which were shown to Mr. Wetzel on the 31st of October. There is no change on these plans with reference to the iron work from what was on there on the 31st of October. That remains the same. I had no conversation with Mr. Wetzel along the line that he was not to do the sash. There was no understanding (as Wetzel here claims) between us that the sash was to be pine instead of iron. This is delineated as outlined upon these plans of the work which was to be done by Mr. Wetzel under his bid. We submitted these plans and specifications to other bidders in the same line of work and got bids from other people for this very work. There were four bids, including Mr. Wetzel's. He was the lowest bidder. It is not the usual practice to have detail drawings in order to bid on a job of this kind. The usual practice is to take what we call scale drawings, meaning small scale drawings, and submit them to the bidders or subcontractors for estimate and the one that is finally successful in getting the work is then later on furnished with full sized enlarged scale details in order to actually execute the work that he has bid on. It is always presumed that there is enough information in the small scale work to render an intelligent bid. It is the same with this set of plans. * * * I submitted it to those that I had originally taken bids from at the time Mr. Wetzel bid. I submitted it to the Architectural Iron Works, the Bayer-Rothgeb Company, and the Lowith Iron Works, the same firms who bid about October 31st. I submitted these very plans which were approved by Mr. Wetzel; those plans plus some details that had been made in the meantime. The work was finally awarded to the Bayer-Rothgeb Company. * * * I do not know off-hand the amount of their bid. It was more than Mr. Wetzel's bid by three thousand or four thousand, I think. The bid of the Bayer-Rothgeb Company was slightly lower than its original bid; in the neighborhood of $500 lower. The other bids which we received after February 3d were about the same as the original bids of those firms. I think they let the bids stand, as I recall it, just as they were. There might have been some slight modification."

Montgomery further testified that, prior to the submission of the bid by Wetzel, he had a conversation with the latter, as to which conversation he (Montgomery) testified:

"At that conversation I told Mr. Wetzel what we desired him to bid on. I outlined the work for him in a more or less helpful way. I submitted the plans and specifications and supplemented them with explanations. I do not recall exactly the conversation, but I remember of running over the plans and specifications with him and pointing out the fact that the job was a commercial job of iron work such as usually used in buildings of that type, and pointed out the features of the work that he was to do, the store fronts, elevators. I remember showing him the sketch of the elevator door, things which I thought might be of help in working up a price on it. I told him with respect to the cast iron store front that it was the ordinary commercial work for that class of building. From the architectural plans that we had before us at the time it is possible to determine very closely the amount of ornamentation which will go into that cast-iron work. I think the drawings or architectural plans would cover the extent of the ornamentation fairly well. It would show the general character and nature of it right on the face of it, whether it were elaborate or not on the small drawings. I remember of telling him that it would be a commercial job. In our practice, and I believe in iron work in general, we refer to a 'commercial job' as a job of the type you would use in the business district to distinguish it from a finely hand-wrought and hand-work forged job that might be used in very high-class residential or public work. The term does not have reference to degree of ornamentation. It would not affect that, because in casting iron the ornamentation is not an important feature, the amount of it. We did not in that conversation mention sash."

Throughout his entire testimony, both on direct and cross-examination, Montgomery repeatedly asseverated that the whole of the work upon which Wetzel was invited to and did submit a bid was fully and in detail explained to the latter.

The witness Graham, called on behalf of plaintiff, stated:

"That he was placing the orders and contracts at the time of the Burke job, and that he was instructed by Mr. Waugh that Wetzel was going to get the orders; that the orders were drawn by him, and that he called Wetzel to the office, showed him the plans and specifications, the order and the bids; that Wetzel signed the plans and specifications, after looking at them, and took the orders with him; that Wetzel returned the following day and stated that the words 'elevator frames' appearing in the purchase order (Plaintiff's Exhibit 2) were improperly included; that he (Graham) immediately saw it was a typographical error; that Wetzel was told that the words stated did not belong there and that the Baker Iron Works had the order for the frames, and that he then scratched out the words 'frames' on Wetzel's copy and on the office copy; that Wetzel then took the orders with him again and left the office, saying that he would go ahead with the work; that he did not at that time raise the question that the order called for wrought iron and cast-iron front entrance and doors; that subsequently and about January 26 a letter was written, sending Wetzel details of the Baker Iron Works for the elevator door frames that were needed by Wetzel to complete the work; that up to that date Wetzel had not given Graham any information that he would not go ahead with the work, although he had been in the office several times between November 15 and January 26; that after the letter of January 26th was written, Wetzel came in with the orders and stated that they were not right, and left the orders with Graham, who told him that he would have to see Mr. Waugh; that later Wetzel came back to see Waugh and afterwards Graham mailed the orders left back to Wetzel."

The witness Waugh, manager of construction for the respondent company at the time in question, testified:

> "That Mr. Wetzel came to the place about the 1st of February; that the orders were there at that time; that Wetzel complained that the details elaborated on the plans and that he did not want to go ahead with the work; that he asked how they elaborated and was informed that there were two particular items objected to by Wetzel: One was the cast-iron stops and the other was the steel sash on the mezzanine floor of the front; that he then informed Wetzel that the iron stops were not a part of his contract, and that if the company wanted them he would be given an additional order to cover the item, but that the item of sash was a part of the original contract and was in the plans and specifications that had been signed. The witness Wetzel then said, 'Yes, that was the worst thing I ever did, was to sign those plans and specifications;' that Wetzel did not indicate at that conference that he would not go ahead with the work; that the Bayer-Rothgeb Company, the subsequent successful bidder who performed the work, had no other form of contract except their bid and the purchase order or acceptance."

The witness Buxton, testifying for plaintiff, stated:

> "That he was a draftsman and had been engaged in that line of work for some 20 years, and was working for respondent company at the time in question; that after November 15 he had possibly six conversations with Wetzel regarding the iron work, discussing various features of the order; that certain changes and revisions were made pursuant to the directions of Wetzel, which were entirely in matters of detail; that in none of such conversations did Wetzel indicate that he was not going on with the contract; that there was no different work required in the details furnished Wetzel from that specified in the plans."

We have for convenience taken the foregoing statement of the testimony of the witnesses named from the brief of counsel for respondent, after carefully comparing it with the testimony of said witnesses as it is presented in the bill of exceptions.

A. L. Lowith, manager of the Lowith Iron Works, engaged in the business of fabricating structural steel and ornamental iron work in all its branches for about 30 years, stated that he was "familiar with reading and translating blue prints, particularly with reference to ornamental iron work"; that when bids for the work in question were first called for by plaintiff (in October, 1922), he submitted a bid therefor; that he figured on plans submitted by plaintiff similar to those designated in the record as "Plaintiff's Exhibit 8" (upon which defendant testified, as seen, that he framed and tendered his bid); that he submitted more than one bid; that "it is possible from a set of architectural plans to determine the degree of ornamentation to be used in cast-iron work." In rebuttal, Lowith stated that he bid on the work when resubmitted of reletting, after defendant refused to proceed to do the work under his bid; that (referring to enlarged or detail drawings of the plans, upon which his later bid was based), the details then presented were "more plainly brought out" than "they are on these," referring to the original plans according to which defendant's bid was estimated and submitted. He said, however: "That the cost of the material shown in the detail drawing probably would be the same as shown on 'Exhibit 8.'" * * * That, "looking at the original plans, I would expect to receive details which would depict the work a good deal more fully and to the extent that it is depicted on these (the enlarged drawings) details." * * * That "preparing an estimate for a work of that kind is a job for an experienced man—a man who is experienced in that line, and he has to visualize certain details of the work. If he has the experience he knows about what any architect or builder will require on a job of this kind. In other words, the character of the job shows itself what will be required." That the purpose for which the building is to be used "would speak to quite an extent to explain what would be required." Lowith further testified that he could not see "a great difference" between the details in the two drawings. "I would say," he continued, "there should not be a difference of more than $150 on the pattern work of the whole job. * * * If there had been any substantial difference between the details and the original plans, my bid would not be the same. It would be higher or lower."

Harry Friedman, who at the time of the occurrence of the transactions involved herein was "estimator and shop foreman" of the Architectural Iron Works of California, testified that his company submitted a bid about October 31, 1922, for the work on the Burke building, for which defendant at the same time submitted his bid and was awarded the contract; that his company also tendered a bid for the same work in March, 1923, after defendant declined to carry out his agreement; that the plans on which he made the later bid involved a full-sized scale drawing, but he found no changes therein from the plans of October 31, 1922. "In fact," he testified, "I put in the same estimate for the same amount. * * * Naturally, a full-size scale drawing you can see a difference in that you can't on a small scale drawing, because it is bigger. When I saw the detail drawings it made no difference in my estimate. * * * I have found it possible to tell from a set of architectural plans the degree of ornamentation which will eventually appear upon the cast iron. If a man has the experience along those lines he will put in and show what is going to happen when the full sizes are made."

C. R. Fleishman, secretary of A. J. Bayer Company, which was awarded the contract for the iron work in question, in March, 1923, after defendant's refusal to proceed with the performance of his agreement for the same work, testified that his company tendered a bid for the doing of said work on or about October 31, 1922, upon plans or drawings designated in the record as "Defendant's Exhibit 8"; that the later bid of his company was based on "Defendant's Exhibit G," being drawings of the work to be done; that he had compared the two drawings, and found that "the details follow very closely to the scale drawings, as far as an estimate is concerned." The witness stated that his later bid was substantially the same as the bid submitted by his company in the first instance. The matter of the extent of the ornamentation in the iron work is in all such cases one of approximation, the estimates of the price of such work resting largely on the judgment of the bidders based upon the character of the building, the purpose for which it is to be used and other considerations which it is not always practicable to explain in complete detail on the architectural drawings, but as to which an experienced and capable iron and structural steel manufacturer should be and generally is capable of exercising intelligent judgment in estimating the kind and the value of the work to be done thereon.

It may here be stated that the several witnesses whose firms made a bid on the work on both occasions testified that there was no substantial difference in amount between the two bids submitted by them.

[2] As to the contention that the finding that there was an acceptance of Wetzel's bid by the plaintiff is not supported by any evidence in the case, it is to be observed that Wetzel himself testified that "ordinarily the giving of an order is an acceptance of the bid —an authorization to go ahead with the work." Furthermore, Wetzel's conduct with reference to the transaction, after receiving the orders, clearly shows that he regarded and assumed that the sending of the orders to him amounted to acceptance of his bid by plaintiff and thus a completed contract. This testimony corresponds with that of the other parties submitting bids for the work. It was admitted by Wetzel that, in his deposition taken before the trial of this action, the main objections to the plans and specifications upon which he framed and submitted his bid revolved around the item of ornamentation—that is, that the nature and the extent of the ornamentation could not be determined from said plans and specifications. In the same deposition, it was shown at the trial, Wetzel stated that certain items which he claimed were not included in his bid "are not even of any great importance."

Further consideration herein of the evidence is not necessary. It is enough to say that these results, which are either expressly or impliedly within the court's findings, are clearly deducible from the evidence: That defendant, upon the small-scale plans or drawings and the specifications, based his bid after a thorough examination of said plans, etc., and upon the conversations with Montgomery explaining the undelineated details of the work; that the plans or drawings in their very nature contemplated extrinsic explanation of the smaller details as to ornamentation; that such a course is usual in such transactions and known so to be by those experienced in iron and structural steel work; that the plaintiff accepted defendant's bid, after which further oral explanations as to details were made to defendant; that the latter, after such acceptance, pointed out to one of plaintiff's agents an item which was erroneously included in one of the purchase orders delivered to defendant, and that thereupon, acknowledging the error, plaintiff's agent struck out and eliminated said item from said purchase order; that at no time when personally consulting any of plaintiff's agents about his bid after the same was ratified or accepted by the plaintiff did Wetzel say or intimate that he did not intend to proceed with the execution of the terms of his agreement, and that he expressed no such intention until addressing to plaintiff a letter, dated February 3, 1923, to the effect that the details previously delivered to defendant by plaintiff (the purchase orders) so far deviated from "the intended work" as to justify him in declaring "your order canceled." From defendant's own testimony and his conduct with respect to the transaction, the court could expressly have found that the truth was that, after his bid had been accepted by plaintiff, he discovered and concluded that he had entered into an improvident agreement, from a financial point of view, and for that reason, and not because he was not given sufficient information as to details, etc., he resolved to repudiate his engagement. He specifically stated, it will be noted, that he based his bid on the drawings and his conversations with Montgomery.

[3] Of course, the effect of the testimony of the defendant and his witnesses at variance with that introduced by the plaintiff upon the salient questions of fact was merely to create a conflict, and the court's findings against the defendant are, therefore, conclusive upon this court, there being nothing in the plaintiff's evidence which marks it as inherently improbable or such as to justify us in holding, as a matter of law, that it is not of sufficient probative force to uphold the decision in all respects.

[4] The first of the several assignments of error based upon certain rulings of the court urged here grows out of the ruling denying admission in evidence on the offer of defendant of a printed form which plaintiff sent to defendant for the purpose of inserting and so specifying therein his proposal or bid for the work. The form, save certain printed words indicating the different items of which the work was to consist and as to which the bid was to be made, was a blank and, of course.

was unsigned. The ruling excluding the paper was proper. We can conceive of no service which it could render as evidence in this case. The defendant's bid and the acceptance thereof by plaintiff through or by means of the purchase orders were, as seen, introduced in evidence. These, with the conversations between the several agents of the plaintiff, particularly the conversation with Montgomery explaining the details of the work and upon which, mainly, the defendant stated he based his bid, were all that were necessary to show, at least with appropriate accuracy, the particular nature and extent of the work for the performance of which the plaintiff solicited the defendant to submit a bid. The blank form, therefore, could have reflected no light upon the proposition or any issue in the case.

[5] It is next objected that there was error in the ruling forestalling an answer to the question to the witness Montgomery on cross-examination by defendant's counsel as to whether the words "iron frames and sash," as contained in the plans and specifications upon which defendant framed and tendered his bid (Exhibit 8) "appeared upon the plans as recorded in the county recorder's office," the original plans and specifications having been filed in the recorder's office with the original contract—that is, the contract for the erection of the building between plaintiff and the owners thereof. The ruling was correct. The defendant undeniably based his bid on "Exhibit 8," which, as seen, contained the words "iron frames and sash." We cannot conceive what relevant or possible purpose the fact, if it was a fact, that said words were not indicated on the original plans could serve in the present case. It may be added that Montgomery stated that the plans recorded and the plans submitted to defendant were different in some of the matters of detail.

[6, 7] The point next urged is that it was error for the court to sustain the plaintiff's objection to the following question to defendant by his counsel: "Have you determined whether or not they (Plaintiff's Exhibit 8) are similar plans to those from which you figured in order to submit your bid?" The proposition which the question was designed to establish was that the words, "iron frames and sash," which, as seen, were on "Exhibit 8," were not on the plans from which defendant made up his bid. Defendant elsewhere testified that those words were not on the plans according to which his bid was prepared. Counsel for defendant on page 79 of his opening brief expressly so admits, contending, however, that the question being specific as to that matter, the ruling disallowing an answer thereto would show that the court "left out of consideration entirely that testimony in arriving at its conclusion as to what contract defendant made." The presumption is that the court, in deciding the case, considered all the relevant and material testimony received, and even incompetent testimony if it was received without objection, as was the testimony of defendant on that subject. The ground upon which the court disallowed an answer to the question was that the plans themselves were the best evidence of the fact thus sought to be shown and upon that ground the ruling was legally correct.

[8, 9] Over objection by defendant, the court permitted the witness Montgomery, in response to a question by counsel for plaintiff, to state what the bid by the Bayer-Rothgeb Company was for the work when that company submitted its bid in the first instance, in comparison with other bids then made—that is, the bid of the Bayer-Rothgeb Company and other bids submitted in the first instance in the month of October, when defendant was the successful bidder. The purpose of this testimony was to show that the Bayer-Rothgeb bid was then substantially the same as its successful bid on the reletting of the contract in February, 1923, and also upon the matter of the measure of damages, as far as it might tend to do so, to show that the bid of said company on the reletting involved a reasonable price for the same work. We think the testimony was competent for that purpose. At any rate, the same question was elsewhere fully gone into without objection, and it was therefore in the record for all the purposes of the decision below.

[10] There are two other assignments under the present head. We will not give them special notice herein. Even if we were required to hold that they were technically erroneous, the testimony thereby sought to be brought out by one of said questions and the testimony excluded by the ruling as to the other were elsewhere permitted to go into the record without objection. The rulings therefore were harmless in their effect upon defendant's rights, assuming, but not deciding, that they involved error.

[11] Another question raised by the defendant here is that the award of damages was founded "upon a state of facts which the record does not support." The rule applicable to cases such as the one here is embraced within or declared by section 3300 of the Civil Code, as follows:

> "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

[12] It was practically stipulated by and between counsel, on the close of the taking of the testimony, that the rule as to the measure of damages in the instant case is that adopted by the court in its findings and as fixed by the above section of the Civil Code. It is, however, claimed that it was not shown that the sum at which the Bayer-Rothgeb

Company fixed the price of the work in its successful bid on the reletting of the contract constituted the reasonable value of the work to be performed. The testimony of all the witnesses for plaintiff clearly afforded the conclusion that the bid of the Bayer-Rothgeb Company involved a reasonable price for the performance of said work and furnishing the materials therefor. There was no substantial, if in reality any, testimony to the contrary. In Bacigalupi v. Phœnix Bldg., etc., Co., 14 Cal. App. 632, 112 P. 892, involving an action for damages for the abandonment before completion of a contract for the erection and construction of a building, the court, speaking to a similar question to the one now under consideration, stated the rule to be:

> "No witness testified in terms that the accepted bid was a reasonable price or represented the reasonable cost of completing the abandoned contract; but no objection was made to this evidence. No evidence was given that the reasonable cost of completing the building was less than what it actually cost plaintiffs to complete it, or that it could have been completed for any less amount. Under the circumstances the evidence was sufficient to prove the reasonable cost. In the absence of any evidence to the contrary it tended to prove the reasonable cost. The actual cost is some evidence of the value or reasonable cost."

See, also, Angell v. Hopkins, 79 Cal. 181, 21 P. 729; Bunting v. Salz, 3 Cal. Unrep. Cas. 193, 22 P. 1132; Greenebaum v. Taylor, 102 Cal. 624, 36 P. 957; Levy v. Scott, 115 Cal. 39, 46 P. 892; Dunne Invest. Co. v. Empire State Surety Co., 27 Cal. App. 208, 150 P. 405, 411; Wallace v. Ah Sam, 71 Cal. 197, 12 P. 46, 60 Am. Rep. 534.

As stated, there is in the record substantial evidence to support the findings as to the damage sustained by reason of defendant's refusal to carry out his contract and that the cost to plaintiff for having the work called for by said contract performed represented the reasonable value or price of said work as performed by the Bayer-Rothgeb Company under its later bid.

The judgment is affirmed.

I concur: PLUMMER, J.

90 Cal. App. 390

MILES et al. v. ROSENTHAL et al.★
(Civ. 3383.)

District Court of Appeal, Third District, California. March 26, 1928.

Hearing Denied by Supreme Court May 24, 1928.

1. Appeal and error 🔑502(6)—Record should show that motion for new trial was duly presented and decided.

The record itself should show that appellants' motion for new trial was duly presented to, and passed on and decided by, trial court.

2. Appeal and error 🔑768—Record may be treated as disclosing presentation and denial of motion for new trial, where not denied in appellees' brief.

Where counsel for appellees did not deny in his brief that a motion for new trial was presented to, and denied by, trial court, which was not shown by record, appellate court may assume such facts and treat record as so disclosing.

3. Appeal and error 🔑782—Appeal from order denying new trial must be dismissed; points arising being reviewable on appeal from judgment (Code Civ. Proc. §§ 956, 963).

No appeal being authorized from order denying motion for new trial, appeal therefrom must be dismissed under Code Civ. Proc. § 963, points arising from grounds on which such motion may be made being reviewable on appeal from judgment under section 956.

4. Appeal and error 🔑731(5)—Specification, undoubtedly intended to raise question of sufficiency of evidence, in bill of exceptions certified by trial judge as containing all evidence, will be treated as sufficient.

Specification in bill of exceptions that "verdict is unsupported by the evidence to prove the truth of the charge," referring to misconduct with which defendants in libel suit charged plaintiffs, will be treated as sufficient to justify examination of evidence to determine its sufficiency to support verdict for defendants, though awkwardly expressed, in view of undoubted purpose of raising such question and trial judge's certificate that bill contains full and correct statement of all evidence, which is not voluminous.

5. Libel and slander 🔑112(3)—Evidence in libel suit held to support verdict for defendants on issue of truth (Civ. Code, § 45).

In libel suit under Civ. Code, § 45, between firms of real estate brokers, oral evidence, letter filed with realty board by defendants, and latters' complaint in prior suit against plaintiffs, *held* to support verdict for defendants on issue as to truth of defendants' charges.

6. Libel and slander 🔑112(2)—Evidence in libel suit held to support finding that publication of charges was without malice (Civ. Code, § 45, and § 47, subd. 3).

In libel suit under Civ. Code, § 45, evidence *held* to support jury's finding that publication of defendants' charges against plaintiffs by letter filed with city realty board was without malice, within section 47, subd. 3, but made in good faith under honest belief that charge was true.

7. Appeal and error 🔑916(3)—Appellate court may presume that answer to complaint, introduced in evidence, properly denied all material averments.

Appellate court may presume that answer, not in transcript, to complaint in former action against plaintiffs by defendants, who introduced complaint in evidence, properly denied material averments of complaint or tendered an issue on all material facts.

★Hearing denied by Supreme Court.

8. Evidence 🔑271(18), 318(1)—Answer to complaint, attached to charge filed with realty board, and introduced as evidence in defendants' libel suit, held inadmissible as hearsay and self-serving.

Answer to complaint, attached to written charge filed by plaintiffs against defendants with realty board, and introduced in evidence by plaintiffs in defendants' subsequent suit for libel, *held* inadmissible as hearsay and self-serving.

9. Evidence 🔑155(8)—Complaint attached to, and explaining, written charge against defendants, held admissible in libel suit (Code Civ. Proc. § 1854).

Complaint attached to, and more fully explaining, written charge filed against defendants by plaintiffs before realty board, *held* admissible, under Code Civ. Proc. § 1854, in defendants' subsequent libel suit.

10. Evidence 🔑155(8)—Complaint, introduced as evidence in libel suit, may be considered as disproving malice in filing charge, based on facts alleged (Code Civ. Proc. § 1854).

Real estate brokers' complaint, admitted as evidence under Code Civ. Proc. § 1854, in defendant brokers' subsequent libel suit, could be considered by jury for any competent purpose, as to show that defendants' filing of charge, based on facts alleged, with realty board, was inspired, not by malice, but by conviction of duty to board as member, in honest belief that plaintiffs had committed act of such turpitude as to justify their expulsion or suspension as members.

11. Evidence 🔑332(3)—Answer to complaint held inadmissible in defendants' libel suit as showing only that plaintiffs tendered issue of falsity of charge based on facts alleged.

In real estate brokers' libel suit against other such brokers, answer to complaint in former action against plaintiffs by defendants, who introduced it in evidence to show that filing of charge, based on facts alleged, with realty board, was not inspired by malice, was not competent for any purpose, as it could only show that plaintiffs tendered issue whether charge was true or false in former action.

12. Libel and slander 🔑124(8)—Complaint in libel suit held to warrant instruction limiting jury to consideration of injury to plaintiffs' business.

In real estate brokers' action against other such brokers for libel, complaint alleging that charge published by defendants injured plaintiffs' firm in its business and reputation *held* to charge injury to good name and reputation of copartnership as business concern, so as to warrant instruction limiting jury to consideration of injury to plaintiffs' business as distinguished from any damage to them individually.

13. Trial 🔑253(3)—Instruction that plaintiffs claimed that libel injured them in their occupation held not to limit jury to consideration of injury to their copartnership business (Civ. Code, § 45).

Instruction that real estate brokers' action against other such brokers for libel was brought under last clause of Civ. Code, § 45, "the claim being that the alleged libel has a tendency to injure the plaintiffs in their occupation," *held* not to limit jury to consideration of injury to plaintiffs' business, without regard to any damage to them individually; its meaning being that plaintiffs relied on damage to copartnership as business concern through any damage to personal reputation of individual members.

14. Libel and slander 🔑50—Falsity of charge which was qualifiedly privileged was immaterial, if made without malice, in good faith, reasonably believing it to be true (Civ. Code, § 47, subd. 3).

In real estate brokers' action against other such brokers for libel in charge filed with realty board, instruction that, if communication was privileged within Civ. Code, § 47, subd. 3, falsity of charge therein was immaterial, if made without malice, in good faith, believing it true, on reasonable grounds, and that verdict should be for defendants, if they honestly believed charge to be true, *held* not erroneous; publication being qualifiedly privileged.

15. Libel and slander 🔑93—Defendant need only plead that qualifiedly privileged publication was made without malice.

In action for libel in qualifiedly privileged publication, defendant need only plead that publication or communication was made without malice.

16. Libel and slander 🔑101(1)—Defendants, alleging that publication was without malice, assumed burden of proving such fact.

Defendants, pleading that alleged libelous publication was made without malice, assumed the burden of proving such fact.

17. Libel and slander 🔑101(4)—Defendants, alleging truth of charge, held required to prove only their honest, good-faith belief.

Defendants, pleading in justification of alleged libelous publication that charge was true, *held* required to prove only that they honestly and in good faith believed it to be true.

18. Libel and slander 🔑124(2)—Instruction that burden is on plaintiffs in libel suit to show that communication was not privileged, and that charges were false and malicious, held erroneous, where answer affirmatively alleged contrary.

In real estate brokers' action against other such brokers for libel in charge filed with realty board, instruction that burden is on plaintiffs to show that communication was not privileged, and that charges therein were false and made with malice, *held* erroneous, where answer alleged that communication was privileged, and that charge was true and published without malice.

19. Appeal and error 🔑1064(1)—Instruction that plaintiffs must show that communication was not privileged, and that charges were false and malicious, held not reversible error, where evidence showed truth and want of malice as matter of law.

In real estate brokers' action against other such brokers for libel in charge filed with realty board, instruction that burden is on plaintiffs to show that communication was not privileged, and that charges therein were false and malicious, *held* not reversible error, though answer affirmatively alleged privilege, truth, and want of malice, where evidence showed, as matter of law, that charge was true and made without malice.

20. Libel and slander 🔑5—Performance of lawful act in proper way, pursuant to inexorable duty, affords no inference of malice.

The performance of a lawful act in a proper way in pursance of a duty inexorably required, as by real estate brokers in filing charge against other such brokers with realty board, as was their duty as members of such board, affords no inference of malice.

21. Libel and slander 🔑101(4)—Malice is not inferred from qualifiedly privileged communication or publication (Civ. Code, § 48).

In cases of qualified privilege, as in real estate brokers' filing of charges against other such brokers with realty board, of which both were members, malice is not inferred from the communication or publication, under Civ. Code, § 48.

22. Libel and slander 🔑124(7)—Instruction that plea of justification is not sustained, unless evidence tends to prove every element essential to truth of charge, held properly disallowed.

In libel suit, instruction that defendants' plea of justification is not sustained, unless evidence tends to prove every element essential to truth of charge, and that evidence not convincing jury of truth thereof cannot be considered as tending to mitigate plaintiffs' damage, *held* properly disallowed as not stating true rule.

23. Appeal and error 🔑1033(5)—Instruction on presumption of malice from proof of publication of false, unprivileged matter was harmless to plaintiffs, where communication was privileged.

In real estate brokers' action against other such brokers for libel in charge filed with realty board, instruction on presumption of malice from proof of publication of false and unprivileged matter was harmless to plaintiffs; communication being privileged.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by F. S. Miles and another, copartners doing business under the firm name and style of Miles & Fitzhenry, against Bernard Rosenthal and others, copartners doing business under the firm name and style of Rosenthal Realty Company, and another. From a judgment for defendants and an order denying a new trial, plaintiffs appeal. Appeal from order dismissed, and judgment affirmed.

Arnold Praeger, of Los Angeles, for appellants.

Samuel A. Miller, of Los Angeles, for respondents.

HART, J. This action was brought by the plaintiffs against the defendants for damages for an alleged libelous writing published by the latter concerning the former and involving an attack upon their character and reputation as real estate brokers.

The questions of fact were tried by a jury, who found for the defendants. The appeal is from the judgment and from a purported order denying plaintiffs a new trial.

[1-3] The defendants first protest that the record does not show that a motion for a new trial was presented to and determined by the court below; hence "there is no appeal here from an order denying a new trial." As to this, all that the record itself discloses is that the defendants gave notice of intention to move for a new trial, and a notice that, on the 11th day of December, 1924, they "will move the court" to vacate and set aside the verdict of the jury and the judgment thereon entered. There is, however, nothing in the record to show that a motion for a new trial was ever presented to the trial court, or that said court ever passed upon or decided or made an order denying such a motion. In their opening brief, counsel for plaintiffs assert that "in due time a motion for a new trial was made on the grounds set forth in the motion of intention, and within the time allowed by law said motion was heard by the court and denied," and that no denial of said statement is made by counsel for the defendants in their brief. The record itself should, of course, show that the motion was duly presented to, and passed upon and decided by, the court. We may, upon the consideration that counsel for defendants did not deny in his brief that a motion for a new trial was presented to, and denied by, the court, assume that, in point of fact, such motion was made and denied, and that the record may be treated as so disclosing. There is, however, no appeal authorized from an order denying a motion for a new trial, and the appeal from such order here will therefore have to be dismissed. Code Civ. Proc. § 963. The points growing out of the grounds upon which a motion for a new trial may be made, where such motion is made and denied, may be reviewed upon the appeal from the judgment. Code Civ. Proc. § 956; Wiley B. Allen Co. v. Wood, 32 Cal. App. 76, 79, 162 P. 121.

[4] It is further preliminarily objected by the defendants that the question of the sufficiency of the evidence cannot here be reviewed, for the asserted reason that plaintiffs have not specified in the bill of exceptions "the particulars in which such evidence is alleged to be insufficient." The "specifications of error" set forth in the bill of exceptions, with the exception of one, are addressed entirely to an alleged error in the

ruling of the court excluding certain evidence offered by the plaintiff and alleged errors in embracing within its charge to the jury certain instructions proposed by the defendants, and excluding therefrom certain instructions proposed by plaintiffs. The specification involving the exception referred to is to the effect that "the verdict is unsupported by the evidence to prove the truth of the charge," referring to the alleged misconduct with which the defendants charged the plaintiffs and upon which this action is based. The specification is certainly awkwardly expressed, but we shall assume that it is sufficient to justify a review of the testimony to determine whether it is sufficient to support the verdict; the purpose of the specification undoubtedly being to raise that question. Besides, the trial judge has certified that the bill of exceptions contains "a full, true, and correct statement of all of the evidence admitted at the trial of the above-entitled action, and the papers used on the motion for a new trial," and, as the evidence is not voluminous, we will treat the specification sufficient in all respects to justify an examination of the evidence with the view of determining whether the decision below is bottomed by sufficient evidentiary support.

[5] The record discloses that both the plaintiffs and the defendants were, prior to and at the time of the commencement of this action, duly licensed real estate brokers, in the city of Los Angeles, and, as the entitlement of the complaint declares, each was organized for that purpose as a copartnership. It appears that, prior to and at the time of the institution of this action, there existed and was maintained, in the city of Los Angeles, as its principal place of business, a corporation, duly organized and existing under and by virtue of the laws of the state of California, under the name of the "Los Angeles Realty Board, Incorporated," and that the plaintiffs and the defendants were members thereof. The object of said realty board and the purpose for which it was formed are set forth in article II of its constitution and by-laws, as follows:

> "To secure for its members the benefit of united effort and concentrated power, to the end that the evils and annoyances connected with the transaction of business in real estate and real estate brokerage, shall be abated; to promote good-fellowship and fair-dealing in such business; to protect its members and the public in general from irresponsible, unprincipled and dishonest dealers in real estate; to promote the enactment of legislation for the protection of property rights and the dealings pertaining thereto; and to do all else in the power of the association and its members, which may tend to the upbuilding, and stability and the dignity of the business of dealing in real estate. This corporation is not organized for pecuniary profit."

Article IV of the by-laws provides that complaints against members of the board shall be in writing, "upon the regular form provided by the board," and delivered to the secretary thereof. Said article further provides that when a member is "complained against," he shall immediately be furnished with a copy thereof, and within ten days therefrom shall, in writing, answer the charge set forth therein. It is also provided that no member shall be dismissed from membership of said board without "first having the opportunity of appearing before the arbitration committee or the board of governors and being heard in self-defense." Article IV proceeds:

> "All complaints and defenses thereto shall be immediately submitted to the arbitration committee—such committee will promptly analyze each complaint, have power to subpœna principals and witnesses, and their findings shall be final, subject only to review by the board of governors. Should either party to a complaint be dissatisfied with the findings of the arbitration committee such aggrieved party may upon payment of a fee of $25 have his case reviewed by the board of governors in regular or special session.
>
> "Findings of the arbitration committee shall be promptly reported to the board of governors, in writing, and shall set forth clearly and concisely the allegation—the defense—and the finding of the committee."

It appears that, on the 31st day of December, 1923, the defendants instituted an action in the superior court in and for the county of Los Angeles against the plaintiffs to recover the sum of $5,000, which, it was alleged in the complaint in said action, was obtained by the plaintiffs in a real estate transaction to which the former and the latter were parties under circumstances which it was charged in the complaint in that action involved fraudulent conduct upon the part of the plaintiffs. Certain of the allegations of the complaint filed in said action by the defendants here (as plaintiffs therein) against the plaintiffs here (as defendants therein) involved the alleged libelous statements of and concerning the plaintiffs herein of which they here complain. The complaint in said action is too lengthy in its statement of the case to justify reproducing herein, only in substance, the allegations thereof which are important in their relation to the case at bar. It will suffice, for the purposes of the decision here, to explain generally and briefly such allegations. It is therein alleged that the plaintiffs and one J. M. Hardman, on the 11th day of October, 1923, entered into an exclusive option agreement with one Curry, by the terms of which Miles & Fitzhenry (plaintiffs here) and said Hardman were to have and receive an option from said Curry for the sale of a certain lease for the price of $95,000 net to the said Curry; that said agreement expressly provided that Miles & Fitzhenry and Hardman were to receive no commission on the sale of said lease. The terms and conditions of the payments on the purchase price of said lease were prescribed by said option agreement, and the option was to expire on October 22, 1923, but before said date the time for the expiration of said agreement was, on the same terms and conditions, extended to and including November 6, 1923. Between the date of the execution of said agreement and the 6th day of November, 1923, said Hardman proposed to Bernard Rosenthal, a member of the defendant copartnership herein, that his firm purchase an interest in said option agreement, and, after negotiations between Hardman and the defendants here regarding the proposition so made by Hardman, said defendants, on the 31st day of October, 1923, entered into an agreement with the plaintiffs whereby the former agreed to, and finally did, purchase the interest of plaintiffs here in said exclusive option agreement for the sum of $4,000, which sum the defendants here then paid to plaintiffs here. The Rosenthals thereupon became the owner of the half interest of Miles & Fitzhenry in said agreement; Hardman being the owner of the other half interest. On October 31, 1923—the day on which the defendants here purchased and paid for the half interest of the plaintiffs here in said option, and about six hours subsequently to such purchase and payment—the plaintiffs and said Hardman approached said Curry, and stated to the latter that it was impossible for them to sell said lease for the sum of $95,000 net to him (Curry), and at the same time said to the latter that they (said plaintiffs and Hardman) had a purchaser who would purchase said lease for $95,000, "and (quoting from the complaint in said action) that they would proceed to sell the lease to said prospective purchaser if the said W. E. Curry would agree to pay to them the sum of $5,000 as a commission for services rendered in the sale of said lease; that in truth and in fact the said lease had already been sold to the plaintiffs herein at least five or six hours prior to the making by these defendants of said representations to the said W. E. Curry, and that the said plaintiffs herein assumed and agreed to perform all the terms and conditions of said option agreement of October 11, 1923, and that as a result of the agreement to assume and carry out the terms and conditions of said option agreement of October 11, 1923, and further by reason of their having paid to the defendants, Miles & Fitzhenry, the sum of $4,000, the plaintiffs became entitled both as agents and as purchasers of said option agreement to any and all sums of money to be paid to the defendants herein by reason of said transaction. Upon information and belief plaintiff alleges that, for the further purpose of misleading the plaintiffs herein, and said W. E. Curry, the defendants Miles & Fitzhenry had it appear that the defendant Edward J. Peil had rendered services in effecting the sale of said lease, and therefore authorized the payment by said W. E. Curry to said Edward J. Peil of said sum of $5,000 as commission; that, however, said Edward J. Peil has rendered no services in connection with this transaction; that upon information and belief the plaintiffs further allege that the defendant Edward J. Peil is now, and was at all times herein mentioned, employed in the office of the defendant Miles & Fitzhenry as their agent; that prior to the filing of this cause of action, and to wit, on or about the 21st day of December, 1923, the plaintiffs purchased of and from the defendant James M. Hardman his interest in and to said option agreement of October 11, 1923, and extensions to November 6 and of October 31, 1923, and is now the owner and holder of said option agreement and is entitled to all benefits and proceeds thereof; that the plaintiffs herein have paid into escrow the sums of money set out in the option agreement of October 11, 1923, and the extension thereof dated October 31, 1923, and have carried out all the terms and conditions on their part to be performed."

The complaint in the present case alleges, among other things:

"That on or about the 4th day of January, 1924, the defendants herein willfully, intentionally, and maliciously wrote and published a certain letter concerning the plaintiffs herein, which said letter is in words and figures as follows, to wit:

" 'January 4, 1924.

" 'Los Angeles Realty Board, City—Gentlemen:

" 'Complaint against Miles & Fitzhenry.

" 'Misrepresentation and subterfuge in the sale and transfer in a certain leasehold located on Cahuenga avenue between Hollywood and Sunset boulevard.

" 'Endeavor to collect from both sides without the knowledge of both.

" '(See attached legal instrument.)

" 'Rosenthal Realty Co.

" 'By Bernard Rosenthal.'

"That said letter was delivered to the said Los Angeles Realty Board and was read by divers persons.

"That, by the publication of said words and language as aforesaid, the defendants intended to, and did, charge and assert, and to be understood as charging and asserting, and by the readers of said letter in fact was understood as charging and asserting, that the plaintiffs had been dishonest and corrupt in their dealings, and had been guilty of a breach of the Real Estate Brokers Act of the state of California, chapter 51 of the Laws of 1923, approved April 27, 1923.

"That said charge as made and published by the defendants and as understood by the persons reading said letter, and by the defendants intended to be so understood, was and is false, malicious, and unprivileged, and did and does expose the plaintiffs to hatred, contempt, and obloquy by imputing to them a dishonest and disreputable course of conduct in their said business. That said charge published by defendants as aforesaid was maliciously made, and was intended to defame said firm and injure it in its business and reputation.

"That, by reason of the publication aforesaid, the business of the plaintiffs was injured, and the reputation of said business defamed and damaged, in the sum of $50,000."

The answer of the defendants to the said complaint admits that on the date stated in paragraph 3 of the last-mentioned pleading defendants wrote the letter, in said paragraph referred to, "addressed to the Los Angeles Realty Board, a copy of which is set out in the complaint, but deny that they wrote and (or) published the same willfully and (or) maliciously"; admits that said letter was delivered to said Los Angeles Realty Board; and avers that it was written and delivered to said board in the discharge of the duty of defendants "to the general public and other persons engaged in the business of buying and selling real property in the city of Los Angeles and throughout the state of California, and as a privileged communication." The answer (paragraph 4) specifically sets up the defense that the letter as set out in paragraph 3 of the complaint was written and delivered by the defendants to said realty board "as a privileged communication."

As a separate and special defense, the defendants allege that both they and the plaintiffs are members of the realty board above mentioned, set forth certain provisions of the constitution and by-laws thereof, which provisions are hereinabove, in substance, presented, and proceed further to allege that it was in pursuance of their duty as members of said board, as prescribed by said constitution and by-laws, "and for no other reason," that they (defendants) delivered to the secretary of said board the letter hereinabove set forth. It is in said answer further alleged that said letter and the complaint contained therein against the plaintiffs were so filed and delivered without malice, and that "the same was and is a privileged communication." As "a further and separate defense," the answer alleges:

"That the charge against the said plaintiffs contained in the said letter of January 4th, 1924, written by these defendants, and delivered to the said Los Angeles Realty Board, was and is true, and said letter was written and delivered without malice, and as a privileged communication."

The plaintiffs' action is, of course, founded on section 45 of the Civil Code which provides:

"Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

The defendants, as has been shown, pleaded that the letter filed with the realty board was and is a privileged communication, and that the same was made in the manner indicated without malice. Civ. Code, § 47, subd. 3. So much of said section as directly concerns the present consideration defines, in part, a privileged publication to be one made "in a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information."

We have reproduced hereinabove copious quotations from the complaint, a copy of which, as seen, was attached to the written charge of misconduct filed before the realty board by the defendants against the plaintiffs. That pleading, or a copy thereof, was undoubtedly so filed for the purpose of amplifying or explaining the charge made against the plaintiffs. The allegations of said complaint are also important in their bearing upon the ruling of the trial court in excluding certain evidence offered by the plaintiffs, and to which ruling attention at the appropriate place herein will be given.

The evidence, both oral and documentary, conclusively supports the verdict. The fact that the plaintiffs held an option on the Curry lease and the fact that they sold said option to the defendants for the consideration of $4,000 are not denied. There is ample proof from which the jury, believing such proof as presumptively they did, were justified in finding, as impliedly they did so find, that the plaintiffs, within a brief time after selling to defendants their right of option to purchase said lease, procured from Curry an agreement to the effect that they could and would sell the lease to a prospective buyer for the sum of $95,000, provided he would pay them (plaintiffs) the sum of $5,000 for consummating such sale. As to this agreement, it should be stated that it was in writing, and ostensibly was made with one Edward J. Peil, who, however, the evidence without conflict shows, was an employee of the plaintiffs at the time of its execution. The agreement was signed by Curry, and beneath his signature were these indorsements and in the order here given:

"Witness: Edward J. Peil.
"Accepted: C. Albert Fitzhenry."

At the time of the execution of the above agreement, Fitzhenry, Miles, Peil, and Hardman were present, and witnessed and took part in the transaction. Curry, testifying as a witness for the defendants, declared that he was not on that, or any other occasion, told either by Fitzhenry, Miles, Hardman, or Peil that the plaintiffs had sold their option to purchase the lease to the defendants. And, notwithstanding that both Fitzhenry and Hardman, the latter (so the evidence shows) operating conjointly with the plaintiffs in the several transactions, were called to the witness stand by the plaintiffs and questioned concerning certain phases of the transaction, were not asked a single question by their attorney relative to this latter transaction with Curry. Indeed, counsel for plaintiffs so restricted the examination in chief of those witnesses that counsel for defendants, as the trial court properly held, could not competently inquire into the facts of said transaction on cross-examination. Nor was there offered by the plaintiffs any testimony regarding said transaction or any attempt made by them to make the transaction accord or appear to accord with the proper conception of fair dealing on the part of the plaintiffs in the transaction. From these circumstances and those characterizing the transaction itself, the jury were warranted in concluding as their verdict implies that they did conclude, that the said transaction could not be explained by the plaintiffs consistently with those ethical considerations which should be the ruling force behind all business transactions between man and man, and which, as the evidence shows, it is the cardinal purpose of the realty board of the city of Los Angeles, to which both parties to this action belong, to inculcate in and require of its members that they, as real estate brokers, carry into all their transactions with any of the public with whom thus they have dealings.

[6] That there is testimony from which the jury were legally authorized to infer and definitely conclude that the publication of the communication in the manner indicated was without malice on the part of the defendants, but that it was made in good faith and under an honest belief that the charge against the plaintiffs therein contained was true, an impartial reading of the record evidence will leave no room for doubt. The plaintiffs, upon applying for membership in the realty board, referred said board to the defendants as vouchers of the fitness of the plaintiffs for membership of the organization, and were, by the defendants, strongly recommended to that organization as in all respects eligible to be received as such members. This circumstance is important, in that it constitutes conclusive proof of the fact that, prior to the happening of the transactions involved herein, the personal relations between the plaintiffs and the defendants were of an amicable character; that, in other words, prior to the time mentioned, there did not exist between them that feeling of personal hostility which often arises between individuals that are rivals in the prosecution of the same kind of business enterprises. Again, the fact that the defendants instituted an action against the plaintiffs to recover the $5,000 which Curry agreed to pay them as a commission for selling the lease is itself a circumstance tending strongly to show that, rather than being actuated by malice in complaining of the plaintiffs to the realty board, the defendants honestly believed that the plaintiffs had in the transaction committed a wrong, and thus had violated the very first of the objects to promote and maintain which the realty board had been organized and was being maintained. So believing, and having reasonable grounds for such belief, it was the duty of the defendants, as members of the realty board, to complain to said board of the conduct of the plaintiffs in the transaction and to file with the board a complaint in writing setting forth the nature of the charge. In this connection, it should be stated that Bernard Rosenthal, a member of the copartnership defendant, testified that he first went to the secretary of the realty board and verbally complained of the conduct of plaintiffs in the transactions, but was told by said secretary to put his charge in writing, as the bylaws of the organization required, and that thereupon he filed with the board a copy of the complaint in the action of defendants against the plaintiffs to recover the $5,000 referred to, charging against the latter the alleged misconduct in the transactions involved herein. Moreover, Bernard and Joseph Rosenthal each testified that, at the time of filing the charge against plaintiffs with said board, he bore no malice against the plaintiffs or any of them, and that he "bore none now."

The plaintiffs introduced testimony to the effect that, in a conversation over the telephone with Hardman, after the discovery by the defendants of the $5,000 transaction between Curry and (ostensibly) Peil, Bernard Rosenthal referred to the defendants as "crooks," and threatened that he "would get them." It was further shown that one of the Rosenthals made complaint of the transaction to certain members of the Masonic Lodge in which Miles, of the plaintiff copartnership, was then progressing through the degrees, with the purpose, obviously, of preventing Miles from proceeding further in the matriculation of his membership of that body. Miles himself was present when the charge was made to the Masonic members. These circumstances were offered, of course, upon the assumption that they tended to show that the defendants nourished a malicious feeling towards the plaintiffs, growing out of the transactions involved herein. These circumstances are not necessarily inconsistent with the defense interposed by the defendants that the charge filed with the realty board was true, or with the further defense that the communication was privileged and published without malice. With regard to the part Peil took in the $5,000 transaction with Curry, it is well to note that the plaintiffs did not deny or attempt to contradict the testimony that he (Peil) was in their employ at the time that transaction occurred, and that it was carried on and completed in the presence of Fitzhenry, Miles, and Hardman. Peil himself was not called as a witness, and no explanation essayed of why he was not. The jury could well have concluded from the circumstances attending that transaction, which took place shortly after the plaintiffs had sold their interest in the option to defendants, that Peil, in said transaction, was not acting for himself but for the plaintiffs, and that they used him therein as a mere makeshift to conceal, if thus it could be done, any malversation on their part in the deal.

Further consideration herein of the evidence is not required. It is enough to say that the evidence upon all the essential issues submitted by the pleadings, as well as those worked in by the proofs, is such as to absolutely forbid interference by a court of review with the result arrived at below, in so far as are concerned the evidentiary considerations of the record. We are well justified by the record in saying that, in the facts, this case, in so far as the transactions giving rise to it are concerned, finds a striking counterpart in the case of Tate v. Aitken, 5 Cal. App. 505, 512, 90 P. 836, as will be perceived on reading the opinion therein.

[7-11] The defendants introduced in evidence, under the sanction of the trial court, the complaint in their action against the plaintiffs for judgment for the $5,000 which Curry agreed to pay to them or (ostensibly) to Peil. It was, it will be kept in mind, a copy of said complaint which was attached to the complaint filed by defendants with the realty board against the plaintiffs. The latter thereafter offered in evidence the answer to said complaint, and the court sustained an objection by the defendants to the admission thereof, on the ground that the answer did not constitute competent evidence, in that it was self-serving. Said answer is not in the transcript here, but it may be presumed that it properly denied the material averments of the complaint, or tendered an issue upon the material facts. In any event, however, we agree with the trial court that said answer would be and was, as to the instant case, hearsay and self-serving. But the complaint, being a part of the written charge filed against the plaintiffs before the realty board, and, as above stated, explanatory, in a more amplified form, of the charge than was the brief written charge itself, was admissible under section 1854 of the Code of Civil Procedure. In that view, the answer to said complaint would not be admissible, since it in no way or sense bore any connection, certainly no direct connection, with the act of the defendants in preferring the charge against the plaintiffs before the realty board, and therefore it would not be admissible under the terms of the section of the Code just mentioned. The complaint in said action, being admissible and admitted under said section, became subject to consideration by the jury for any competent purpose which it might subserve in the determination of the issue which they were required to decide. It undoubtedly tends to show (and the jury had the legal right to consider that pleading on that question) that the filing of the charge against the plaintiffs with the realty board was inspired, not by malice, but by a conviction of duty they owed to said board, as members thereof, arising out of an honest belief that the plaintiffs, also members of said organization, had committed an act in a real estate transaction which was characterized by a degree of turpitude sufficient to justify either their expulsion or suspension as members of the board. In other words, the complaint in said action, being founded on precisely the same transaction and exactly the same facts as those constituting the basis of the charge filed with the realty board, became, upon its introduction into the record, competent evidence of no little potency in probative force that the defendants were not actuated by malice in making the complaint against the plaintiffs to the realty board. The effect of the answer to said complaint, presuming, as we may, that it denied each and every material averment of said complaint, would only be to tender in that action an issue upon the question whether the charge was true or false, and, obviously, all that said answer could accomplish here, if admitted in evidence in this case, would be to show that in the other action the plaintiffs here, as defendants there, had by answer tendered such issue, which would prove nothing material to the issues in this case or tend to do so. It certainly would not tend to prove in the present action that the defendants, in preferring the charge against the plaintiffs before the realty board, were prompted by malice. Said answer was not competent evidence for any purpose or for any reason in the case at bar.

[12, 13] The instruction first complained of contained the definition of libel in the precise language of section 45 of the Civil Code. Immediately following that definition as so given, and in the same paragraph, the court added: "This action is brought under the last clause of that, the claim being that the alleged libel has a tendency to injure the plaintiffs in their occupation." It is this particular part of the instruction to which the plaintiffs object; the argument being that the court thereby limited the jury to the consideration of the injury, if any, sustained to the business of the plaintiffs by the publication, whereas, so it is contended, the plaintiffs were entitled to have considered by the jury any damage which might have resulted to them individually or in their personal capacity. While the complaint, as will be observed (paragraph 5), alleges that the

charge filed with the realty board "did and does expose the plaintiffs to hatred, contempt, and obloquy by imputing to them a dishonest and disreputable course of conduct in their said business," still it is clear that, when that language of the complaint is read and considered in connection with other allegations of that pleading, the real essence or gravamen of their objection to the charge is that the effect of its publication was to injure and degrade the good name and reputation of the copartnership as a business concern. In confirmation of this conclusion, we need only to refer to the last sentence in paragraph 5 and also to the language of paragraph 6 of the complaint. The language of paragraph 5 particularly here referred to is hereinabove presented, as is also paragraph 6 of said pleading, which expressly alleges that the damage done by reason of said publication was to the business of the plaintiff corporation. But the instruction in effect necessarily embraces the proposition that it would be the duty of the jury to consider the damage, if any, done to the personal character and reputation of the members of the copartnership, for, obviously, only because of the damage or injury to the personal character and reputation of the members as real estate brokers could there be damage or injury done to the copartnership as an artificial entity, and an intelligent jury could not otherwise understand the instruction. What undoubtedly was meant to be stated in the instruction, and what the instruction rationally construed does say, was that the plaintiffs relied in this action upon the damage, if any, which resulted to the copartnership as a business concern, through any damage which had been done to the personal character and reputation of the individuals constituting the copartnership.

[14] It is next claimed that the court misdirected the jury in instructing them that, if they found that the communication in question was privileged within the meaning of subdivision 3 of section 47 of the Civil Code, the fact that such communication contained a false charge against the plaintiffs is immaterial, "provided you find that said charge was made by the defendants without malice, in good faith in their belief of its truth, and upon reasonable grounds for their belief, your verdict would be for the defendant." This instruction is not an erroneous statement of the law applicable to cases where the publication complained of comes within the rule, as does the case here, of qualified privilege. Snively v. Record Publishing Co., 185 Cal. 565, 198 P. 1. The same is to be said of another given instruction, of which complaint is made, to the effect that, even if the jury found that the charge was not true, the verdict should be for the defendants, if they found that the latter "honestly believed it to be true."

[15-21] The court instructed the jury that "the burden of proof is on the plaintiffs in this case to show that the communication by the defendants to the realty board complained of was not a privileged communication, and that the charges made therein against the plaintiffs were false and were made with malice." This instruction, say plaintiffs, involves a misstatement of the rule applicable in cases of the character of the one before us.

As seen, the answer herein alleges that the communication is privileged; that the charge therein made is true; and that it was published without malice. In Snively v. Record Pub. Co., supra, it is said that, even where the complaint does not allege that the charge against the plaintiffs was made and published with malice, if the defendants allege in their answer that "the publication was on a privileged occasion and was made without malice," they thus directly put in issue the question of actual malice; that in such case, as "actual malice was an essential part of that defense, it was necessary for the defendants to prove such absence in order to sustain this defense." In the instant case, as we have seen, the plaintiffs expressly charged that the communication was filed with the board with the purpose of maliciously injuring the plaintiffs. If the defendants had merely denied that the publication was made with malice, we would be inclined to the conclusion that the burden would be upon the plaintiffs to prove the existence or presence of malice in the publication; but, however that may be, the defendants went further than that—indeed, further than the law required them to go—for, as is lucidly pointed out by Mr. Justice Curtis, in the very recent case of Maher v. Devlin (Cal. Sup.) 263 P. 812, 819, all that is necessary in such a case as the present is to plead that the publication or communication was made without malice; whereas, the defendants here allege that the publication was privileged, that it was true, and made without malice. We are of the opinion that thus they assumed the burden of proving that the communication was made without malice, but that, notwithstanding that they pleaded in justification that the charge was true, all that they were required to prove in that particular was that they honestly and in good faith believed it to be true. Obviously, the allegation of the answer that the charge was true necessarily carried the statement that the defendants honestly believed it to be true. However, the instruction now being considered involved, under the circumstances of this case, an erroneous statement of the law; but the error so committed is not such as to require a reversal, for the reason that we are clearly justified in the conclusion at which we have arrived on a painstaking consideration of the record that it must be held, as a matter of law, that the evidence shows that the charge contained in the communication is true, and that it was made by the defendants without malice. We have hereinabove reviewed the evidence, and it speaks for itself on this proposition in no uncertain terms. It is not necessary here to recapitulate the evidence or the analysis thereof, which has already been given. We may, though, with no impropriety emphasize the proposition that, in filing the charge against the plaintiffs with the realty board, the defendants, honestly believing the same to be true, did only what it was their bounden duty to do as members of that organization. If they had failed or omitted to pursue that course, they would have been guilty of a flagrant violation of the obligations to which they subscribed when they were initiated into membership of said board, and for which they would have been subjected at the least to censure at the hands of that organization, and possibly to expulsion from further affiliation therewith. The performance of a lawful act in a proper way in pursuance of a duty inexorably required can afford no inference of malice in the performance of such act. To the contrary, the irresistible inference in such case is that such act was done or performed not only without malice, but in response to an imperative or binding duty or obligation. It may be added that, in cases of qualified privilege, to which class of cases the one at bar belongs, the rule is that malice is not inferred from the communication or publication. Civ. Code, § 48.

[22] It is claimed that it was error for the court to disallow a proposed instruction to the effect that the plea of justification by the defendants is not sustained, "unless in your judgment the evidence tends to prove every element essential to the truth of the charge implied to the plaintiffs. * * * And, if the evidence offered by defendants in support of their defense that the alleged defamatory matter is true falls short of convincing you that such charge is true, you cannot consider such evidence as tending to mitigate the plaintiffs' damage." From what has been said above, the foregoing instruction does not embrace a statement of the true rule.

[23] Plaintiffs' instruction No. 8 is not pertinent to the evidence in this case. We need not further consider it. The court's instruction on the subject of the presumption of malice following from the proof of the publication of false and unprivileged matter contains a correct statement of the rule in unprivileged cases, but was not pertinent to the issues herein. It was harmless in its effect upon the rights of the plaintiffs. Indeed, if anything, it was favorable, rather than unfavorable, to the plaintiffs.

The judgment is affirmed.

I concur: PLUMMER, J.

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90 Cal. App. 535

JEWETT et al. v. ALBIN et al. (EKMAN et al., Interveners). (Civ. 6126.)★

District Court of Appeal, First District, Division 2, California. April 2, 1928.

Hearing Denied by Supreme Court May 31, 1928.

1. New trial 🔑155—Power to hear motion for new trial within two months after service of notice of entry of judgment held not defeated by unsuccessful party's prior notice of intention to move for new trial (Code Civ. Proc. §§ 659, 660).

Power of trial court to hear motion for new trial within two months from service of notice of entry of judgment under Code Civ. Proc. § 660, *held* not defeated, causing fatal delay in service of bill of exceptions, by giving of notice of intention to move for new trial by unsuccessful party prior to receiving notice of entry of judgment; time for giving notice of intention under section 659 not being involved.

2. Estoppel 🔑116—Proof of waiver must include proof of knowledge of underlying facts.

Proof of waiver must include proof of knowledge of the facts upon which waiver is based.

3. Appeal and error 🔑1010(1)—Findings contrary to undisputed evidence are sustainable only if evidence is insufficient as matter of law to support contrary findings.

Where findings are made contrary to undisputed evidence, they are supportable only in case the evidence offered is insufficient as a matter of law to support findings in favor of unsuccessful party.

4. Equity 🔑1—Court's discretion to grant or refuse equitable relief must be exercised in accordance with the evidence.

Discretion exercised by court in granting or withholding equitable relief is exercised in accordance with the evidence and on definite principles and precedents, and is not arbitrary or whimsical.

5. Injunction 🔑62(3)—Change of conditions due to presence of stores, garages, and apartment houses and lack of demand for residential property held to require withholding equitable relief to restrain violation of restrictive covenants.

Change of conditions in neighborhood of tract by construction of gas stations, stores, apartment houses, and rooming and boarding houses and want of demand for residential property *held* to require withholding of equitable relief sought to enjoin violation of restrictive covenants limiting use of property for residences for single families, since granting of an injunction would result in imposing unjust burdens on defendants.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action by Louisa Jewett and others against George H. Albin and others, wherein Rose A. Ekman and others intervened. Judgment for plaintiffs, and defendants and interveners appeal. Reversed.

★Hearing denied by Supreme Court.

Frank P. Doherty, A. C. Routhe, B. Zum Brunnen, Shepard Mitchell, and Leslie E. Clawson, all of Los Angeles, for appellants.

Tanner, Odell & Taft and Fred H. Taft, all of Los Angeles, for respondents.

KOFORD, P. J. Before stating the facts of this case we will first consider respondents' motion to dismiss the appeal. This motion is based upon the claim that the proposed bill of exceptions was not presented in time and that the notice of appeal was not filed in time.

[1] The trial was had without a jury, and resulted in a judgment for plaintiffs, which was entered November 21, 1924. On November 24 respondents served on appellants a written notice "that the findings and judgment in favor of plaintiffs were *signed* and *filed* November 20, 1924. Appellants on December 1, 1924, served and filed their notice of intention to move for a new trial. On January 23, 1925, respondents served notice of *entry* of judgment. On March 17, 1925, the motion for a new trial was presented and denied. This was within two months from the service of the notice of entry of judgment on January 23, 1925, but much more than two months from November 24, 1919, when notice was given that findings and judgment had been filed. Thereafter, on March 27, within ten days after the order denying a new trial, notice of appeal was served and filed. On May 19, 1925, the proposed bill of exceptions was served upon respondents. It is not claimed that the proposed bill of exceptions was served too long after March 17, the day on which the motion for a new trial was actually denied, but that it, as well as the notice of appeal, should have been served and filed respectively within ten days and two months after notice of filing of judgment and findings November 24, 1924, or at least within that length of time after December 1, 1924, when notice of intention to move for a new trial was served and filed. It is claimed that the notice of intention was a waiver of notice of entry of judgment, and therefore the time within which the court had power under Code of Civil Procedure, § 660, to pass on the motion for a new trial commenced running at that time. The decisions are to the contrary, holding that the two months' period commences to run only from the time expressly stated in Code of Civil Procedure, § 660. Moore v. Strayer, 175 Cal. 171, 165 P. 530; Strehlow v. Mothorn, 197 Cal. 112, 239 P. 850; Hutton v. Chapman, 197 Cal. 288, 240 P. 764.

Respondents rely on Prothero v. Superior Court, 196 Cal. 439, 238 P. 357, which holds that actual notice of entry of judgment starts running the ten days' time in which a notice of intention to move for a new trial must be made under Code of Civil Procedure, § 659. The question here raised, however, relates to the limitation of time on the power of the court to pass on a motion for a new trial as provided in Code of Civil Procedure, § 660, and not to the time within which the notice of intention to move for a new trial must be given under Code of Civil Procedure § 659. In Strehlow v. Mothorn, supra, a distinction is pointed out between a limitation upon the power of the court and a limitation upon the right of a party to move for a new trial. It should also be noticed that Code of Civil Procedure, § 660, says "after * * * service on the moving party of notice of the entry of the judgment," while section 659, Code of Civil Procedure, says "after receiving notice of the entry of the judgment." One may receive notice by obtaining knowledge without service, but is not served with notice by obtaining actual knowledge.

Respondents' points raised against the perfecting of the appeal are therefore not well taken.

The plaintiffs in this action, respondents here, obtained a permanent injunction against appellants based on building restrictions contained in deeds by which a tract of land called Westmoreland tract was originally conveyed to the several lot owners. The judgment decreed that all the restrictions were valid and subsisting and inured to the benefit of plaintiffs and all other lot owners in the tract. It enjoined all the defendants "from using any lot (in the tract) or the structures or buildings on said lots, as a rooming house or boarding house or apartment house, or for any business, calling, or occupation *other than as a residence for a single family*," and from violating any of said restrictions.

One of appellants' contentions which involves an interpretation of the restrictions is that whatever relief might be properly granted in equity against *construction* of an apartment house, its *use* as such was not actually prohibited by the restrictions and that the restrictions do not limit buildings to use of a single family. The restrictions follow:

> "(1) The property hereby conveyed shall be used for residence purposes exclusively and no building or structure pertaining to or for the conduct of business of any kind whatsoever shall ever be erected thereon.
>
> "(2) No residence of less than two full stories above the basement shall be erected or placed upon said premises, and no residence shall be erected or placed upon said premises that shall cost less than four thousand dollars ($4,000).
>
> "(3) The residence to be built * * * shall" —certain setback lines established, not involved here.
>
> "(4) Prescribes height of fences not involved here.
>
> "(5) No more than one residence shall ever be erected or placed," etc.
>
> "(6) No double or tenement houses or flats nor any kind of a residence except a residence

designed for use as a single residence, shall ever be erected or placed upon the premises hereby conveyed.

"(7) No oil well, etc.

"Upon a breach of either or any one of the foregoing conditions, the title to said property hereby conveyed and to the whole thereof shall become at once divested from the second party herein, his heirs or assigns and shall revert to and revest in the parties of the first part, their heirs or assigns.

"It is further agreed by the parties hereto that the premises hereby conveyed are part of a tract intended to be used exclusively as a first class residence property, and it is agreed that the conditions hereinbefore recited are intended for and are for the benefit of the remainder of said tract and of the owners thereof, and that a breach of any one of said conditions may be enjoined or prevented by any person owning any property in the tract of which this a parcel."

Clark and Bryan opened the tract in 1903 or between 1901 and 1903, and deeds each containing the same conditions and restrictions were executed by them to the various purchasers of lots in the tract. The restrictions have no time limit. Defendants Albin eventually became the owners of lot No. 21, upon which was situated a dwelling house. In May, 1923, the defendants Albin obtained a building permit to rebuild the said residence into an eight-family apartment house, and, commencing on May 16, 1923, vigorously prosecuted the work. Their certificate of title obtained allowed it. The city zoning ordinance allowed it. A first mortgage was obtained for $28,000, and defendants proceeded to make improvements which are said to be valued at between $65,000 and $85,000. The Albins had also obtained a quitclaim deed to their lot No. 21 from the original owners, Clark and Bryan, conveying the reversionary interest described in the original deeds. On August 2, 1923, when the improvements had progressed to a point where the building was ready to receive the exterior coat of stucco, the several plaintiffs, who owned and occupied five lots in the tract, commenced this action against defendants Albin and against the owners of fourteen other lots in the tract who alleged to have threatened to or to have actually been violating the restrictions in one way or another. Before the judgment was obtained, defendants Albin had completed the improvements, at least as to outward appearances.

The complaint, besides the charges against the Albins, alleged that the owners of other designated lots threatened to conduct rooming and boarding houses; that an owner of another lot had permitted the running of a school for defective children and threatened to continue; and that another owner had conducted and threatened to continue to conduct an apartment house. As to those defendants who were alleged to have threatened, the evidence in the case showed that they had actually done the things alleged to have been threatened, although the court's findings only go as far as the allegations of the complaint. These violations set forth from the evidence are as follows:

Lot 16 owned by appellant Dudley: Used as a rooming house for two years at least.

Lot 15 owned by appellant Wyche: Used as a rooming house with signs advertising that fact displayed in front of it, for about three or four years.

Lot 12 owned by appellant Taylor: Used as a rooming house for two or three years, displays signs advertising that fact; was formerly used for certain church activities.

Lot 18 owned by appellant Ralphs: Used for several years as a school for feeble-minded children.

Lot 19 owned by appellant Poland: Apartment house operating for about three years.

Lots 24, 25 owned by appellant Walsh: Boarding and rooming house, 25 to 30 roomers and boarders.

Lot 53: Rents rooms.

Lot 63: Apartment house; sign advertising that fact displayed on premises.

Lot 62 owned by appellant Cain or by appellant Parlan: Used as an apartment house or rooming house; displays sign advertising this fact. Originally built 20 years ago as a double or duplex residence; for past 12 years used as a rooming house.

Lot 65 owned by Hamlin: Used as a rooming house.

Lot 90 owned by appellant Young: Rented to occasional roomers.

Lot 96 owned by appellant Halldin: Used as a boarding house; displays sign; formerly used as a fraternity house.

Lot 105 owned by appellant Peck: Rents to roomers. (Not a single residence.)

Appellants contend that the judgment grants to the plaintiffs greater rights than the deed restrictions provide. Numerous authorities are cited which hold that an apartment house is a building used for residence purposes exclusively, and it is argued that therefore the Albins' apartment house does not violate the clause in restriction No. 1, which states that the property conveyed "shall be used for residence purposes, exclusively." The only other clause in the deed which refers to use of a building as distinguished from the construction and erection of a building is that contained in the last paragraph of the deed which is not numbered nor referred to as a restriction but is in the form of an agreement as to the intention of the original parties. This clause states that the tract is "intended to be used exclusively as a first-class residence property." Authorities are also cited to the effect that this clause is not violated by an apartment house. Restriction No. 6 prohibits the erection of an apartment house or a residence not "designed for use as a single residence." Appellants urge that this clause does not prescribe the use to be made of a building after erected, especially if its outward appearance conforms to the building restriction; that such deed restrictions are strictly construed; and that the judgment here went further than is authorized by the deed in enjoining the use of the buildings of the Albins and of other defendants. It is specially urged on behalf of all the appellants that the injunction by limiting the use of the buildings of all of the defendants to "a residence for a single family" interpolated into the deed a condition which is not to be found therein.

The foregoing contentions affect differently the several defendants in this case. Their actions complained of include running of a boarding house, of an apartment house, renting rooms, conducting a school, erecting and occupying a duplex house, and erecting and using an apartment house. Most, but not all, of the buildings so used were originally designed and built for a single dwelling or residence. The contentions made, and above outlined, might be good as to some appellants and not to others because of the diversity of conditions affecting them.

[2] It is further contended that the plaintiffs have waived the benefits of the restrictions by their long acquiescence in the many violations of them over a period of years, without protest, and also that plaintiffs are guilty of laches, particularly with respect to the Albans in that building operations were openly and actively carried on under an apartment house permit, duly posted, for almost two months before any objection was raised, appellants in the meantime expending a large amount of money, some of which was lent by Brunnen, mortgagee, intervener and appellant. Some of the plaintiffs were called as witnesses at the trial by the defendants and examined in respect to the extent of their knowledge of the several violations of the restrictions which had been taken place in the tract and in respect to the erection of the Albin apartment house. But not all the plaintiffs were so examined, some of them did not appear at all at the trial. These points therefore would not be available to the appellants with equal force with respect to all of the plaintiffs, even though available as to those plaintiffs who appeared and were examined at the trial, unless it must be inferred from the nature of the various violations of the restrictions that plaintiffs knew of them. Proof of waiver must include proof of knowledge of the facts upon which the waiver is based.

In connection with their point of waiver, appellants contend that the trial court erred in making findings against their defense, that conditions in the neighborhood of the tract and in the tract itself had so changed during the 22 years which had elapsed since the opening of the tract of 1903 until the time of trial that a court of equity should not grant equitable relief to the plaintiffs. This defense is one which is available to all of the appellants and against all of the plaintiffs alike. It amounts to an attack upon the findings of the trial court.

[3] All of the evidence upon the issue of the changed conditions in the tract and in the neighborhood of the tract was offered by the defendants. The cross-examination of these witnesses did not materially qualify their evidence on this issue. No rebuttal on this issue was offered by the plaintiffs. The evidence on this issue is without conflict. The record therefore does not present a case of findings made upon conflicting evidence, but, on the other hand, the findings are supportable only in case the evidence offered is insufficient as a matter of law to support findings upon this issue in favor of the defendants.

The evidence in the transcript touching upon this point follows: The tract is bounded on the north by Tenth street, on the south by Eleventh street, and on the east by Hoover street. Three streets run north and south through the tract, being Elden avenue near the west followed by Magnolia avenue and Arapahoe street. The tract is comparatively small, being a strip 3½ blocks long containing 56 lots in all. It was stipulated that Tenth street, bounding the tract on the north, had been ordered widened by the city council, making it a 100-foot boulevard and a main traffic artery. Some of the plaintiffs were called as witnesses by the defendants. The testimony they gave related to the extent of their knowledge of the various violations of the building restrictions which had taken place in the tract and not to the point under discussion. This testimony contained some admissions of knowledge and some denials and testimony from which the inference might or might not be drawn that they had knowledge of these violations by their general knowlege gained in going to and from their homes and over the streets in the tract. One of these plaintiffs lived diagonally across the street from the Albins' lot.

The defendant Albin testified. He bought lot No. 21 in 1917. He narrated his negotiations leading up to the construction of the apartment house, his investigation of the title, his securing a loan, his visit to the building department of the city of Los Angeles, and his information that the district had been zoned under the city ordinance so as to permit apartment houses. He described the activities connected with the construction of the building in a way which was obviously intended by his counsel to establish the inference that the neighborhood well knew what the nature of the structure he was building was to be. He said he had made repeated efforts to sell the lot; that it apparently had no value. He estimated the value of the lot according to the tax receipt at $5,000, the value of the completed apartment house at $85,000, and stated the total incumbrances were $36,000. He described the several violations of the restrictions in the tract which are above set forth.

Witness Clark, one of the original subdividers of the tract, testified that he bought the property in 1901; that it was then a pasturage and the Los Angeles city limits then ended on the east side of Hoover street; that he subdivided other tracts which adjoined this tract both on the north and on the south side in about 1898 and in 1901. These tracts were originally used for residential purposes. One of them went into business about ten years afterwards.

Witness Walsh, one of the defendants, a real estate broker, testified that the only demand for lots in the tract for residential purposes was purely to move an old house on. He described the character of the surrounding neighborhood in adjacent tracts. He said Hoover street, beginning at Ninth street and down to Pico, is used for gas stations, stores, apartment houses, rooming houses, and boarding houses. Pico is entirely for business. Ninth and Hoover is a business center, with stores and garages. Pico from Hoover street straight through westward has old houses. East of Hoover street is used for stores for quite a distance and inside property for multiple dwelling houses, apartment houses, and flats. He further testified that the plan to make Tenth street a boulevard had the effect of discouraging people from owning single residences on account of pending assessments. He said the property on the south side of Eleventh street, known as the Lone Star tract, was used for apartment houses and flats. South of Eleventh street the Lone Star tract has eight or nine apartments and many flats. The Pico frontage is entirely used for stores and garages. North of Tenth and west of Hoover is used for flats, apartments, boarding houses, rooming houses and stores. He estimated the value of the Albins' apartment house at $60,000. From one side view and from the front view it did not appear to be an apartment house, but from another side looking down the driveway it could be seen that it was an apartment house from outward appearances. He also testified concerning some of the violations within this tract which are set forth hereinabove. He said the property to the north of the tract was not exclusively residential, that there were three art schools on Magnolia, and that there were two or three clubs, a good many boarding and rooming houses, and some houses remodeled for apartments. His own lots within the tract at the corner of Arapahoe and Tenth street were leased as a boarding house and had been so for about a year.

Witness Whatnall, director of city planning of the city of Los Angeles, testified that he had made a study of the neighborhood before the zoning ordinance was passed. Objection to much of his testimony was sustained. It related to the reasons and considerations which entered into the city planning and zoning ordinances. He stated, however, that the ordinance was based on the then existing uses in the vicinity. He described the Tenth street boulevard project as including other streets and extending from the city limits, Miles avenue east to the Country Club boulevard, thence easterly to the Los Angeles high school, practically from the east to the west side. The zoning ordinance, as he testified, zoned Tenth street as business and the remainder of the Westmoreland tract as for multiple dwellings.

Defendant Cain testified that he had owned lot 62 in the tract for 21 years, and that upon purchasing it he had erected a duplex or double residence, which had been occupied as separate apartments, one by his own family and one for his mother's family.

In Downs v. Kroeger, 200 Cal. 743, 254 P. 1101, the Supreme Court sustained the action of the trial court in withholding equitable relief against violations of deed restrictions upon the ground that changes in conditions occurring since the restrictions were created made the enforcement of such restrictions unjust and inequitable. Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476; Trustees v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365; McClure v. Leaycraft, 183 N. Y. 36, 75 N. E. 961, 5 Ann. Cas. 45, are therein cited and quoted with approval upon this doctrine. The doctrine is also recognized and stated in Miles v. Clark, 44 Cal. App. 539, 187 P. 167, and in Pomeroy's Equity Jurisprudence (4th Ed.) footnote under section 1295, and was applied in connection with abandonment and waiver in Los Angeles Terminal Land Co. v. Muir & S. P. R. R. Co., 136 Cal. 36, 68 P. 308.

The evidence in the instant case shows changed conditions in the neighborhood of the tract to even a greater extent than that reviewed in Downs v. Kroeger, supra, and in addition shows changed conditions in the tract itself. The tract is much smaller and therefore much less capable of maintaining singly its exclusive character. The period of time which has elapsed is much greater.

[4] The discretion which is exercised by a court in granting or withholding equitable relief is not an arbitrary or whimsical discretion, but is to be exercised in accordance with the evidence in the case and on definite principles and precedents. 21 Corp. Jur. 34; Johnson v. Poteet (Tex. Civ. App.) 279 S. W. 902. The evidence in the Downs Case called for the withholding of equitable relief, and

therefore the evidence in this case, standing without conflict, entitled the plaintiff to the same treatment.

[5] The evidence here being uncontradicted, the findings should have been favorable to this defense. The testimony shows that, during the lapse of time since 1903, conditions have so changed, in the tract itself, on the opposite side of the streets bounding the tract and touching each block thereof on either two or three sides, and also in the neighborhood surrounding the tract, as to require the court to withhold equitable relief as unjust and burdensome out of proportion to any benefit that could be derived by the plaintiffs from the judgment. The restrictions are not limited in time, but are perpetual, and the property owners in this tract may be required to see their buildings decay with no definite knowledge of when the legal status of the neighborhood may change and therefore not knowing what character of improvements or repairs may profitably be made. They must either have relief in this action or some similar action at an uncertain time in the future, or must remain subject to the whim of the last property owner in the tract who shall concede that conditions have sufficiently changed to warrant an abandonment of the restrictions.

The conclusion we have arrived at upon this point requires a reversal of the judgment as to each of the appellants, and it is therefore unnecessary for us to decide the other points made and segregate and divide them as they might be found to be available and applicable to the several defendants as they might be grouped according to the diverse circumstances and facts affecting them.

The judgment is reversed.

We concur: STURTEVANT, J.; NOURSE, J.

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90 Cal. App. 582

FERBRACHE v. POTTER et al. (Civ. 6215.)★

District Court of Appeal, First District, Division 1, California. April 3, 1928.

Hearing Denied by Supreme Court May 31, 1928.

1. Quieting title ⟹10(2)—Where deed of plaintiff's predecessor antedated that of defendants', and hence was superior, plaintiff could maintain action to quiet title (Code Civ. Proc. § 738).

Even though plaintiff, in action to quiet title, is not the legal owner of the property in dispute, where deed of plaintiff's predecessor antedates that of defendants' predecessor, deed of plaintiff's predecessor was superior, and, under Code Civ. Proc. § 738, action was maintainable to determine who had superior equity.

2. Boundaries ⟹48(8)—Acquiescence in fence held not to constitute agreement that it was boundary line, where evidence was insufficient to show that there was any uncertainty as to dividing line.

Evidence in action to quiet title *held* insufficient to support finding that dividing line between plaintiff and defendant was uncertain and that parties intended to locate true line between them, and hence mere acquiescence by plaintiff in existence of fence did not amount to an agreement that fence was an accepted boundary line.

3. Adverse possession ⟹89—Defendants held not to have acquired adverse possession by location of fence, where plaintiffs and not defendants paid taxes on land, including disputed area.

Where defendants in action to quiet title, and their predecessors paid taxes on 200 acres, amount called for in their deeds, without including any portion of disputed area, and plaintiff and his predecessors paid taxes on 565 acres, which must have included land in dispute, *held* that defendants did not have title by adverse possession by reason of location of a fence.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action to quiet title by J. A. Ferbrache, substituted for Frank C. Staniford, trustee, against Stephanna Potter and others. Judgment for defendants, and plaintiff appeals. Reversed.

Hugh K. McKevitt, of San Francisco, and Fry & Jenkins, of San Jose, for appellant.

C. L. Witten, of San Jose, and W. F. Cowan, of Santa Rosa, for respondents.

CAMPBELL, Justice pro tem. This is the second appeal in this action. In the former appeal (Staniford v. Trombly, 181 Cal. 372, 186 P. 599) the court held that the evidence did not sustain the findings, that the findings that there had been a boundary agreement, and that plaintiff was estopped to deny defendants' title, or that defendants had acquired title by adverse possession, were not sustained. The judgment was reversed, and the action went back to the lower court to be retried. It was retried, and is now here on appeal from a judgment again entered in favor of defendants on the second trial.

When the action was tried the second time, it was tried upon the same pleadings of the first trial and upon the same points that had been made and presented upon that trial. The defendants continued to contend that a boundary line agreement had been made with respect to the lands in controversy; that plaintiff was estopped to controvert defendants' title to the property in controversy by virtue of the boundary line agreement and by virtue of long acquiescence in defendants' claim of title by adverse possession and by adverse possession. In addition to these claims, made on the former trial, the defend-

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★Hearing denied by Supreme Court.

ants sought in the second trial to establish their actual record title to the disputed area.

[1] Plaintiff and defendants own adjoining lands, plaintiff to the south and defendants to the north. The basis of plaintiff's contention is his deed, which fixes the north line of the land granted to him as the line from S5 to ¾-inch iron pipe (H Flag) and from S5 easterly to F1—¾-inch iron pipe is a point on the southerly line of the Solis rancho 80 ch. from S34—S5, ¾-inch iron pipe, and F34 are all fixed points, and S5 is a patent corner, a government mark.

The above is the description in the original deed from Moore to Matthis. Subsequently the same description is repeated in deeds from Matthis to Riddell, from Riddell to Riddell, from Riddell to Staniford, and from Staniford to plaintiff, and is fairly well authenticated and not controverted by any evidence in the chain of title, but is controverted by the deed from Moore to Gano.

On October 6, 1859, Moore conveyed to Gano the lands along the westerly or southerly side of the Solis rancho from point S7 a distance of 122 chains, which, according to McMillan's testimony and the findings, overlap the lands conveyed to Matthis on January 30, 1861, and afterwards conveyed to Riddell, plaintiff's predecessor. In other words, Moore conveyed to Gano lands he afterwards conveyed to Riddell's predecessor, according to the testimony and map of McMillan. This Gano's deed is in a distinctly different line of title. His land was afterwards sold under execution sale to one E. Auzerais and found its way afterwards into the hands of one A. J. McKerron under descriptions which merely referred to the Auzerais deed. The effect of the finding is to accept as binding the course and call of the Gano deed and to discard the course and call of the Matthis deed. The Gano deed is not in the line of plaintiff's title. Even if correct, it is a finding merely that plaintiff is not the owner of the disputed area. As a finding that defendant is the owner, it is without support, for, if Moore could not convey land which he had already conveyed to Gano in 1859 to Matthis (plaintiff's predecessor in interest), in 1861, he could not convey to Arthur (defendant's predecessor in interest) in 1867.

If we concede that Gano and his successors held the legal title to the land in dispute, or a part thereof—with which title, however, we are not concerned—still Matthis' deed antedates Arthur's deed and is therefore superior. "An action under section 738 of the Code of Civil Procedure to determine adverse claims, or, as it is usually termed, an action to quiet title, may be maintained to determine which party has the superior equity." Tuffree v. Polhemus, 108 Cal. 670, 41 P. 806; Buchner v. Malloy, 155 Cal. 253, 100 P. 687.

This disposes of the only question presented on this appeal which was not urged on the former appeal. If, therefore, upon the retrial of the case there was not the additional evidence produced requisite to establish the agreed boundary line as claimed, that plaintiff was estopped by virtue of long acquiescence to controvert defendants' title, or that defendants have acquired title to the area in dispute by adverse possession, the judgment must again be reversed. On the other hand, if the necessary evidence was presented which was lacking in the former trial, the judgment should be affirmed.

Respondents in their brief do not contend that the evidence offered in the second trial on the question of estoppel differs from that introduced in the first trial, or that any additional evidence was presented to establish the claim of estoppel, which evidence the reviewing court on the former appeal held lacked the essential element of estoppel, namely, false statements or concealments; respondents contenting themselves with directing our attention to two points only—other than the new one discussed—namely, "agreement as to boundary line" and adverse possession.

[2] As to the question of an agreed boundary line, respondents set forth in their brief the testimony of George Arthur Trombly as supplying the necessary facts lacking in the former trial, and have directed our attention to no other testimony or evidence that the boundary line between the lands of the parties was uncertain and disputed and that the line claimed was agreed upon as the true boundary line. The testimony of George Arthur Trombly, set forth in respondents' brief, is as follows:

> "There was a fence there prior to the time the picket fence was built to keep my stock separate. It started up and passed close to tree 5 and run down to what is designated as the 'big rock.' There was the old fence that was marked between two places. That was put up to keep Riddell's stock out and Arthur's stock inside. It run from somewhere in the locality of tree 5 down to where it is marked here as the 'big rock,' and, after my father moved up onto the place, then they established the line through here."

Respondents further quote from the testimony of the same witness as additional evidence produced that a boundary line agreement had been entered into between the predecessors in interest of plaintiff and defendants as follows:

> "The picket fence was built about 1876 or 1878. I worked on a part of the fence myself. My father and a hired man, my brother and I built part of it, and an old German fellow that lived there, by the name of Ossity, built the rest of it for Mr. D. C. Riddell (predecessor in interest of appellant). The picket fence started from tree 5; I don't know how far it extended toward the southern boundary of the Solis rancho. I don't know the exact distance at the end of it, but it was a picket fence and partly a brush fence up to within 150 to 200 yards of the Solis and Las Animas grant. The brush fence was supposed to be straight with it where the picket fence is. The place where

the brush fence ended was brush and rocks and heavy timber; too rough to build anything but a brush fence. It was supposed to be in a straight line with that fence and as a continuation of the other as I marked the line that is supposed to be here. I didn't help build it but I helped my father work on the fence, but the brush fence this man Ossity and his son and a hired man was the ones that did the work on it to the end of it."

With this addition to the evidence, the court found, as it did in the former trial, that the fence was not built upon an agreed boundary line to settle any dispute, uncertainty or controversy arising concerning the true dividing line, the court finding:

> "That at the time said fence was built, and also for some time before then, the stock owned by one or the other of said parties would wander or stray over the land of the other, causing annoyance or trouble both to the owner of the land and to the owner of the cattle, and that to prevent this annoyance or trouble Dewitt C. Riddell and Peter Trombly agreed to build a fence to prevent the straying of the stock, and that a certain line was agreed upon, upon which to erect this fence both by Dewitt C. Riddell and Peter Trombly, the former to build the south half of said fence and the latter to build the north half thereof, and that, agreeable to this arrangement, and in either the year 1876 or in the year 1877 or in the year 1878, the fence was built by said Dewitt C. Riddell and said Peter Trombly upon such line. Said fence was not built upon an agreed boundary line between the Riddell tract and the Trombly tract to settle any dispute, uncertainty, or controversy arising over or out of the true location of the dividing line between the said two tracts of land."

It is true that the court also found, as it did at the first trial:

> "That the true location of the boundary line between the Riddell tract and the Trombly tract was uncertain at the time the fence line was so located, and that said parties intended to locate the true line between them."

The finding that the fence was built to prevent the straying of stock from one tract to the other and was not built upon an agreed boundary line to settle any uncertainty arising over the true location of the dividing line is inconsistent and irreconcilable with the finding that the parties intended to locate the true line between them. "Where there are contradictory findings about matters material to the merits of the case, and the determination of which, one way or the other, is essential to the correctness of the judgment, there the judgment cannot stand. Learned v. Castle, 78 Cal. 459 (18 P. 872) 21 P. 11. No judgment can properly be entered when the court finds both for the plaintiff and the defendant on a material issue." Fanta, etc., v. Maddex (Cal. App.) 252 P. 630.

It is useless, however, to pursue this discussion further, as this question was determined on the former appeal and unless the evidence here quoted establishes the fact that the dividing line was uncertain and the parties erected the fence intending to locate the true dividing line between their respective tracts, this question must again be determined adversely to respondent. In the testimony of George Arthur Trombly, above quoted, all that has any bearing on the intention of the parties to establish the true dividing line is contained in the statement:

> "There was the old fence that was marked between two places. That was put up to keep Riddell's stock out and Arthur's stock inside. It run from somewhere in the locality of tree 5 down to where it is marked here as the 'big rock,' and, after my father moved up onto the place, then they established the line through here."

This evidence falls short of being sufficient on which to base a finding "that the parties intended to locate the true line between them," and does not add anything material on this question to the record presented on the former appeal; and, further, the finding that "said fence was not built upon an agreed boundary line between the Riddell tract and the Trombly tract to settle any dispute, uncertainty, or controversy arising over or out of the true location of the dividing line between the said two tracts of land" is supported here, as it was in the former record on appeal, by the evidence. "The mere acquiescence in the existence of the fence and the occupancy of the land to the north of it would not amount to an agreement that it was on an accepted boundary line. And the large area of the irregular parcel subtended by the fence and the creek to which it extended would go far to indicate that the builders of the fence were fixing a line 'for occupancy and not for title.'" Staniford v. Trombly, 181 Cal. 372, 375, 186 P. 599, 600.

[3] As to defendants' claim of title by adverse possession, there is no evidence that they paid all taxes levied or assessed upon the land claimed. It was stipulated and conceded at the trial that the records of the assessor's and tax collector's offices show that practically every year from 1874–75 to 1909–10 the property has been described in such an uncertain manner that it is impossible to ascertain what line bounds the northerly or westerly boundary of the Riddell tract or the southerly or easterly boundary of the Trombly tract. The northerly or westerly line of the Riddell tract is bounded in the assessor's record by the land of Trombly, while the southerly or easterly line of the Trombly tract is bounded in said record by the land of Riddell or Riddell Bros., and Riddell paid taxes on 565 acres of land and Trombly paid taxes on 200 acres of land, the acreage called for respectively in their deeds. Our attention is directed by respondents to the testimony of George Arthur Trombly as establishing payment of taxes on the area in controversy as follows: "I paid the taxes on it (area in dispute) ever since 1898." This state-

ment, "area in dispute," inserted parenthetically by the author of the brief, is not borne out by the record. The witness testified:

> "I can locate the *20 acres* that was conveyed from Lydia L. Trombly and William T. Trombly to George A. Trombly. * * * I paid the taxes on it ever since 1898. * * * In Solis rancho 20 acres of land, bounded north by Trombly (reading receipt No. 8889). That's the piece right there.
>
> "Q. 8889 assessed to George Trombly. It seems to be described 20 acres of land (reading). A. That is the same one. There is some places they call it bounded by Trombly and some by the Watsonville road."

The area of land in dispute, according to the testimony of plaintiff's surveyor, Herrman, contains about 165 acres, and the surveyor McMillan, called by defendants, testified that it "includes near 30 acres in there, somewhere in there, roughly speaking. Of course, I would like to have the privilege of correcting that if it is not the correct amount, because that is assumed." It is therefore apparent that, if the 20 acres upon which George Arthur Trombly paid the taxes evidenced by tax receipt No. 8889, and which sometimes is described as bounded by Trombly and sometimes by the Watsonville road, as stated by George Arthur Trombly, is included in the area in dispute, he did not pay taxes on the entire tract in controversy. We are unable, however, from either map printed in the transcript—one introduced by plaintiff and the other by defendants—to locate this 20 acres. It is not material, however, as the court found that, after said deed was made by John H. Moore to said George T. Arthur (Trombly's predecessor), every assessment made to George T. Arthur or to the said Peter Trombly, or to his successors in interest, in each case stated that the lands being assessed were 200 acres; and the court finds that the deed from the said John H. Moore to George T. Arthur (Trombly's predecessor) included an acreage of 200 acres, without including parcels A or B (area in dispute), and also found that "neither George T. Arthur nor Peter Trombly, nor any of their or either of their successors in interest ever paid any taxes at any time on any land which was not expressly bounded on the south by the land of Dewit C. Riddell or Speer Riddell (plaintiff's predecessor) or the successors in interest of said Dewit C. Riddell and Speer Riddell or by one of them." The court thus found that after the deed to Arthur, every assessment made to Arthur or Trombly stated the lands being assessed were 200 acres, and that the deed to Arthur included 200 acres without including any portion of the disputed area, and such finding is supported by evidence and the stipulation as to the assessments. The defense, therefore, here, as on the former appeal, must fail "because defendants and their predecessors paid taxes on property comprising but 200 acres (the amount of land called for in their deeds), and appellant and his predecessors in interest paid taxes on 565 acres which must have included the land here in dispute. The defendants therefore do not hold title by adverse possession." Staniford v. Trombly, 181 Cal. 372, 376, 186 P. 599, 600.

As to appellant's assigned error of law, that the court erred in overruling the objection of plaintiff to the testimony of George Arthur Trombly given to show an estoppel, it may be said that, while such evidence does not establish an estoppel, the testimony complained of was admissible in support of defendants' claim of adverse possession, as it dealt with the use of the land by defendants.

What has been said renders a discussion of appellant's second assignment, that the court erred in permitting the witness McMillan to testify concerning the "Auzerais line," unimportant.

We find no evidence in the record calling for a different ruling than that made on the former appeal.

The judgment therefore is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

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90 Cal. App. 594

PEOPLE v. KUDER et al. (Cr. 1539.)

District Court of Appeal, Second District, Division 2, California. April 3, 1928.

As Modified April 24, 1928.

1. Criminal law ⚷1015, 1081—Filing of individual motions in arrest of judgment by defendants, tried and convicted under one indictment, did not necessitate separate appeals by state, and hence one notice of appeal was sufficient.

Where five defendants, charged and tried under one indictment, were convicted by same jury in one verdict and filed individual notices of motion in arrest of judgment, all in substantially identical language, and trial court made one order granting motion, from which state prosecuted single appeal filing single transcript, *held*, that mere presentation of question whether indictment stated facts sufficient to constitute public offense by each defendant individually did not convert prosecution into five separate cases, necessitating filing of five separate appeals, and hence appeal was not dismissable because only one notice was given.

2. Criminal law ⚷1015—Defendants convicted under one indictment, filing individual motions in arrest of judgment which were granted in single order, could not complain of single appeal from order.

Where defendants, tried under one indictment and convicted in one verdict, filed individual motions in arrest of judgment and court entered single order granting arrest, to which no objection was interposed nor attempt made to assert that order was prejudicial, *held*, that

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

defendants could not complain in motion to dismiss state's appeal from order so granted of treatment of their motions below, nor of appeal therefrom as being one proceeding.

3. Criminal law ⚷1081—Notice of appeal by state from order granting arrest of judgment held sufficient, despite insufficient entry of clerk (Pen. Code, § 1241).

Notice of appeal given by state's attorney from order granting arrest of judgment announced in open court at conclusion of ruling, that "We give notice at this time of appeal, to save our rights," and notice in writing thereafter being served and filed that state appealed from an order granting defendants' motion in arrest of judgment *held* sufficient despite incomplete minute notation of appeal by clerk of court, since Pen. Code, § 1241, provided that absence of entry of announcement of appeal should not invalidate appeal.

4. Clerks of courts ⚷66—Criminal law ⚷643—Clerk of court, ordinarily, has no judicial powers; certified report of official reporter is prima facie evidence of proceedings reported by him (Code Civ. Proc. § 273).

Ordinarily, clerk of court is but ministerial officer and is clothed with no judicial powers, whereas certified report of official reporter is prima facie evidence of proceedings reported by him by virtue of Code Civ. Proc. § 273.

5. Criminal law ⚷1081—Notice of appeal on ground that court erred in granting defendants' motion in arrest of judgment held sufficient.

Notice of appeal *held* not insufficient in that grounds therefor were not specified, where trial court granted motion in arrest of judgment on sole ground that indictment did not state public offense and appeal was specifically based upon ground that court erred in granting defendants' motion in arrest of judgment; there being no showing that respondents were misled by insufficient notice.

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

J. M. Kuder, E. B. Fishel, U. R. Fishel, C. G. Luke, and Stephen Bedford were convicted of a violation of the Corporate Securities Act. From an order granting defendants' motions in arrest of judgment after conviction, the People appeal, and defendants move to dismiss the appeal. Motion denied.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

J. M. Friedlander, Corporation Com'r, H. A. I. Wolch. Asst Corporation Com'r, and Vernon S. Gray, Deputy Corporation Com'r., all of Los Angeles, amici curæ.

Arthur L. Veitch, of Los Angeles, for respondent Kuder.

Estudillo & Schwinn, of Riverside, for respondents E. B. Fishel and U. R. Fishel.

P. N. McCloskey, of San Bernardino, for respondent Luke.

William Guthrie and R. E. Hodge, both of San Bernardino, for respondent Bedford.

CRAIG, J. The five defendants and respondents herein were jointly indicted, tried by a jury, and convicted of an alleged violation of the Corporate Securities Act St. 1917, p. 673, as amended. The verdict was returned on June 24, 1927, that:

> "We, the jury in the above-entitled action, find the defendants guilty as charged in the indictment."

The trial court fixed June 29, 1927, as the date for sentence. On June 24, after the rendition of the verdict, the defendant E. B. Fishel filed a motion in arrest of judgment. Thereafter, and on June 29th, Luke, Kuder and Bedford filed motions to vacate the verdict and for a new trial, and each of the Fishels filed motions for a new trial; on the date last mentioned Kuder, Bedford, and Luke filed motions in arrest of judgment, and on July 1st, U. R. Fishel filed a motion in arrest of judgment, at which time all of the motions were presented and argued by counsel for the respective defendants. Thereupon a recess was taken until 2 o'clock p. m. of the same day, and the transcript of the clerk of the trial court recites the following order as having been then made:

> "This being the time heretofore continued to for the further hearing on motions for new trials, motions for arrest of judgment and for pronouncing judgment, the defendants are present with their counsel and the district attorney is also present.
>
> "Motions for arrest of judgment of each and all defendants herein are granted on the ground that the indictment does not state facts sufficient to constitute a public offense."

The motions to set aside the verdict and for a new trial were not acted upon. The district attorney announced at the time of the trial court's ruling: "We give notice at this time of appeal, to save our rights." Entry was made in the clerk's minutes that: "The district attorney gives notice of appeal." Thereafter and on July 6, 1927, the district attorney filed the following notice in writing:

> "Written Notice of Appeal by the Plaintiff from an Order Granting Defendant's Motion in Arrest of Judgment.
>
> "Supplementing the oral notice of appeal given and made in open court on the 1st day of July, 1927, by Geo. H. Johnson, district attorney in and for the county of San Bernardino, state of California, for and on behalf of the people of the state of California, at the time of the granting of defendants' motion in arrest of judgment, written notice is hereby given by the people of the state of California that they appeal to the District Court of Appeal of the state of California, Second appellate district, from an order granting defendants' motion in arrest of judgment, made and entered on the 1st day of July, 1927."

On the same date a "Statement of Grounds of Appeal, and Application under section 1247 of the Penal Code of the State of California,"

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

was filed, specifying as "general grounds": "That the court erred in making an order granting defendants' motion in arrest of judgment." The statement and application further reads as follows:

> "The people of the state of California designate that, in order to properly present their appeal, it will be necessary to have all of the phonographic reporters' notes transcribed covering the entire proceedings of the trial, together with all records and documents filed in said cause, and the clerk's transcript, as required by the Penal Code of the state of California; and plaintiff hereby requests that an order of the court be made accordingly."

Subsequently, and within the statutory time therefor, a transcript was filed, and the appellant served and filed its opening brief.

The respondents Fishels, Luke, and Bedford each now present separate motions in this court, wherein the respondent Kuder joins by stipulation, that the plaintiff's appeal be dismissed, and they assert as grounds for such dismissal that: (1) The purported notice of appeal did not specify or refer to the order or judgment from which appeal was taken. (2) But one notice of appeal was given, and but one transcript, and one brief filed in a matter involving five purported appeals, from five separate and distinct orders. (3) The notice does not meet the requirements of section 1247 of the Penal Code, fails to state in general terms or at all the grounds of appeal or points upon which appellant relies, and does not constitute a legal notice of appeal.

[1] The principal ground upon which these motions are based is, as succinctly stated on behalf of the respondent Fishels, that:

> "The conclusive interpretation of the action of the trial judge is that five orders were made. It must be conceded that, five separate motions being made, each motion should be taken care of by a separate order. This was the duty of the trial judge. In support of the judgment of the trial court, the presumption of regularity must be indulged in, and this being so, we must presume that the trial judge did his duty by making one order for each of the motions."

It is insisted that since a single appeal is insufficient to obtain a review of separate causes, tried together, where separate judgments have been rendered, separate transcripts should be filed, and distinct appeals prosecuted. An apt illustration of the respondents' theory is presented by the case of Washington v. State, 32 Ga. App. 72, 122 S. E. 629, wherein it was said that the court having separately passed upon each motion, the two distinct and separate judgments overruling the two distinct and separate motions for a new trial cannot be reviewed in one bill of exceptions. The cited case, it is argued, "is on all fours" with the instant one. We are unable to agree with the respondents' asserted analogy between several individual orders or judgments, based upon separate trials or motions, arising from consolidated cases, which was the situation in the case of Washington v. State, supra, and that of a single order, granting an arrest of judgment to five defendants, jointly indicted and convicted of a united and concerted violation of law, in one transaction, although represented by different counsel, as the record here shows the proceeding to have been presented, conducted and concluded.

The indictment in this case charged that the five named defendants were accused of the crime of a violation of the Corporate Securities Act, a felony, in that they did on or about the 30th day of September, 1925, willfully, unlawfully, knowingly, fraudulently, and feloniously authorize and direct and aid in the issue and sale of, and cause and assist in causing to be issued, executed and sold, certain stock certificates and securities, contrary to the form, force, and effect of the statute in such cases made and provided. They were tried together upon the foregoing indictment, and were convicted by the same jury, in one verdict. Individual notices of motion in arrest of judgment were served and filed on behalf of each defendant, by his respective counsel, but all were in substantially identical language, seeking the same result, and the arguments of defendants' various counsel were presented simultaneously. The trial court, as we have observed, made its order granting the "motion in arrest of judgment," as appears by the transcript of the official reporter.

We think the opinion in State v. Boylston, 138 La. 21, 69 So. 860, is clearly applicable to the facts of the instant case. There, three indictments were returned, to which exceptions were taken by three motions to quash; the same questions of law were presented in the three cases; and, although not consolidated, they were argued together, and the trial court by one opinion and decree granted the motion in each case. In denying motions to dismiss an appeal from such order upon the ground that there should have been three separate orders and appeals therefrom, the Supreme Court of Louisiana said:

> "It is evident, therefore, that, as the opinion and decree were identified, by title and number, with, and were intended to apply alike to the three cases which had been argued together, and in which the same motion to quash had been sustained, so the motion and order of appeal, similarly identified, were intended to be applied to the opinion in its relation to the three cases, respectively; and, as defendant does not, and cannot, well deny the application of the decree to each of the cases, he cannot be heard to deny the application of the motion and order of appeal to the decree, as so applied to the cases. * * * We do not consider, however, that there was any greater irregularity in deciding and appealing the cases, as was done,

than there was in arguing them together, since the convenience of the litigants was equally subserved, and the cases no more lost their respective identities in one instance than in the other."

But one case, presented under one indictment, and in which a single verdict was rendered, constituted the basis of the question before the trial court, to wit, as to whether or not the indictment stated facts sufficient to constitute a public offense. This being so, it is inconceivable that the mere presentation of that question by each defendant individually could any more convert the prosecution and conviction into five separate cases than would the fact that each defendant individually pleaded "not guilty" to the indictment. And especially is this emphasized by the record herein, which discloses that certain defendants requested and were denied a severance, and that thereafter all counsel agreed that:

> "All motions made, and all evidence introduced, either orally or documentary, and all evidence offered, shall be deemed to have been made and offered by and on behalf of each and all of the defendants, unless the contrary appears."

[2] Conceding merely for the sake of argument that each of the defendants would have been entitled upon request to an individual verdict, and a separate ruling upon each motion filed, no such request was made, no objection was interposed to the action of the trial court in sustaining their contention by a single order, and they do not attempt to assert that the verdict or order as entered was prejudicial. Hence respondents cannot now complain of the treatment of their motions below, nor of the appeal therefrom, as being one proceeding. People v. Gayle (Cal. Sup.) 259 P. 750.

[3, 4] The argument that the notice of appeal was insufficient is equally without merit. Counsel for the people announced in open court at the conclusion of the ruling: "We give notice at this time of appeal, to save our rights." Thereafter notice in writing was served and filed, that the people of the state of California appealed "from an order granting defendants' motion in arrest of judgment." But one order having been made, and the district attorney having appeared on behalf of the people, there can be no doubt as to the identity of the order from which an appeal was taken, nor as to the party appealing. The entry made by the clerk of the court recited that: "The district attorney gives notice of appeal." It is contended that this falls far short of the statutory entry under section 1241 of the Penal Code, which requires that:

> "Any announcement of appeal made in open court by either the defendant or the people, must be by the clerk immediately entered in the minutes of the court."

It is to be observed, however, that the section mentioned contains the further provision:

> "But the failure of the clerk to so enter the same in the minutes shall *in no way affect* or invalidate the appeal."

The phonographic transcript, as heretofore stated, discloses that the district attorney, as counsel for the people, announced that "We give notice at this time of appeal, to save our rights," which can bear no other construction that the people of the state of California appealed from the order then made by the trial court. It is true that the brief notation of the court clerk consisted of the mere *fact* that counsel for the people announced that he appealed, but the transcript of the county clerk also contains the further notice in writing, and it appears that the appeal was perfected, and that respondents appeared and filed briefs therein. It has uniformly been held that ordinarily the clerk of a court is but a ministerial officer, and is clothed with no judicial powers (8 R. C. L. 626; Wolf v. Mulcrevy, 35 Cal. App. 80, 169 P. 259; Rose v. Lelande, 20 Cal. App. 502, 129 P. 599), whereas the certified report of the official reporter is prima facie evidence of the proceedings reported by him (Code Civ. Proc. § 273). The authorities cited by respondents involved cases wherein the certified record of the *county clerk* contained defective entries which prejudicially affected the rights of parties to appeals, and it was held that the injured party was entitled upon motion in the trial court to have the record so amended as to speak the truth. We cannot say, therefore, that in the face of the official stenographic record, an incomplete minute notation by the court clerk should be permitted to prejudice the parties' legal rights, when it is expressly provided by statute that the absence of any entry by him shall not have such effect.

[5] It is also contended that the notice of appeal is insufficient in that the grounds of appeal are not specified. As already observed, the trial court granted the motion in arrest of judgment upon the sole ground that the indictment did not state a public offense, and the appeal was specifically based upon the ground that "the court erred in making an order granting defendants' motion in arrest of judgment." It requires no exertion of more than ordinary reasoning to conclude from this as the people had specified the only ground which was available, or in fact, existent, the appeal was founded upon the contention that the court had erred in ruling that the indictment did not state a public offense. Further, respondents do not attempt to assert that they were, or could have been, misled thereby.

The motion to dismiss the appeal is denied.

We concur: WORKS, P. J.; THOMPSON, J.

90 Cal. App. 751

OUTRAM v. CHAPMAN. (Civ. 5225.)★

District Court of Appeal, Second District, Division 1, California. April 10, 1928.

Rehearing Denied May 8, 1928. Hearing Denied by Supreme Court June 6, 1928.

Appeal and error 🔑1011(1)—Finding of trial court, based on conflicting evidence, held binding on appellate court.

Finding of trial court in plaintiff's favor, based upon conflicting evidence, *held* binding on appellate court on appeal.

Appeal from Superior Court, Los Angeles County; John L. Hudner, Judge.

Action by Mrs. Jessie M. Outram against H. C. Chapman for money had and received. Judgment for plaintiff, and defendant appeals. Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Henry M. Lee, of Los Angeles, for respondent.

WOOD, Justice pro tem. Plaintiff alleged in her complaint that defendant became indebted to her in the sum of $750 for money had and received for her use and benefit; that one-half of this sum had been paid, and the balance was still due and payable. The trial court made findings in favor of plaintiff, and defendant appeals from the judgment rendered thereon. Defendant, with one other, was the owner of a parcel of land which plaintiff agreed to purchase. An instrument dated October 23, 1923, was drawn up by Kells & Grant, real estate brokers, which both parties signed, and which contained a number of provisions such as are usually found in instruments of this kind. In the document receipt was acknowledged by the brokers of the sum of $750 "as deposit and part payment on account of the purchase" of the lot. Apparently both plaintiff and defendant believed it was necessary to complete the transaction within 30 days from October 23, for both testified that there were some negotiations for an extension of time beyond this date. It is not necessary to here set forth the details of this agreement, since neither party complied with its terms. Plaintiff did not complete her cash payment, and defendant did not tender a deed. On December 8, 1923, defendant sold the property to another party through the instrumentality of Kells & Grant. Plaintiff would clearly be entitled to the return of all of her deposit, unless she forfeited the right to demand one-half of it by the taking of the option on the property hereinafter mentioned.

Kells & Grant, on November 24, 1923, obtained from defendant a written option on the lot in question by which they secured the exclusive right to purchase it until December 3, 1923. For this option, which was obtained in their own name, they paid to defendant the sum of $375 out of the deposit of $750 theretofore made by plaintiff, and returned to plaintiff the sum of $375. Defendant now contends that Kells & Grant were acting as agents of plaintiff, and were authorized by her to obtain the option for her and make the payment from her deposit. Ample evidence was introduced to support defendant's position, and, if it had been believed by the trial court, judgment would doubtless have been rendered for defendant. There was, however, a sharp conflict of testimony on the subject of the option. Plaintiff testified that she did not authorize Kells & Grant to pay to defendant the sum of $375, and had never heard of the option before the commencement of the action. We are therefore confronted with the ordinary case of a conflict of evidence in which the trial court found in plaintiff's favor, and in which we are bound by the findings of the lower court. Except in the testimony of the witness Lint, which is contradicted by Mrs. Outram, there is nothing in the evidence which discloses an authorization, either express or implied, on the part of the brokers to obtain the option and pay for it out of plaintiff's funds.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

COACHELLA VALLEY COUNTY WATER Dist. v. STEVENS. (Civ. 3386).†

District Court of Appeal, Third District, California. March 26, 1928.

Hearing Granted by Supreme Court May 24, 1928.

1. Waters and water courses 🔑107(3)—Complaint in action to restrain defendant's taking subterranean water from own land for other than domestic purposes held not to state cause of action.

Petition in action by a county water district to restrain defendant from taking water from his own land for other than domestic purposes *held* not to state facts sufficient to constitute a cause of action, since it contained no allegations that defendant was digging wells where he had no right to sink them; mere statement that defendant was tapping subterranean water sources not establishing fact that he was proceeding to do what he had no right to do.

2. Pleading 🔑8(2)—Allegation that defendant proposed to take and spread subterranean water on land and waste it held conclusion and not statement of fact.

In action by county water district to restrain defendant from taking water from his own land from underground sources on theory that it interfered with rights of riparian users, an allegation that defendant proposed to spread

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★Rehearing denied. Hearing denied by Supreme Court.

†Superseded by opinion of Supreme Court, 274 P. 538.

water on his land and waste the same *held* simply a conclusion and not a statement of fact.

3. Waters and water courses 🔑101—Owner of land above belt saturated with percolating water is entitled to reasonable use thereof, though use interferes with neighbor's use.

Owner of land lying above belt saturated with percolating water is entitled to reasonable use thereof on his own land, though use interferes with water percolating in or to neighbor's soil.

4. Waters and water courses 🔑101—Owner of land above belt saturated with percolating water has no right to take and carry such water to distant lands.

Owner of land lying above belt saturated with percolating water has no right to carry water to distant lands for purposes of sale, etc.

5. Statutes 🔑109—Whatever is germane to purposes of act may be held as included within title, though not specifically mentioned.

Whatever is germane to the purposes of an act may be held as included within the title, even though not specifically mentioned therein.

6. Waters and water courses 🔑107(3)—Water district held not proper plaintiff in action to restrain landowner's taking subterranean water from land within district, where district owned no land affected (St. 1913, p. 1049, § 12, subd. 6, as amended by St. 1923, p. 312, § 1).

Where county water district, organized pursuant to St. 1913, p. 1049, § 12, subd. 6, as amended by St. 1923, p. 312, § 1, brought an action to restrain an owner of land within such district from using water, which he procured by sinking wells into saturated belt, for such purposes as he desired, *held*, that the district was not a proper party plaintiff, since it owned no land in such district.

7. Waters and water courses 🔑107(3)—Water district held not proper plaintiff in action to restrain landowner's use of privately owned percolating waters within district, on theory plaintiff represented public (St. 1913, p. 1049, § 12, subd. 6, as amended by St. 1923, p. 312, § 1).

County water district organized under St. 1913, p. 1049, § 12, subd. 6, as amended by St. 1923, p. 312, § 1, *held*, not proper plaintiff, on theory it represented the public, in action to restrain landowner's use of percolating waters within district, where it desired waters to be used in irrigating lands of private owners, since such waters were not public property.

8. Waters and water courses 🔑216—Statutory provisions affecting water district's water rights apply only to property in which district has ownership or pecuniary interest (St. 1913, p. 1049, § 12, subd. 6, as amended by St. 1923, p. 312, § 1; Const. art. 4, § 24).

St. 1913, p. 1049, § 12, subd. 6, as amended by St. 1923, p. 312, § 1, relative to county water district's rights as to water use, applies, in view of Const. art. 4, § 24, only to property owned by or in which water district, as such, has ownership or pecuniary interest.

9. Waters and water courses 🔑107(1)—That landowner would waste water unless restrained gave district no right of action, where it owned no land affected (St. 1913, p. 1049, § 12, subd. 6, as amended by St. 1923, p. 312, § 1).

In action by county water district, organized pursuant to St. 1913, p. 1049, § 12, subd. 6, as amended by St. 1923, p. 312, § 1, to restrain landowner within district from certain use of water percolating beneath surface of his land, complaint's allegation that defendant would spread water over certain lands and waste same *held*, in view of St. 1907, p. 122, not to give district right of action, where it was not owner of any lands affected.

10. Waters and water courses 🔑101—That many landowners might be adversely affected by landowner's use of percolating waters held not to make private right to use subject to public regulation (St. 1913, p. 1049, § 12, subd. 6, as amended by St. 1923, p. 312, § 1).

Mere fact that number of landowners in water district organized pursuant to St. 1913, p. 1049, § 12, subd. 6, as amended by St. 1923, p. 312, § 1, might be adversely affected by landowner's use of waters percolating beneath his land, *held* not to make his private right to use thereof subject to regulation as public property.

11. Waters and water courses 🔑107(3)—Statute relative to joinder of parties held not to support water district's action to restrain landowner's use of percolating waters, where district owned no land (St. 1913, p. 1049, § 12, subd. 6, as amended by St. 1923, p. 312, § 1; Code Civ. Proc. §§ 369, 382).

Code Civ. Proc. § 382, providing for suit by one for benefit of many persons under certain circumstances, and section 369, relative to defense by trustee, *held* not to support action of county water district organized pursuant to St. 1913, p. 1049, § 12, subd. 6, as amended by St. 1923, p. 312, § 1, seeking to restrain owner of land within such district from using percolating waters as he desired, since, in view of Code Civ. Proc. § 379, and Const. art. 4, § 25, subds. 19, 33, the district, owning no land, had not such interest as required for suit.

12. Waters and water courses 🔑107(1)—"Police power" held not to authorize water district's action against landowner to restrain use of percolating water.

"Police power" of state *held* not to authorize county water district's action against landowner to restrain his use of water, where district owned no land, since police power must have for its foundation public peace, health, safety, or welfare of the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Police Power.]

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by the Coachella Valley County Water District against Prescott T. Stevens. Judgment for defendant, and plaintiff appeals. Affirmed.

H. L. Carnahan and J. M. Stevens, both of Los Angeles, and Thomas C. Yager, of Indio, for appellant.

W. G. Irving and Sarau & Thompson, all of Riverside, for respondent.

PLUMMER, J. The complaint in this action sets forth that on or about the 16th day of January, 1918, the appellant was and ever since said date has been a duly incorporated county water district in the county of Riverside, state of California, and was so incorporated under an act of the Legislature, entitled "An act to provide for the incorporation and organization and management of county water districts, and to provide for the acquisition of water rights or construction thereby of waterworks and for the acquisition of all property necessary therefor, and also to provide for the distribution and sale of water by said districts," approved June 10, 1913, and amendments thereto; that said water district is situate wholly within the county of Riverside and includes within its exterior boundaries a number of sections of land particularly mentioned and described commencing at a place near the north boundary line of Riverside county, from whence the exterior boundary lines of said district are mentioned and set forth showing that it comprises a tract of land in said county lying in a southerly and southwesterly direction therefrom embracing the lands lying in the valley from which the district derives its name. The complaint then describes the valley referred to as extending from a certain mountain known as and called "San Gorgonia" on the northerly line of said Riverside county in a southeasterly direction some 60 miles to the shore of the Salton Sea. The height of the mountains surrounding the valley, the width of the valley, its elevation above sea level, and the natural incline of the valley are all particularly described. It is then alleged that the Whitewater river is a natural stream of water flowing in a well-defined channel along the course and over the land particularly described in the complaint; that said stream rises on the southerly and easterly slopes of San Gorgonia Mountain and other mountains adjacent thereto, and thence flows southerly down through and across the lands described as lying within the Coachella Valley County water district.

It is further alleged in the complaint that during the rainy season large quantities of water and snow fall upon the slopes of the mountains referred to and are thence carried down through the Whitewater river toward the sea. The lands within the district are described as being mostly arable, and with water, susceptible of being brought up to a high degree of cultivation, but that without water said lands are arid and unproductive. The complaint further alleges that some 13,000 acres of land within said district have been cultivated and irrigated, and that, if sufficient water were available, at least 72,000 acres of land lying in said valley might be brought under cultivation and valuable crops raised thereon; the fact that the annual rainfall within said district is but light, and the necessity for irrigation is alleged, and the source of water for irrigation described as the Whitewater river hereinbefore mentioned, having its origin and course as stated; that the water in said river in its course from the said San Gorgonia Mountain runs in a good surface stream until it reaches a certain described tract of land belonging to the defendant in this action, where it encounters a dike or strata of soil impervious to water, which causes it to accumulate in a subterranean reservoir, and from this place in the stream on down in its course to the Salton Sea the bed of the stream is porous and of such a character as permits the water to sink beneath the surface and also of such a character that it takes up and holds the water coming down in said Whitewater river to such an extent that large quantities thereof are rendered available for irrigation; that the water so finding its way into and saturating the masses of gravel and other material underlying the plain of said valley and along the course of said river has been extracted and withdrawn therefrom, at great expense, by means of pumps operating by motors and engines, and that for many years wells have been so operated along said valley, and subterranean waters taken from said plain and used by the owners of lands and the inhabitants of towns and villages in said valley for domestic purposes and for irrigation, and that such subterranean water constitutes the only course from which landowners can obtain water for the uses mentioned. The complaint then sets forth that the amount of water which can be obtained from the subterranean sources is insufficient for irrigating the lands lying within said valley that could be profitably utilized if water could be obtained for the irrigation thereof, and that any diminution or depletion of the underground waters in said plain or in the amount of water supplying and replenishing the same would necessarily diminish the amount of water produced therefrom by pumping, and would deprive the owners of the land in said district of water necessary for the uses and purposes hereinbefore mentioned.

The complaint then alleges that the defendant is and for more than 20 years preceding the beginning of this action his predecessors have been the owners of certain lands particularly described in the complaint, and that said lands are not suitable for cultivation; that no part of the water of said stream is necessary for irrigating the same, and that the only beneficial use that can be made thereof is for domestic purposes, and that a constant flow of one-fiftieth of a cubic foot per second of time is reasonably sufficient for such purpose. It is then alleged that along the northerly boundary line of the land belonging to the defendant there is a natural dike in the soil, impervious to water, extending to, or near, the surface of the ground and across the channel of Whitewater river; that said dike causes all water flowing thereto in said stream or percolating therefrom to the soil beneath and adjacent to said stream, to rise, at and where said dike exists, to or within 15 feet of the surface of the ground, and thereby forms a natural underground reservoir or basin above said dike, and from said reservoir said water flows as a running stream in a narrow and well-defined channel over said dike to the lands below; that within three months preceding the beginning of the action said defendant has entered upon his lands at and about said dike and over said natural reservoir, and without the consent of the plaintiff or of any owner of land riparian to or appropriator or user of water in said stream along the course thereof below said land of defendant, or of any other inhabitant of said district, and against the protest of the plaintiff and the will of said owners of land riparian to said stream and the appropriators and users thereof and of said inhabitants of said district, has begun to construct and drill and complete upon said lands of defendant, and at, upon, or near to said dike, and over and within said natural reservoir, a well, or wells, and that defendant intends thereby to pump or otherwise obtain all waters flowing in said stream, or retained in said reservoir and to build and construct dams and other works and ditches for the diversion of said or a large portion of the water flowing or percolating therein and through the soil above, and thence, by means of dams or other works, ditches, pipe lines, and other conduits, to take, divert, appropriate, and carry away from said stream and from said reservoir and away from said lands riparian to said stream along the courts thereof below said reservoir to section 10, in township 4 south, range 4 east, and other lands adjacent thereto, and southerly and southeasterly therefrom all of the waters so impounded to the amount of 60 cubic feet per second constant flow, and to spread and waste the same upon and over said lands; and that unless restrained from so doing, said defendant will so complete said wells and dams and other diversion works and take, divert, appropriate, and carry away said waters to said lands, and thereby deprive the plaintiff, the appropriators, and present users of said waters of the use and benefit thereof, and that unless restrained from so doing, said defendant will sink and complete said wells, construct dams, ditches, and other diversion works, and take and carry away therefrom to said section 10 all of said water to the amount hereinbefore alleged, and there spread and waste the same upon said land.

The complaint further alleges that prior to the year 1922 the defendant, Stevens, and his predecessors in interest claimed and now claims a right in and to the waters of Whitewater river which said waters were diverted from said stream in the northeast quarter of section 24, township 3 south, range 3 east, S. B. B. & M.; that thereafter, and on or about the 15th day of March, 1922, the defendant Stevens changed and caused to be changed his point of diversion aforesaid and is now threatening to divert and diverting said water from a point approximately 17,000 feet up the bed of said stream from said original point of diversion, thereby taking and removing said waters from the bed of said Whitewater river, changing the natural course thereof, preventing the riparian use of a subsurface flow from said waters, and decreasing the flow of the waters in said Whitewater river, to the great and irreparable damage and injury of the plaintiff herein.

The complaint concludes with a prayer for an injunction restraining the defendant from completing his wells, from pumping water from the reservoir underneath his lands referred to, from taking waters from said reservoir for other than domestic purposes, and also for an injunction restraining the defendant from changing the point of diversion of the waters alleged to have been taken therefrom by appropriation, as just herein stated, and also that it be decreed that the owners of land in said Coachella Valley have a superior right over the defendant as riparian owners of the waters herein referred to.

To this complaint the defendant, Stevens, demurred, setting forth as follows: That the Coachella Valley County water district, plaintiff herein, has not legal capacity to sue for the reason that it appears affirmatively in the complaint that the plaintiff has no right, title, or interest in or to any real or personal property situated within the boundaries of said district, or in or to any water or water rights used for any purpose within said district, and is not authorized by law to prosecute said action; that the plaintiff is not the real party in interest; that said complaint does not state facts sufficient to constitute a cause of action; that there is a defect or misjoinder of parties plaintiff in said action, for the reason that the persons who are alleged in said complaint to be the owners of the riparian lands therein described and who are alleged to own and possess rights to appropriate water from the Whitewater river, etc., are not named as parties plaintiff.

The demurrer interposed by the defendant, Stevens, was sustained without leave to amend, and on the 20th day of January, 1925, judgment was entered in favor of the defendant for his costs and dismissing the plaintiff's complaint. From this judgment the plaintiff appeals.

[1-4] The foregoing résumé of the complaint shows clearly that it does not state facts sufficient to constitute a cause of action. It contains no allegations or statement of facts showing that the defendant is digging wells where he has no right to sink the same, nor are there any statements of fact that the defendant is not entitled to draw water from the subterranean sources underneath his own property. The mere statement that the defendant is proceeding to sink wells upon his own land, to tap subterranean sources of water thereunder, and also the waters percolating and saturating the soil under his own lands, establishes the fact that the defendant is proceeding to do just what he has a legal right to do. It requires no citation of authorities to show that an owner of land has a right to sink wells thereon to obtain a water supply for use upon his real estate. There are no facts contained in the complaint from which it can be reasonably concluded that the defendant proposes to take any water beyond the confines of the watershed of the Whitewater river or beyond the watershed contributing to the Coachella Valley. The mere allegation that the defendant proposes to spread water upon his land and waste the same is not a statement of any fact, but is simply a conclusion. There is nothing in the complaint to the effect that the defendant is wrongfully sinking any wells upon his own land or is wrongfully taking any water, or is taking any water, or proposes to take any water to which he is not entitled. From the facts alleged in the complaint that the defendant is sinking wells upon his own lands, it is evident that no allegations can be truthfully made that the defendant is wrongfully sinking wells thereon, or that taking water therefrom would be wrongful. Even if the facts alleged in the complaint are sufficient to bring this action within the rule announced in Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, the defendant, as the owner of land lying above the belt or strata which has become saturated with percolating water, is entitled to a reasonable use thereof on his own land, notwithstanding such reasonable use may interfere with water percolating in or to his neighbor's soil. The limitation as to such owner's right is that he shall not make an unreasonable diversion of such waters percolating therein, and, as further said in the case just referred to, such waters cannot be carried to distant lands for purposes of sale, etc. In other words, all the owners of land lying above a saturated belt are entitled to make reasonable use of the waters found beneath their own lands. No facts are stated in the complaint showing that the defendant was not, or is not making reasonable use of all waters extracted and proposed to be extracted by means of wells sunk or being sunk upon premises belonging to himself.

It may also be stated here that there are no facts set forth in the complaint showing that the plaintiff is the owner of any of the lands within the district, or that the plaintiff is the owner of any water or water rights therein, or that any of the acts or contemplated acts of the defendant will in any manner whatsoever injure any property rights of the plaintiff.

Notwithstanding the want of merit in the complaint as shown by the foregoing statement of particulars, it is evident, as shown by the opinion of the trial court giving reasons why the defendant's demurrer should be sustained, and also from the fact that the demurrer was sustained without leave to amend, the trial court, in its ruling, went directly to the vital defects in this action aimed at by the demurrer, to wit, that the plaintiff has no capacity to sue in this action.

This action is based entirely upon the assumption that the Coachella County water district has a legal right to become either plaintiff or defendant or intervene in any controversy affecting simply the private rights of the private landowners owning land within the territorial boundaries of the water district, though none of the waters referred to in the complaint belong to the plaintiff. The plaintiff owns no land. It is simply a water district. The title of the act under which the water district was incorporated specifies that such a district may acquire water rights, may construct waterworks, and may provide for the distribution and sale of water, but there is no pretense in this action that the Coachella water district has acquired any water rights, has constructed any waterworks, or is selling or distributing any water, or that it has any interest whatever that will be interfered with by the alleged acts of the defendant. The right of the plaintiff to institute and prosecute this action for the settlement of private disputes concerning water and the preventing of one landowner taking, from the waters beneath the surface of his land, waters that would otherwise percolate to and saturate the soil beneath another landowner, is based upon subdivision 6 of section 12 of the act approved June, 1913 (Stats. 1913, p. 1049), as amended by the act of the Legislature approved May 11, 1923 (Stats. 1923, p. 312, § 1). This subdivision is in the following words and figures, to wit:

> "To store water for the benefit of the district; to conserve water for future use; to appropriate, acquire and conserve water and water rights for any useful purpose; to commence,

maintain, intervene in and compromise, in the name of the district, and to assume the costs of any action or proceeding involving or affecting the ownership or use of waters or water rights within the district used or useful for any purpose of the district or a benefit to any land situated therein; to commence, maintain, intervene in, defend and compromise actions and proceedings to prevent interference with or diminution of the natural flow of any stream or natural subterranean supply of waters used or useful for any purpose of the district or a common benefit to the lands within the district or its inhabitants; and to commence, maintain and defend actions and proceedings to prevent any such interference with the aforesaid waters as may endanger the inhabitants or lands of the district."

On the part of the appellant it is contended that this subdivision authorizes the maintenance of this action by the water district, even though it has no ownership whatever in the lands involved or in the waters in controversy, or in the waters about to be taken and used by defendant. On the part of the respondent it is urged that the subdivision referred to gives no such authority; that such authority, if given by the subdivision, is not included within the title of the act, is not germane thereto or to anything contained therein, and is therefore, to that extent, unconstitutional. The title of the act, as it appeared in 1913, and as it was carried down by successive amendatory acts, is as follows:

"An act to provide for the incorporation and organization and management of county water districts, and to provide for the acquisition of water rights or construction thereby of waterworks and for the acquisition of all property necessary therefor, and also to provide for the distribution and sale of water by said districts."

[5] We do not need to cite authorities to the effect that whatever is germane to the purposes of the act may be held as included within the title, even though not specifically mentioned therein. For instance, the title of the act provides for the acquisition of water rights, which would necessarily include the power to purchase water rights and the power to appropriate water. The title of the act also provides for the construction of waterworks, which would include, as germane thereto, provisions relative to the raising of money with which to construct such waterworks. The title also provides for the acquisition of property necessary for the construction of such works. Germane to the title would be the acquiring of real estate upon which to construct the works, such as dams, ditches, etc. The act further provides for the distribution and sale of water by the district. This would necessarily include, as germane thereto, all the regulations as to the distribution and sale of water and the use thereof by the parties to whom it might be sold, or for whose use distribution is made. Also the title of the act would include all provisions relative to the organization and management of the property of the district; that is, of property belonging to the district, and not simply property lying within the territorial boundaries of the district. It may be here stated that the argument of the appellant seems to proceed upon the theory that the rights of the water district extend to all the lands and waters lying within the territorial limits of the water district, irrespective of the fact that it has absolutely no ownership therein.

Turning our attention to subdivision 6 of section 12, as amended in 1923, we find that it provides for storing water for the benefit of the district; conserving water for future use; that a district is empowered to appropriate, acquire, and conserve water and water rights; to commence, maintain, intervene in and compromise in the name of the district and assume the costs of any action or proceeding involving or affecting the ownership or use of water or water rights within the district, and used or useful for any purposes of the district or of benefit to any lands situated therein. These provisions, if interpreted to relate to any property, whether land, water, or water rights, would be germane to the purposes mentioned in the title; but, if the provision relative to compromising suits between private individuals, or beginning or defending suits to settle mere disputes between private individuals, it is evident that the title contains nothing to which such a power would be germane. The district, after acquiring any water or water rights useful for the district or useful for the common benefit of the district, would have a right to maintain actions to prevent interference therewith, and would have a right to compromise and settle any actions in which the ownership of the district in and to the water or water rights might be involved.

[6] We do not think that the inclusion, within subdivision 6 of section 12, of language which might possibly be construed to refer to any waters used or useful for any lands within the district or its inhabitants, refers to any waters other than those in which the district, as a district, has an ownership. It certainly cannot be held that it was the intent of the Legislature to create a legal entity which might play the part of a super-plaintiff or a super-defendant in settlement of mere private rights, or that such a super-plaintiff or super-defendant should exercise the prerogative of settling, compromising, or adjusting mere private disputes. The different provisions of the subdivision of the section referred to must all go back and relate to the purposes for which water districts may be created, and when we go back to the title of the act and read therefrom the purpose or purposes, we find

that it is for the acquisition of water rights, for the construction of waterworks, and for the distribution and sale of water by said districts, which includes, of course, the management of the machinery of the corporation. There is not a single intimation in the title that the Legislature had in view the creation of a legal entity which might appear either as plaintiff or defendant in disputes over private water rights between private individuals, concerning water which might be used within the territorial limits of a water district in which the district, as a district, had neither ownership nor right of possession nor any legal right to the control thereof. If the contention of the appellant is correct, that the district is a legal entity authorized to appear in actions involving only private rights, the question is immediately presented, On which side should the district appear? Should it appear as plaintiff, or should it appear as defendant? If it has a right to advance the costs of such an action, should it finance the plaintiff's side of the case, or should it finance the defendant's? In any of these situations, if the district has a right to create itself a party, either as plaintiff or defendant, in the settlement of mere private rights, then the Legislature has created a corporation with power within itself to determine the extent of the private rights of individuals in and to property in which the corporation known as the district has absolutely no ownership or pecuniary interest whatever.

There is nothing in the complaint which shows any public interest, but the facts alleged therein do show that no facts can be alleged establishing any public interest or ownership in and to the waters under the defendant's lands and premises. This is clearly shown by the case of San Bernardino v. Riverside, 186 Cal. 7, 198 P. 784, where it is said:

> "The original title to percolating water was in the owner of the land in which it is found. * * * That the title and ownership of land extends to the center of the earth and includes everything in the cone having the superficial boundaries of the land for the base and the center of the earth for its vertex."

It is further held that water under lands lying within the municipality of the city of San Bernardino is private property, and that the water so underneath the land could remain private property until it is taken from the owners of the land and devoted to public use in some manner provided by law. It is further held in that case that the declaration in the amendments to the Code that all water within the state is the property of the state does not affect or limit private ownership to subterranean water such as is involved in this action. It is further held in that case that a city situate in an artesian basin which overlies a part of the subterranean waters of the basin has no right to such waters on the theory that the underlying waters of the basin are by law subject to public use for the common benefit of the overlying lands and the inhabitants of the basin, and that the city is substituted to the individual rights of landowners for the benefit of all, since the water is private property, and the rights of the city as a municipality are not to be measured either by the law regarding riparian rights or by the law concerning the rights of the landowner in water underlying his land.

[7] The case of San Bernardino v. Riverside, supra, applied to the case at bar, establishes clearly that the Coachella water district has no interest, ownership, or control whatever of the waters percolating beneath the surface of the soil owned by the defendant in this action; that such waters are not public; that, not being public, no action can be maintained in relation thereto on the theory that the plaintiff represents the public and is appearing for and on behalf of the public. The case to which we have just referred takes up and determines the limits of ownership of landowners in and to subterranean waters, and holds that they cannot be taken outside of the watershed supplying or feeding such subterranean waters, which questions, however, are not involved in this action. What we have said leads unavoidably to the conclusion that if appellant's construction of subdivision 6 of section 12 of the act of 1913, as amended by the Legislature in 1923, is correct, then and in that case the subdivision is violative of section 24 of article 4 of the state Constitution.

[8, 9] This conclusion, however, is avoided by construing, all and singular, the terms of the subdivision referred to as applying only to property owned by or in which the water district, as a water district, has an ownership or pecuniary interest. That the district must, in order to prosecute an action in relation thereto, have a pecuniary ownership or interest, and not simply a desire to see one or the other of the private parties, prevail. The allegation in the complaint that the defendant will spread water over certain lands and waste the same does not give the plaintiff a right of action. In this particular the appellant refers to the act approved March 6, 1907, and the amendatory acts thereto (Stats. 1907, p. 122), relative to wasting artesian water. Such wasting is made a misdemeanor, and prosecution therefor could only be had in an action begun by and on behalf of the people of the state of California, and this only upon the assumption that the defendant obtains and thereafter wastes artesian water.

Reverting again to the fact that the pleadings show that the defendant is the owner of land within the territorial limits of the water district, whether he is taking water by appropriation or by means of sinking wells, he is doing all those acts in relation to his own property and is not diverting any water to any land outside of the district or the watershed of the Whitewater river. We may appropriately quote from 25 California Jurisprudence, p. 1008 et seq., § 13:

> "The right to make use of the water of streams constitutes private property, whether the right originates in riparian proprietorship or appropriation on private or public lands. An appropriation under the Code is private property within the meaning of the Code sections. The same rule applies to underground waters." [Here the text-writer quotes from the case of San Bernadino v. Riverside, 186 Cal. 7, 198 P. 784, the substance of what we have heretofore set forth taken from said case.] * * * "Inasmuch as riparian rights are real property and part and parcel of riparian lands to which they attach, the ownership thereof can be divested only by grant, prescription, condemnation, contract, or estoppel. Legislative enactment cannot have the effect of destroying the rights of the riparian owner, nor may such rights be taken for public use without compensation to the proprietor."

[10] Many authorities are there cited, supporting the text. The mere fact that there may be a number of landowners in the Coachella Valley in Riverside county possessing private water rights does not, by reason of mere numbers, make the private rights possessed by such landowners public property.

Again, if appellant's interpretation of subdivision 6 of section 12 of the amended act of 1913 relating to water districts is correct, and if the latter portion of said subdivision explicitly gives water districts the right to appear as either plaintiff or defendant in actions involving private water rights between private individuals, it would lead to the conclusion that that portion of subdivision 6 which purports to give such right of action to the corporate entity known as the district is violative of subdivisions 19 and 33 of section 25 of article 4 of the Constitution, for the reason that the subdivision purports to grant to the corporation a special and exclusive right which is not granted to any other kind of corporation within the state, that is, the right to maintain such an action as is presented in this cause, the right to take sides in private disputes, and also, if such a right can be granted, subdivision 33 of said section and article of the Constitution would necessitate that a law of that kind must be general.

In support of the contention that the district has a right to prosecute or defend actions of this kind, our attention is called to section 369 and section 382 of the Code of Civil Procedure; section 369 relating to the right of an executor or administrator or trustee of an express trust to appear and defend in actions relating to the property of which such representative is a trustee. We do not quite see the applicability of this section, for the reason that the plaintiff is not a trustee of any property owned by any private individual in the district. It is empowered to acquire property, but it is not empowered to act as a trustee. If it were empowered to act as a trustee, the question would arise on which side of a private controversy should the district appear. Would its appearance on either side in controversy depend upon the judgment or the wish, whim, or caprice of the officers of the district? If a trustee of the private water rights owned by residents of the district, then the plaintiff would be in the position of representing both sides of the controversy, and necessarily could not be authorized to appear in behalf of either one.

[11] Section 382 of the Code of Civil Procedure does not, in our opinion, furnish any support for this action. The interest referred to in that section does not mean simply a partisan interest or a desire to see one or the other side of a controversy prevail, but refers to an interest pecuniary in character or dependent upon some legal right or title. As said in Carey v. Brown, 58 Cal. 180, quoting from page 183:

> "It seems to us that the Code permits one to sue or defend for the benefit of many persons, only in cases where they are so united in interest with the person who brings the action or defends against it, as to make them necessary parties under the first clause of section 382, Code Civ. Proc., which precedes the clause that authorizes one to sue or defend for many."

If the defendant in this action, in the exercise of his private rights to take water from the subsoil of his land, is trenching upon, or proposes to trench upon, the private right of some other person or persons owning lands within the Coachella Valley, their rights only are affected, and not the right of the corporation or entity known as a district, because, as we have shown, the district has no ownership, pecuniary interest, legal right, or title in or to any such waters. No pretense is made that it has ever acquired any such ownership or title. Section 379 of the Code of Civil Procedure requires that every action must be prosecuted in the name of the real party in interest, except as provided in section 369 of the Code, to which we have just referred as not being applicable to this cause.

[12] In support of its contention that the judgment of the trial court is erroneous, several cases having to do with the police power of the state are set forth in appellant's brief. Under this heading, section 1 of article 14 of the Constitution declares that water appropriated for sale, rental, or distribution is a public use, and subject to the regulation and control of the state; that irrigation districts, water districts, and reclamation districts are organized for the purpose of carrying out the purposes of the Legislature in its desire to provide for the general welfare of the state. We are again cited to the fact that wasting of water from artesian wells is a public offense, and that one of the paramount interests of the state is in the storage, conservation, and diversion of water. With these statements we agree, but that does not change the fact that the police power of the state must have for its foundation the public peace, the public health, the public safety, and the public welfare of the state, and not merely ascertaining and determining whether one or a number of individuals possess or does not possess a prior private right. As we have heretofore shown, the declaration of the Legislature concerning the waters of the state in nowise affects waters held in private ownership. In one of the cases cited by the appellant we find a complete answer to its contention. In the opinion filed by Justice Shaw in denying a rehearing in the case of Western Indemnity Co. v. Pillsbury, 170 Cal. on page 733, 151 P. 418, we find the following:

> "The very foundation of the conception of police power is that it must exist and can only exist to protect the public from evil, hurt, or mischief, and to promote the public interest or welfare or the public convenience. It may well be said, therefore, that it can be exerted upon the individual only when he, or his property, causes, or is likely to cause, evil, hurt, or mischief to the public or to the public interest, or interferes with the public welfare or convenience. No one would seriously dispute the proposition that the private property of a person cannot be taken from him, under the police power, solely because its possession by the public, or by another individual, would be a greater public benefit than its possession by the original owner."

That there is no public interest in the waters referred to in this case, see, also, San Bernardino v. Riverside, supra. To take up and differentiate all the cases cited by the appellant, from the case at bar, relative to the exercise of police power by the state, would unduly extend this opinion. However, we may refer to two of them, to wit, Kansas v. Colorado, 185 U. S. 125, 22 S. Ct. 552, 46 L. Ed. 838, and Missouri v. Illinois, 180 U. S. 208, 21 S. Ct. 331, 45 L. Ed. 497. These cases both had to do with the public health and welfare of the respective states. In the case of Missouri v. Illinois it is distinctly pointed out that it is not the province of the government to interfere in any matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, but that the wrongs complained of must affect the public at large. It is evident that the public cannot be affected in any degree by a determination of whether the defendant, Stevens, or some other individual may pump privately owned subterranean waters in the Coachella Valley. We have not taken up and considered whether this proceeding, if allowable as claimed by the appellant, would be violative of section one of the Fourteenth Amendment to the United States Constitution, as urged by the respondent, nor have we considered the question as to whether anything contained in this proceeding is other than due process of law, for the reason that such questions are not considered essential to a decision herein.

The judgment of the trial court is affirmed.

I concur: HART, J.

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90 Cal. App. 528

PEOPLE v. PISCITELLA. (Cr. 1442.)

District Court of Appeal, First District, Division 1, California. April 2, 1928.

1. Burglary ⚷9(2)—Crime of burglary held complete on first entry with intent to remove safe, though removal was not effected until second entry (Pen. Code, § 459).

Where defendant and others broke into store with intent to remove safe and failed to take safe because of its weight, but, after securing other companions, broke into store a second time and removed safe, crime of burglary was complete on first entrance into building with intent to remove safe, under Pen. Code, § 459.

2. Criminal law ⚷507(3)—Witness participating in second entry, but not first entry, held not "accomplice" to offense under first entry, and testimony was effective to corroborate accomplice (Pen. Code, §§ 32, 1111).

Witness not participating in first entry into store with intent to remove safe and not connected with parties to that offense before same was committed, but aiding in removing safe after second entry, though an accessory, under Pen. Code, § 32, to offense under first entry, was not an "accomplice," under section 1111, defining accomplice as one liable to prosecution for identical offense charged against defendant, and testimony of witness was effective to corroborate testimony of accomplice.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

3. Criminal law ⚷407(2)—If accused fails to deny accusation indicating admission of its truth, accusation is admissible with evidence of accused's conduct.

Statements of third persons are not admissible in evidence simply because they are made in presence and hearing of accused; but, if it is proved that accused failed to deny accusation under circumstances which may be construed as admission of its truth, or failed to act as it might reasonably be expected an innocent person would act, evidence of statement is admissible in connection with evidence of conduct in face of accusation.

4. Criminal law 🔑511(1)—Evidence held to corroborate testimony of accomplice and support conviction for burglary based on original entry.

In prosecution for burglary, inference of guilt reasonably to be drawn by jury from conduct of defendant in face of statements made in his presence accusing him of burglary, together with fact that defendant transported associates to place where previous entry into building had been made, and conduct on arrival there connecting defendant with original entry, *held* sufficient to corroborate testimony of accomplice charging defendant with burglary and supported conviction for burglary based on original entry.

5. Witnesses 🔑388(2)—Evidence to impeach testimony of accomplice held properly rejected, where no foundation was laid for impeachment.

Evidence of statements made by accomplice tending to show motive for testifying falsely offered to impeach testimony of accomplice *held* properly rejected, where no foundation was laid for attempted impeachment.

6. Criminal law 🔑863(2), 865(1)—Instruction requiring jurors to listen to fellow jurors and decide case on evidence, made after jury voluntarily stated they stood eleven to one for conviction, was not erroneous, as indicating guilt or coercion.

Where jury reported inability to agree and requested further instructions in prosecution for burglary and stated that they stood eleven to one for conviction, which statement was not made in response to any question by court, instruction that jurors should not be arbitrary, but should listen to arguments of fellow jurors and decide from evidence, not sympathy or prejudice, *held* not prejudicial error, as indicating evidence pointed to defendant's guilt, or as indicating coercion.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Dick Piscitella was convicted of burglary, and he appeals. Affirmed.

Edward M. Fellows, of Santa Clara, for appellant.

U. S. Webb, Atty. Gen., and Lionel B. Browne, Deputy Atty. Gen., for the People.

CASHIN, J. Defendant was charged by an information with the crime of burglary and upon trial was convicted. An appeal was taken from the judgment, and it is urged as grounds for reversal that the evidence was insufficient to support the verdict, that certain remarks of and an instruction by the trial court to the jury, and a ruling upon the admissibility of testimony offered by the defendant were prejudicially erroneous.

According to the testimony of Frank Lauricella, a witness for the prosecution, he with the defendant and one Di Bello, at about 1 o'clock a. m. of December 25, 1926, entered a feed store conducted by Paul Cribari in San Jose, with the intent to remove therefrom a safe containing a sum of money; the safe and its contents being owned by Cribari. An entrance was effected by opening a window, through which they were enabled to unlock the door of the building. After entering it was found that owing to its weight they were unable to remove the safe. They then left the building and drove in an automobile to a resort in San Jose, where they met and procured the assistance of John Taminelli and Tony Barelona. Following this meeting and on the same night the three first mentioned, accompanied by Taminelli and Barelona, again visited the building. On this occasion the lock of the door was broken by Di Bello. An entry was again made and, all the parties assisting, the safe was placed in the automobile and carried away. Tony Barelona was also called as a witness for the prosecution, and testified to meeting the defendant with Di Bello and Lauricella in front of the resort referred to by the latter, and that the three last mentioned were seated in an automobile owned and driven by the defendant; that at the request of the occupants of the automobile the witness entered the same and was driven by the defendant to the Cribari premises. He further testified to a conversation had between the parties previous to their arrival at the Cribari place; his testimony in this connection being as follows:

"Q. After you got into the car where did you go; any particular place? A. No.

"Q. Where did you go? A. Drove around the block a couple of times and we stopped. I don't know whether it was the second or third street where Paul Cribari's was.

"Q. Before you went out to Second street was there any conversation occurred? A. I heard some one say in the car—I don't know whether it was Dick—they went there the first time, somebody said they went out, could not do it, and they came over and got Jack Taminelli and myself.

"Q. What did they say they could not do? A. They could not lift the safe or something.

"Q. Did they say why they came to see you? A. After I was in the car they said they came over for me and Jack to help them because they could not lift the safe.

"Q. When was the first time you knew anything about the burglary? A. That was the same night.

"Q. The same night. You mean when they came to get you? A. Yes.

"Q. Was that the first time that you heard of it? A. Yes. * * *

"Q. At the time you had the conversation, going back a moment, in the automobile going down there who was present at that time and heard the conversation? A. All of us.

"Q. By 'all' you mean who? A. Dick Piscitella, Frank Lauricella, Joe Di Bello, and John Taminelli and myself."

The witness further testified that after his arrival at the Cribari premises he assisted the defendant and the others in removing the safe; his description of this transaction being in substantial agreement with the testimony of Lauricelli. Other witnesses testified to having seen Lauricelli and the defendant together in the latter's automobile shortly before 2 o'clock on the morning the offense was committed.

At the close of the case for the prosecution the district attorney elected to rely for a conviction upon the first entry into the building, and it is urged by the defendant that the corroboration of the testimony of the witness Lauricelli, who admittedly was an accomplice in the commission of the offense, was not sufficient to justify a conviction.

The only evidence in corroboration of that given by the witness Lauricelli which raised more than a suspicion of guilt was that of Barelona; and it is contended that the latter was also an accomplice, and, further, that his testimony, in so far as it related to the first entry into the building, was insufficient to show more than the fact that a crime was committed, and did not tend to connect the defendant therewith.

[1-4] The crime of burglary was complete upon the first entrance into the building with intent to remove the safe. Pen. Code, § 459; People v. Sharp, 58 Cal. App. 637, 209 P. 266. Admittedly Barelona did not participate in the first entry, nor was he connected with the parties to that offense before the same was committed. Under section 32 of the Penal Code he was an accessory thereto; but, as held in People v. Collum, 122 Cal. 186, 54 P. 589, under the laws of this state an accessory is not an accomplice, nor was he such within the following definition found in section 1111 of the Penal Code, namely:

> "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which [his] testimony * * * is given."

The statements testified to by the witness Barelona were made in the presence of the defendant by one of his companions, and in effect charged him with having participated in the original burglary. The statements of third persons are not admissible in evidence simply because they were made in the presence and hearing of the accused; but if it is proved that he failed to deny an accusation under circumstances which may be construed as an admission of its truth, or that he failed to act as it might reasonably be expected that an innocent person would act, evidence of the statement is admissible in connection with evidence of his conduct in the face of the accusation. People v. Lew Fat, 189 Cal. 242, 207 P. 881; People v. Matthew, 194 Cal. 273, 228 P. 424; People v. Bradley, 23 Cal. App. 44, 136 P. 955; People v. Porter, 64 Cal. App. 4, 220 P. 20. As the court said in People v. Yeager, 194 Cal. 452, 486, 229 P. 40, 54:

> "Such evidence is not admissible for the purpose of proving the truth of the accusatory statements, but rather as indicating a consciousness of guilt on the part of the accused by allowing an imputation opposed to the presumption of innocence to pass unchallenged. It is for the court in the first instance to determine whether the import of the statements is such that it would furnish a foundation for proof of conduct, and it is then for the jury to decide whether the accused was aware the statements were made, whether, under all the circumstances shown, they call for a disclaimer, whether the accused did reply to them, and whether, if he did not do so, such failure showed criminal intent or a consciousness of guilt. If these propositions of fact are resolved in favor of the prosecution the item of conduct should be given the effect to which upon the entire case it is entitled."

And as held in the following case, an implied admission of guilt may have as much weight as one made in express terms; the evidentiary value in any case being a matter for the jury to determine. People v. Shelest, 62 Cal. App. 213, 216 P. 389. The inference of guilt reasonably to be drawn by the jury from the conduct of the defendant in the face of the statements made in his presence, together with the fact that he transported his associates to the place where it was evident from the conditions described by Barelona a previous entry into the building had been made, and his conduct upon their arrival there, tended strongly to show his connection with the original burglary and were sufficient to corroborate the testimony of Lauricelli, his accomplice.

[5] The defendant sought to impeach the testimony of the witness Lauricelli by evidence of statements made by the latter tending to show a motive for testifying falsely. No foundation was laid for the attempted impeachment and the testimony was properly rejected.

After the jury retired for deliberation they reported that they were unable to agree, and, according to the bailiff, requested further instructions. When brought into court their foreman announced that they had been unable to agree and that they stood eleven to one for conviction. The latter portion of the statement was not made in response to any quesion asked by the court. The court thereupon instructed the jury, the material portion of its instructions being as follows:

> "There was not any intimation whatever as to how you stood. I indicated to you that I did not think you had been out long enough. There is one instruction that I should perhaps have given you, but I looked into your faces and perhaps concluded that it was not necessary. And that was that while it was your duty, the duty of each one of you, to have your individual opinion in a case upon reason, upon the law, don't be arbitrary. You cannot be arbitrary. Eleven cannot be arbitrary; one cannot be arbitrary.

You should be tolerant. You should listen to the arguments of your fellow jurors. You should listen to the statement of the facts of the case as produced here on the witness stand, and after a full consideration of all of the facts and upon the reasoning of your fellow jurors, if any one of you should be convinced—it makes no difference whether for conviction or against conviction—if you should be convinced you are wrong, then it is your duty upon your oaths to change your vote and vote in accordance with your conviction in the case, honest conviction. You cannot decide a criminal case upon sympathy or upon some suspicion or upon something that you see in the case that you do not like exactly, provided you are convinced from the evidence itself, from the legal phases of the case, that your opinion in the case is well founded and your conclusion is right, right from the legal standpoint, from what the court has told you about the law. And it is your duty to decide it from the evidence, and do not decide it upon prejudice or upon sympathy or upon anything outside of the evidence itself. You are bound under your oath to take the evidence as it is produced to you, and the law as given you by the judge, and reach your conclusion, reach a legal conclusion. That is the administration of the law. Anything short of it is not. * * *"

[6] The defendant, in view of the statement made by the foreman of the jury, assigns these remarks and instructions of the court as being prejudicially erroneous.

We find nothing therein which indicated that the trial court viewed the evidence as pointing to the defendant's guilt, nor does the language used indicate coercion. The facts were closely analogous to those in People v. Miles, 143 Cal. 636, 77 P. 666, and People v. Rhodes, 17 Cal. App. 789, 121 P. 935, and we are satisfied that the defendant suffered no prejudice.

After an examination of the entire record, including the evidence, we are convinced that the verdict is fully supported and that there are no grounds for reversal.

The judgment is affirmed.

We concur: TYLER, P. J.; PARKER, Justice pro tem.

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90 Cal. App. 762

KETCHUM v. MASSA et al. (Civ. 5073.)

District Court of Appeal, Second District, Division 2, California. April 10, 1928.

1. Appeal and error ⚷1011(1)—Conflicting evidence as to cause of automobile accident cannot be revalued by appellate court, and trial court's determination is final.

Where evidence was in decided conflict as to cause of collision between plaintiff's and defendants' trucks, appellate court cannot revalue evidence, and determination of trial court is final.

2. Appeal and error ⚷1011(1)—Whether defendants' driver was intoxicated at time of collision is for trial judge, where evidence conflicts.

Whether driver of defendants' truck colliding with plaintiff's truck was intoxicated is, under conflicting evidence, for trial judge trying case without a jury.

3. Automobiles ⚷243(3)—Evidence that driver of defendants' truck colliding with plaintiff's truck was intoxicated held admissible to enable court to judge driver's testimony as to cause of accident.

In action for property damages resulting from collision of automobile trucks owned by plaintiff and defendants, evidence that driver of defendants' truck was under influence of intoxicating liquor was properly admitted to enable court to properly judge such driver's testimony as to cause of accident.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by E. R. Ketchum, doing business under the firm name and style of the Atlas Transfer, against G. D. Massa and another, doing business under the firm name and style of the Independent Fish Company, and others. Judgment for plaintiff, and defendants named appeal. Affirmed.

Loucks & Phister, of San Pedro, and C. W. Pendleton, of Los Angeles, for appellants.

Thomas P. White and Vincent C. Hickson, both of Los Angeles, for respondent.

STEPHENS, Justice pro tem. This is an action for property damages resulting from the collision of two autotrucks. The trial was before the court sitting without a jury, and plaintiff was awarded judgment. The defendant Frank Julio defaulted, and neither he nor Jane or John Doe are in this appeal. Motion for new trial was denied, and the remaining defendants appeal, specifying three points.

[1] Point 1: "Plaintiff's negligence was the approximate [proximate] cause of the accident." A heavy truck with trailer, belonging to plaintiff and being driven for him, was proceeding northerly on a paved street. Another truck, belonging to defendants Massa and Memeghine, doing business as the Independent Fish Company, was being driven southerly for them on the same street. Defendants claim that plaintiff's truck was on the wrong side of the road and that defendants' truck was turned to the left, to avoid a head-on collision. Plaintiff claims that his truck was on its right side of the road and that defendants' truck cut in front, attempting to pass to the left. The right front of plaintiff's truck and the right rear wheel of defendants' truck came together. There was some evidence that certain places in the street, in the immediate vicinity of the accident, were dug up. There is also evidence

that the tracks of plaintiff's truck showed this vehicle to have at all times been traveling on its right side of the street. This brings to light a decided conflict of testimony, and under the familiar rule this court cannot attempt to revalue the evidence. The determination of the trial court is final in the case.

[2, 3] Point 2: "Evidence of Intoxication." Evidence pro and con was received by the court as to whether or not the driver of defendants' truck was under the influence of intoxicating liquor. The determination of the trial court on this subject, like all other disputed points of fact, lies with the trial judge. Defendants further complain that the testimony was not admissible at all and that its admission was prejudicial, but the court had a right to know whether or not defendants' driver was intoxicated, in order properly to judge his testimony as to the cause of the accident. The evidence was properly admitted.

Point 3: "Findings not supported." We have already passed upon this subject under point 1 as to the cause of the accident. Defendants further complain that there is no evidence that the use of the truck was worth $10 per day for 20 days while it was being repaired, or that it was necessary to take 20 days in its repair. They further contend that the truck may have been just ready to re-enact the part of the deacon's one-horse shay, immortalized by Holmes. Suffice it to say that ample testimony is in the record to support every finding of the court, and the findings support the judgment.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

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90 Cal. App. 563

KENNEDY v. MINARETS & W. RY. CO. et al.

(Civ. 3460.) ★

District Court of Appeal, Third District, California. April 2, 1928.

Hearing Denied by Supreme Court May 31, 1928.

1. Negligence 🔑21—Failure of defendant, properly setting fire, to tend it with reasonable prudence constitutes actionable negligence.

Actionable negligence may be established in action for setting fire by proof that defendant, after properly setting it, failed to manage and tend it with reasonable prudence and ordinary care appropriate to the circumstances.

2. Negligence 🔑21—Nature of smoldering substance, nearness of combustible material, and other conditions must be considered in determining whether failure to extinguish fire was negligence.

Character of smoldering substance and nearness of combustible material, and circumstances and conditions generally, must be taken into consideration in determining whether ordinary care has been exercised to extinguish smouldering fire.

3. Negligence 🔑134(2)—Direct proof of place of origin is not required in action for setting fire.

In action for setting fire, direct evidence is not required in order to justify jury in reaching a conclusion as to the origin of the fire.

4. Negligence 🔑134(1)—Plaintiff's burden to establish defendant's negligence in setting fire need only be by preponderance of evidence, without necessity of demonstration or absolute certainty.

While burden of proof is upon plaintiff to prove fire was caused by defendant, in action for negligently setting fire, proof need only be by the preponderance of evidence, and demonstration or absolute certainty is not required.

5. Railroads 🔑482(3)—Verdict for plaintiff held sustained by evidence, in action against railroad, burning grass and rubbish along way, for negligently setting fire to plaintiff's land.

In action against railroad company, engaged in burning grass and rubbish along its right of way, for damages for negligently setting fire to plaintiff's land, evidence of failure of defendant's employees to extinguish fire in log and of proximity of dry grass and other nearby fires *held* sufficient to sustain verdict for plaintiff.

6. Railroads 🔑481(1)—In action against railroad for burning of land July 17, alleged result of fire set July 7, evidence of fire in immediate vicinity on 15th held admissible.

In landowner's action against railroad for setting fire to plaintiff's land through burning of rubbish along right of way on July 7, evidence of occurrence of fire on July 15 *held* admissible, where defendant's fire left burning stumps and logs, and fire which damaged plaintiff's premises occurred on July 17, especially where evidence of the fire on the 15th was elicited from one of defendant's witnesses without objection.

7. Damages 🔑137—$8,505 actual damages for setting fire held not excessive, in view of evidence of destruction of 2,720 acres of pasture land, fences, cattle, and trees on plaintiff's premises.

In action against railroad for setting fire, verdict for plaintiff for actual damages for $8,505 *held* not excessive where evidence showed destruction of 2,720 acres of pasture land, of several hundred rods of fences, and of some cattle, together with a large number of trees.

8. Damages 🔑227—In action for negligently setting fire, court may instruct jury to render verdict for treble damages, or may itself allow treble damages on jury's finding of actual damages (Pol. Code, § 3344; Civ. Code, § 3346a).

Under Pol. Code, § 3344, and Civ. Code, § 3346a, permitting treble damages for negligently permitting a fire to extend to other property, court may instruct jury to ascertain actual damages and then treble the same, or may instruct jury to find actual damages and then may itself

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★Hearing denied by Supreme Court.

allow treble damages based on the jury's finding, in action for setting fire.

9. Railroads ⚿483—Award of treble damages held proper in action against railroad for negligent failure to extinguish fire, causing damage to plantiff's land (Pol. Code, § 3344; Civ. Code, § 3346a).

In action against railroad for negligence in setting fire and allowing it to spread to plaintiff's premises by failure to extinguish it, ruining pasture land, fences, and woods, court's allowance of treble damages made on basis of jury's finding as to actual damages *held* proper, under Pol. Code, § 3344, and Civ. Code, § 3346a, permitting treble damages for negligent setting fire or suffering it to extend to another's property.

10. Damages ⚿227—Proof of negligence alone warrants imposition of treble damages for setting fire (Civ. Code, § 3346a; Pol. Code, § 3344).

Element of negligence alone justifies imposition of treble damages for setting fire or permitting it to spread, under Civ. Code, § 3346a, and Pol. Code, § 3344.

11. Damages ⚿227—Statute imposing treble damages for setting fire held valid exercise of police power (Pol. Code, § 3344; Civ. Code, § 3346a).

Pol. Code, § 3344, and Civ. Code, § 3346a, providing for imposition of treble damages against person negligently setting fire to his own woods or negligently suffering fire to extend beyond his own line, *held* valid exercise of state's police power and not in violation of Constitution.

Appeal from Superior Court, Madera County; J. T. B. Warne, Judge.

Action by Rose R. Kennedy against the Minarets & Western Railway Company and others. From an adverse judgment, defendant named appeals. Affirmed.

Harry I. Maxim, of Madera, and Everts, Ewing, Wild & Everts and Dan F. Conway, all of Fresno, and Herbert J. Goudge, of Los Angeles, for appellant.

Barcroft & Barcroft, of Madera, and Conley, Conley & Conley, of Fresno, for respondent.

PLUMMER, J. In this action the plaintiff obtained a verdict against the defendant Minarets & Western Railway Company, a corporation, for actual damages in the sum of $8,505, which amount the court thereafter, upon motion, trebled under the provisions of section 3344 of the Political Code and section 3346a of the Civil Code, and thereupon entered judgment. From this judgment the defendant Minarets & Western Railway Company, a corporation, appeals.

The record shows the plaintiff to be the owner of 3,600 acres of land and the lessee of about 600 acres of land situated in the foothills of Madera county, and that the defendant Minarets & Western Railway Company is a corporation and at the time mentioned in the complaint was operating a railroad from a point near Friant, in the county of Fresno, to and extending in a general northeasterly direction into the county of Madera, to a point at or known as Central Camp; that the general course of the line of railroad in the county of Madera was along and near the lands belonging to the plaintiff situate in the county of Madera; that on or about the 7th day of July, 1925, the defendant Minarets & Western Railway Company, by its agents and employees, was engaged in burning grass and rubbish along its right of way in the county of Madera; that on or about said 7th day of July, 1925, while the said railroad company, through its agents and employees, was engaged in burning grass and rubbish along its said right of way, a sudden gust of wind carried the fire beyond the right of way belonging to the railway company, which at the place described is of a width of 100 feet, and set fire to dry grass and rubbish beyond the railway company's right of way. The fire thus started burned over about 160 acres of land belonging to a person other than the plaintiff in this action. Thereafter and on or about the 15th day of July, 1925, another fire took place at or near the scene of the first fire and burned over an area of about 1 acre before it was extinguished. Thereafter and on the 17th day of July, 1925, a third fire occurred (which is the fire involved in this action), which burned over 2,720 acres of land belonging to the plaintiff, which lands were mostly covered by pasturage, but had standing and growing thereon brush and also a certain quantity of timber, which timber the testimony shows to be fit for firewood as hereinafter stated. The fire on the 17th also consumed fences belonging to the plaintiff of some miles in length. Also, the testimony tended to show that two calves and one cow belonging to the plaintiff were burned in said fire. This action is prosecuted to recover the damages occasioned by the fire on the 17th, and which is alleged to have occurred by reason of the negligence of the said defendant, its agents, and employees, in not extinguishing the fire that occurred on the 7th of July, 1925; the theory of the case being that the railway company negligently failed to extinguish fire from certain stumps and logs lying upon the area covered by the first fire and set on fire thereby. The defendant denies that it negligently or otherwise failed to extinguish the fire which occurred on the 7th day of July, 1925, and upon this appeal, sets forth that the testimony is insufficient to support the verdict, on the theory that the fire of the 17th was occasioned by the negligence of the defendant railway company; that the testimony is insufficient to show that the plaintiff suffered the actual damages awarded; that the court erred in the admission of certain testimony; and that the court erred in awarding treble damages.

The testimony shows, practically without contradiction, that after the fire of July 7, 1925, a number of stumps of trees, and particularly a certain bull pine log some 18 or 20 feet in length and about 2 feet in diameter, were left without the fire therein being completely extinguished; that the bull pine log around which the major portion of the testimony circulated was left smoking on the 8th day of July, 1925; and that this bull pine log was within from 3 to 5 feet of a tract of unburned dry grass and also near a clump of underbrush. The record also shows without contradiction that a fire occurred within close proximity to the lot just mentioned and the stumps referred to, on the 15th day of July, 1925, and that on the 17th day of July, 1925, when the fire was first discovered, it was within about 20 feet of the bull pine log mentioned herein. No eyewitness saw the beginning of either the fire on the 15th or of the fire on the 17th of July. There is testimony to the effect that smoke was seen coming from the bull pine log three or four days after the 7th of July, and there is also testimony from a witness on behalf of the defendant that the bull pine log was not on fire on the 17th, at the time the fire was discovered in the dry grass and underbrush within 20 feet thereof.

The appellant sets forth at length extracts from the testimony of different witnesses upon which it bases its claim that the origin of the fire is not traceable to a fire left in the bull pine log herein referred to or to any of the burning stumps of trees left upon the premises included within the area of the first fire. This necessitates a summary of the testimony. A witness by the name of Walker testified that he saw the fire on the 7th day of July, 1925; that he was present at the scene of the conflagration; that he went to the place where the bull pine log lay, and that it was burning; that he saw some men there who were covering the log with dirt; that he said to them that was no way to fight the fire in the log, that the wind would come along and blow it off and blow sparks to the adjacent land; that he told the men there was a spring of water about 150 yards away; that the log was about 18 to 20 feet long and about 2 feet in diameter; that there was a good deal of smoke coming from the log late on the evening of the 7th; that the log was from 3 to 4 feet from the grass line.

A witness named Otis Boss testified that he saw the log on the night of the fire after the grass fire was put out; that the log was still smoking; that it had been covered, or about half of it covered with dirt; that sometime after that, he did not remember the date, he saw the log and it was still smoking; that he saw the log after the big fire on the 17th and it was then burning; that at the time he saw the log before the big fire it was about 3 or 4 feet from the grass line; that after the big fire there was no grass near the log in question; that after the fire of the 7th he saw the log in question three or four times, but that he did not try to put out the fire in the logs; that he thought there was danger in it, but he thought the railroad company had men to watch the logs.

The witness Mrs. Nancy Boss testified that she saw the log in question after the fire of the 7th; that it was still smoking three or four days after the fire on the 7th; she saw no smoke coming from any other quarter except in the direction of the bull pine log; and that before the 17th she did not see smoke coming from any other direction than that in which the bull pine log was located.

The witness Neal Boss testified that he was over the fire line of the 7th, two or three days after it stopped; that he saw logs burning and lots of smoke; that he was at the location of the bull pine log a day or two after the fire of the 7th; that it was partly covered with dirt, and that it was burning at that time; that he saw the bull pine log after the 17th of July; that some of it was still left and was smoldering some; that he did not see smoke coming from any other place except from the log just mentioned, after the 17th, the day of the big fire; that the log in question was 4 or 5 feet from the grass line; that there was a spring of water 150 or 200 yards away; that the spring would have furnished sufficient water to have put out the fire.

The witness J. B. Baker testified that he had lived 25 years in the neighborhood where the fires appeared; that it often happened that a whirlwind would carry fire a long ways.

The witness Kitchell testified that he saw oak stumps burning, one oak stump between 8 and 10 feet in height; that he did not see any one attempting to put out the fire in the particular oak stump.

The witness Hannagan testified that the fire of the 7th burned over about 200 acres; that he went past there every day after the fire; that he noticed several logs burning, but did not notice any one log particularly; that he saw the start of the fire on the 17th, and it appeared to come from the direction of the location of bull pine log.

Rose R. Kennedy, the plaintiff, testified as to a smoke coming from the bull pine log for several days after the fire of the 7th.

The witness Sutherland testified that he saw the bull pine log on the 18th and 19th of July; and that the bull pine log was burning; that more of the log was then burned than had been burned by the fire of July 7th.

James Hughes, an employee of the defendant, testified that he saw logs smoking or burning on July 8th.

Charles Enlow, a witness called on behalf of the defendant, testified that he put some additional dirt on the smoking log in question after the railroad men left; that they left bare spots on the log; that when he got to the log first, they were chopping it off, some of them, and some of them were shoveling dirt on it, and punching out the fire, they were smothering out the fire that was on it at that time; that some of the log was left bare; that it was still smoking when the railroad men left. This witness also testified as to two small fires which occurred about the 15th in the same neighborhood; that he assisted in putting out the fire of the 15th; that the fire of the 15th covered about an acre and a half of ground.

Paul Enlow, another witness for the defendant, testified, on cross-examination, that there were stumps or trees left burning after the fire of the 7th; that the men went away leaving things burning. We here give the questions propounded to this witness and his answers:

> "Q. And they left several stumps burning, did they? A. I think they did.
>
> "Q. And they went away? A. Yes; but they were out of danger.
>
> "Q. I know they were, but when they went away, they went away leaving things burning? A. Yes, sir.
>
> "Q. And they did not take any pains to put that out? A. I don't know whether they did afterwards or not.
>
> "Q. Well, they didn't while you were there? A. No, sir.
>
> "Q. They went away? A. Lots of them they did put out, and lots of them they did not."

Mr. O'Connor, a witness called on behalf of the defendant, testified as to what was done toward putting out the fire in the bull pine log on the 8th of July; that it was covered with dirt.

The witness Hughes, called by the defendant, testified that he went there on July 8 with two Mexicans; the log was smoldering some and they covered it with dirt; that there was a little smoke coming from another log in the gulch about 150 or 200 feet away; that they cleaned out the grass away from the log in the gulch 20 or 25 feet.

The witness Patton, called by the defendant, testified that the fire in the stumps and in the log was put out by the 10th of July; that he left on the evening of the 10th of July and did not see any smoke coming from the log in question; that he left about 4 o'clock in the afternoon of the 10th. There was also testimony to the effect that the 17th of July was a record day for heat. The testimony further shows that at the time of the year in question the whole country was exceedingly dry. Testimony was also admitted as to the fact of there being a severe electrical storm eight hours after the fire of the 17th, but as there appears nothing in the record showing any connection between the electrical storm and the fire which we have been discussing, this subject may be dismissed without further comment. The testimony also shows that at the time the employees of the defendant railway company were engaged in burning grass and rubbish along the highway belonging to the company, the men had with them a car containing a water tank holding about 6,500 gallons of water, but so far as the record shows, no water was used from this tank in putting out the fires in the stumps of trees or fallen logs referred to in the testimony. The only method used in safeguarding against the spread of the fire or its being carried by gusts of wind was by covering the fallen logs with dirt. There was also testimony on the part of the employees of the defendant that they had put out the fires in the stumps and logs within the area covered by the first fire, and also that they had put out the fire in the bull pine log of which we have made particular mention.

Upon this testimony, a résumé of which we have given, it is strongly urged by the appellant that the jury was unwarranted in drawing the inference that the fire of the 17th was communicated to the adjoining dry grass by any fire left smoldering in the bull pine log; that it is unreasonable to infer that the fire smoldered in said log from the 7th to the 17th of July. As against this, there is ample testimony for the jury to conclude that the bull pine log was on fire as late as the 18th or the 19th of July, 1925, which would necessitate the conclusion, if the appellant's theory is correct, that the fire started some feet away from the bull pine log and was communicated to it from the burning dry grass testified to by different witnesses as being distant from the log some 3 to 5 feet. The conclusion is unescapable that the fire went either from the grass to the log or from the log to the grass. The testimony in the record is amply sufficient to show that the log was on fire for a few days after the 7th of July, just how long the testimony does not show. And as we have just stated, the testimony is such that the jury could not escape coming to the conclusion that the log was on fire after the 17th of July. There is no explanation in the record as to how the fire started on the 15th of July. The record does show, however, that it started within the vicinity of smoldering stumps, or of stumps which had been smoldering not far from the bull pine log nor very far from the logs situated within the gulch mentioned by one of the witnesses. There is some testimony to the effect that the fire on the 17th started in the vicinity of a log lying in the gulch referred to by witnesses, which was also smoldering after the fire of the 7th. So far as we have been able to discover, no witnesses testified as to how long a fire will smolder in a log of the variety under consideration in this case. If there is any such testimony in the record, counsel at least have failed to call our attention thereto. The jury had before it, however, testimony from which they could conclude that the following facts were established: That the bull pine log was set on fire on the 7th of July; that it was on fire three or four days thereafter; that a fire occurred on the 15th, origin unknown; that a fire occurred on the 17th, and that the bull pine log was burning on the 18th; that prior to the fire of the 17th, dry grass had been left at a distance of only 3 to 5 feet from the smoldering log. The country in question, at the time of the year involved, was exceedingly dry; gusts of wind were not uncommon; that a whirlwind would carry sparks to a considerable distance. From the premises thus laid down the jury had the duty of drawing an inference as to the origin of the fire of the 17th. That the fire in the bull pine log might have been readily extinguished by putting a little water thereon seems to be unquestioned. The testimony in the record also leads to the conclusion that covering a log with dirt instead of putting out the fire tends to cause it to smolder for a considerable period of time.

In the case of Paiva et al. v. California Door Co., 75 Cal. App. 323, 242 P. 887, this court had before it an action involving inferences as to the origin of a fire. In that case the plaintiff contended that the defendant negligently left smoldering fires in two stumps near the west boundary line of its land, and that the evidence warranted the inference that fire was communicated from one of these stumps to the inflammable pine needles and leaves covering the land where the fire was discovered. This court said:

> "There is no direct evidence that either of these stumps was burning on Monday morning. If they were burning at that time, in the absence of any other evidence as to the origin of the fire, it might be inferred, reasonably that the high wind carried sparks or pieces of burning material from one of the stumps to the place where the fire started."

The court then set forth the evidence tending to show that there was fire in these stumps, and held, after a summary of the evidence, that the question as to the origin of the fire and that the fire might have followed from being blown from said stumps to the adjoining combustible material by the wind was a question to be submitted to the jury, and, in the absence of explanation as to how the fire started, it was not unreasonable to infer that the origin of the fire was in said smoldering stumps. In the Paiva Case the defendant's employees were engaged in burning on defendant's property on Saturday, and quit work at about 3 o'clock on that day; that a fire broke out on the premises involved, Sunday night; that the fire which did the damage in the Paiva Case started some time on the following Monday. The testimony in the Paiva Case also showed that a very high wind was blowing on the day the fire started. In considering the question as to leaving smoldering fire in stumps, this court further said:

> "It is not intended, of course, to express any opinion as to the weight of the evidence produced at the trial, but, viewing the evidence in the light most favorable to the plaintiff, as is required on a motion for a nonsuit, sufficient [evidence] appears to prove a prima facie case in favor of plaintiff. It cannot be said as a matter of law that it is not negligence to leave burning stumps unguarded during the dry season in close proximity to lands covered with trees, brush, leaves, and grass. It is reasonably to be anticipated that a wind may carry sparks from the burning stumps to the inflammable materials on the adjacent lands."

In Young v. San Joaquin Light & Power Co., 257 P. 152, this court had before it an action involving damages alleged to have been caused by a fire negligently left to smolder by the defendant. It is there held that the leaving of a smoldering fire within 10 or 12 feet of inflammable material when a wind was blowing from the fire toward the plaintiff's property presented to the trial court a question of fact as to negligence, and also a question of fact as to the cause of the fire, and that the trial court was justified in concluding that from such facts the fire under consideration was caused. It may be stated further that in that case the testimony showed that the premises where the fire started were inclosed by a fence where the gate through which entrance was usually had thereto was ordinarily kept locked. The testimony in the Young Case showed that for some little time after the fire had been started by the defendant's employees, smoke was seen rising from the premises. In the case just cited this court took up and referred to a number of other cases relative to the negligence of the defendant in starting and negligently leaving fires unguarded (citing, also, the case of Paiva v. California Door Co., supra). The court also cited cases as to inferences to be drawn as to negligence of a defendant from not taking proper precautions to extinguish a fire which had been lawfully started.

[1-3] Actionable negligence may be established by proof that the defendant, after properly setting out a fire, failed to manage and tend it with reasonable prudence and ordinary care appropriate to the circumstances. Thus, what would be reasonable diligence and prudence and ordinary care in extinguishing a grass fire where the substance left as burning embers is very slight and almost negligible would be entirely inadequate and fail to be proper care or even ordinary care in the event that the burning embers or smoldering substance is of such a

character that a fire might be retained therein for a considerable period of time and fanned by a gust of wind, a strong wind, or a whirlwind, and sparks therefrom carried to combustible substances nearby. The nearness of the combustible substance would also present a question to be considered in determining whether ordinary care had been taken to extinguish the smoldering fire. In this case, where the combustible substances were shown to have been within 3 to 5 feet, and the fire was smoldering in a substance likely to retain fire for a considerable period of time, the care required to be ordinary care might, as to dissimilar circumstances and where the damage was not so close or imminent, be classed as the highest possible degree of care. In other words, the circumstances and conditions must be taken into consideration to determine whether ordinary care has or has not been exercised. Again, direct evidence is not required in order to justify a jury in reaching a conclusion as to the origin of a fire. In the case of Dibble v. San Joaquin Light & Power Co., 47 Cal. App. 112, 190 P. 198, we find the following:

> "Appellants also claim that there is no evidence to show that the employees in question either started the fire or failed to extinguish it, or that they negligently permitted it to spread. While it is true there is no direct evidence as to the origin of the fire, the trial court had the right to make any logical, reasonable deduction, which the admitted facts and the undisputed testimony of the witness McCabe permitted. Davis v. Hearst, 160 Cal. 143, 176, 116 P. 530. It is a fair inference that the flames which destroyed plaintiff's property were communicated thereto by the fire, which originated on the right of way of defendants, and which had its origin in one or other of the instrumentalities used by defendants' employees in their work. Reuter v. San Pedro, etc., Co., 37 Cal. App. 277, 283, 174 P. 927; St. Paul Fire, etc., Co. v. Southern Pac. Co., 30 Cal. App. 140, 142, 157 P. 247; Fay v. Cox, 45 Cal. App. 696, 188 P. 623; Toledo, etc., Co. v. Fenstermaker, 163 Ind. 534, 72 N. E. 561, 562; Roundtree v. Mt. Hood, etc., Co., 86 Or. 147, 168 P. 61. It is equally clear to us that the employees of defendants were guilty of gross carelessness in not properly controlling and extinguishing the fire when their attention was directed by McCabe to the probability of its spreading. It was burning in tall, dry grass near the adjacent fields of stubble and grain, and it should not have required any warning to apprize them of this imminent danger."

In the case of Cobb v. Twitchell (Fla.) 108 So. 186, 45 A. L. R. 865, the court, in considering testimony as to negligently leaving a fire, stated the rule as follows:

> "In the absence of a controlling statute, such negligence will not be presumed, but must be proved; the burden being upon the party alleging it. Such negligence, however, may be predicated not alone upon the circumstances under which the fire was kindled, or upon a failure to observe requisite precautions preliminary thereto, but may be established as well by appropriate proof that the defendant, after properly setting out the fire, failed to manage and attend it with reasonable prudence and ordinary care appropriate to the circumstances" (citing a number of authorities).

And further, as to the question of care in extinguishing a fire, said:

> "Upon the state of facts before us and in the absence of mitigating circumstances, a jury might reasonably conclude that the defendant or his servants did not observe reasonable prudence and ordinary care under the circumstances in that they were not sufficiently thorough in extinguishing the original fire, or that the fire guard constructed by them, in its dimensions or manner of construction, was not adequate or suitable under the circumstances," etc.

The fire in the case of Cobb v. Twitchell was one that broke out a few hours after the agents of the defendant had supposed it was extinguished. The fire they had started and supposed they had extinguished was near dry grass, brush, and other combustible material. None of the witnesses seem to know how the fire started two hours after they had supposed it had been extinguished. Appended to the case of Cobb v. Twitchell, supra, is an extended note wherein may be found a number of cases having to do with damages occasioned by fires, and supporting the text of the case from which we have just quoted.

[4] In the case of Viera v. Atchison, T. & S. F. Ry. Co., 10 Cal. App. 267, 101 P. 690, an action involving damages by fire, the court, in considering the sufficiency of proof, used the following language which is applicable to the case at bar:

> "The burden was upon plaintiff to prove that the fire was caused by defendant; that it was also due to defendant's negligence; but such proof need only be by a preponderance of evidence, and such as to satisfy and produce conviction in an unprejudiced mind. The law does not require demonstration, or absolute certainty, because such proof is rarely possible. Moral certainty only is required. We must call in aid of the verdict all deductions which the jury could make from the facts proved. Nearly all cases are determined on the reasonable probability of the fact being as found."

In Hudspeth v. St. Louis & S. F. Ry. Co., 172 Mo. App. 579, 155 S. W. 868, in an action involving damages occasioned by sparks from a railroad engine where a barn situate some distance from a railroad track was burned, the court, in speaking of the proof required, held as follows:

> "There was no direct proof that defendant's engine, which passed a short time before the fire was discovered, actually emitted sparks or fire, nor any positive testimony that such sparks, if emitted, could, on the day in question, have been blown the distance to plaintiff's hay and remained hot enough to ignite it. The evidence to make out liability on the part of the defendant was, as is usual in these cases, pure-

ly circumstantial. Nevertheless the probable origin of the fire may be shown by circumstantial evidence; provided the circumstances relied upon are consistent and tend in a substantial way to support the claim of plaintiff, and make it probable, and justify a reasonable inference, that the fire was caused by sparks from defendant's engine" (citing Campbell v. Railroad, 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530; Waddell v. Railway Co., 146 Mo. App. 604, 124 S. W. 588; Foster v. Railroad, 143 Mo. App. 547, 128 S. W. 36; Market v. Railroad, 139 Mo. App. 456, 122 S. W. 1142; Tapley v. Railroad, 129 Mo. App. 88, 107 S. W. 470; Lead Co. v. Railroad, 123 Mo. App. 394, 101 S. W. 636; Wright v. Railroad, 107 Mo. App. 209, 80 S. W. 927).

What we have here said is also supported by the following cases: Bowles v. Hickson, 22 Cal. App. 264, 133 P. 1149; Reuter v. San Pedro R. R. Co., 37 Cal. App. 277, 174 P. 927; McGillivray v. Hampton, 39 Cal. App. 726, 179 P. 733.

[5] The jury in this case had before it the question as to the reasonable probability of the fire being communicated to the nearby grass from the smoldering fire left in the bull pine log. In addition to what we have said, the testimony shows that the grass in the neighborhood of the log was very short, and also had been burned around the log by the fire of July 7th, leaving an intervening space of between 3 and 5 feet. Under all the circumstances disclosed, we think the jury was warranted in coming to the conclusion that it was reasonably probable that the fire started from the log and was communicated from the log to the adjoining short grass, rather than the short grass communicating any fire to the log on July 17th. We think the testimony is also sufficient to justify the jury in concluding that the agents of the defendant had not used reasonable precautions in extinguishing the fire in the burning log. In this particular the evidence tends to show that what was done would cause the fire to smolder for a considerable period of time rather than to extinguish it. We also think that the jury was justified in concluding that the fire smoldered during the entire period of time in the bull pine log; the testimony showing that there was a smoldering fire in the log some days after the fire of July 7th, that a fire occurred on the 15th in the same neighborhood, that a fire occurred on the 17th, and the log was shown by the testimony to be still on fire on the 18th of July, laid the foundation justifying the jury in reasonably concluding that the origin of the fire of the 17th was from the fire left smoldering in the bull pine log.

[6] The appellant urges that the admission of testimony as to the fire which occurred on July 15th was prejudicial and constitutes sufficient ground for reversal. This contention we think untenable. The fires mentioned were all so closely connected as to constitute a series of circumstances tending to show the origin of the fire. The fire of the 7th of July left burning stumps and logs. In the immediate vicinity of these burning stumps and logs a fire occurred on the 15th, and again on the 17th, and, as shown by the testimony, burning logs were on the premises on the 18th of July. The objection urged by the appellant we think completely answered in 12 California Jurisprudence, p. 533, § 10, which reads as follows:

> "Where it is claimed that a fire was caused by sparks thrown from an engine, it is permissible to introduce evidence of other fires caused by the same engine in the same vicinity and about the same time, or to show facts tending to prove that other fires were so caused. The admission of such evidence is a question of policy and expediency in view of the pressing necessity of resorting to circumstantial evidence in a case in which direct evidence is not ordinarily to be had. So, also, evidence of fires emitted or dropped by other engines of the defendant in the vicinity and about the time of the fire is admissible, particularly when the particular engine throwing the sparks which caused the fire complained of is not identified. Questions as to the proximity of time and place to which the proofs must be confined can only be determined in view of the circumstances as the testimony is offered. Evidence of other fires within a few days of the fire in question is proper."

The record in this case, however, further shows that after making objection to the testimony of one witness concerning the fire of the 15th, evidence was elicited from one of the defendant's witnesses showing all the circumstances of the fire of the 15th of July, and this testimony was all admitted without any objection on the part of the appellant. The objection of the appellant as to the ruling of the court in excluding testimony as to an entirely disconnected fire upon premises belonging to another party at a considerable distance from the scene of the fire in controversy is likewise without merit.

[7] The appellant also contends that the judgment in favor of the plaintiff, finding actual damages, is unwarranted by the testimony. The record, as we have stated, shows that 2,720 acres of pasture land was destroyed. The record also shows that in addition to the pasture land several hundred rods of fences were destroyed; also two calves and one cow. There is also testimony in the record which we have heretofore stated, that upon the premises within the burned area were a large number of trees suitable for firewood; that these trees were all burned. The testimony of different witnesses was to the effect that these trees would yield about 25,000 tiers of firewood of a value of between 50 and 60 cents per tier. The appellant in its summary of the damages shown by the testimony sets forth the following figures: "Pasturage, $2,720; fences, $1,000; stock, $125; total, $3,845." No figures whatever are inserted showing the estimated damage or loss occasioned by the burning of the

standing trees. The testimony as to the trees shows an amount which, added to the statement of the appellant, would largely exceed the actual damages allowed by the jury. It is also to be observed that the appellant does not include in its estimate of damages any of the testimony relative to the injury to the pasture land. The record contains evidence that the injury to the real estate was something over $4 per acre; that the market value of the land preceding the fire was something over $12 per acre; and that after the fire it was of the value of only $8 per acre. These figures, amply supported by the testimony, show that the jury was warranted in finding actual damages in the sum named in its verdict.

[8, 9] Appellant finally urges that the court erred in awarding treble damages, and in this particular cites a long list of cases having to do with punitive damages in cases where the defendant has been guilty of oppression, fraud, or malice, as specified under section 3294 of the Civil Code. It would serve no useful purpose to take up and analyze the different cases cited by the appellant, and it is sufficient to say that none of them are based upon Code provisions such as we have in the state of California. The cases relied upon by the appellant have to do only with ordinary trespasses where punitive damages are allowed when the trespass has been accompanied by malice, express or implied.

Section 3346a of the Civil Code reads:

> "Every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in treble damages to the party injured."

The same identical words appear in section 3344 of the Political Code. Consideration of these sections has been had by the Supreme Court of this state in the following cases: Sampson v. Hughes, 147 Cal. 62, 81 P. 292; Galvin v. Gualala Mill Co., 98 Cal. 268, 33 P. 93; Garnier v. Porter, 90 Cal. 105, 27 P. 55. The sections of the Code quoted and the case cited, as well as the case of Paiva v. California Door Co., supra, show that two questions are involved: First, negligently setting fire; second, negligently permitting the fire to escape and burning the property belonging to others. The cases also cited show that in the procedure awarding treble damages, all that is required is that certainty in the fixing of the damages be shown; that is, that the court may instruct the jury to ascertain the actual damages, to find the actual damages, and then treble the same, or may instruct the jury to find actual damages and then when the verdict of the jury is brought in fixing the actual damages, treble damages may be allowed by the court. In this case the verdict of the jury was for actual damages, and upon this finding of the jury as to actual damages, treble damages were allowed. Thus, absolute certainty in the procedure was obtained.

[10, 11] The statute under consideration includes only the element of negligence, and when that is found justifies the imposition of treble damages. That such statutes are constitutional is supported by the overwhelming weight of authority. In Eastman v. Jennings McRay Logging Co., 69 Or. 1, 138 P. 216, Ann. Cas. 1916A, 185, the constitutionality of a similar act was considered and the act upheld. This case, as reported in Ann. Cas. 1916A, supra, is accompanied by an extended note quoting the cases upholding such statutes. The principle upon which such statutes are upheld is thus stated:

> "It is within the power of the Legislature to impose on railroad companies an absolute liability for fire started by locomotives." St. Louis Ry. Co. v. Shore, 89 Ark. 418, 117 S. W. 515, 16 Ann. Cas. 939, and note; Union Pacific Ry. Co. v. De Busk, 12 Colo. 294, 20 P. 752, 3 L. R. A. 350, 13 Am. St. Rep. 221, and note.

And it has been held that the power extends to the imposition on such companies of liability for treble damages irrespective of negligence. Jensen v. South Dakota Ry. Co., 25 S. D. 506, 127 N. W. 650, 35 L. R. A. (N. S.) 1015, Ann. Cas. 1912C, 700. The exercise of such a power is justified, however, only on the peculiar dangers of fire attendant on the operation of railroads. In the reported case it is held that a statute imposing on an individual an absolute liability for actual damages from a fire started accidentally or unavoidably is invalid. The validity of a statute imposing a double or treble liability for damages resulting from the destruction of property by fire occurring through the negligence, willfulness, or malice of the person who kindles it, or allows it to get beyond his control, has uniformly been sustained (citing a long list of authorities). As will be observed by studying the note referred to, the statutes differ somewhat in phraseology, some of them making the allowance of double or treble damages depend upon either negligence, willfulness or malice. None of them, however, require the presence of all three of the elements just stated. Our statute includes only the element of negligence. See, also, the case of Jensen v. South Dakota Ry. Co., 25 S. D. 509, 127 N. W. 650, 35 L. R. A. (N. S.) 1015, Ann. Cas. 1912C, 700, and cases cited in an appended note. The danger from fires in a dry country like California is so great as to justify the police power of the state in imposing treble damages, and in no country is the necessity for greater care being exercised against the spread of fires than in the San Joaquin Valley during the summer months where conditions are always favorable for extensive conflagrations and the absence of moisture rendering the extinguishment of fires, when once started, so difficult. All of these considerations justify the exercise of the police power of the state in imposing damages, such as to insure the reasonable care and precautions necessary under the conditions so existing.

Finding no cause for reversal herein, the judgment of the trial court is affirmed.

We concur: HART, Acting P. J.; BARTLETT, Justice pro tem.

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90 Cal. App. 758

PEOPLE v. WOODS. (Cr. 1589.)

District Court of Appeal, Second District, Division 2, California. April 10, 1928.

Criminal law 🔑419, 420(1)—Testimony as to codefendant's statement admitting that he committed murder with which defendant was charged held hearsay.

In prosecution for murder, testimony of witness that she heard codefendant admit to defendant's wife that he, and not the defendant, had committed the murder, *held* incompetent, as hearsay.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Ray Woods was convicted of manslaughter, and he appeals. Affirmed.

Stanley Visel and Martin S. Ryan, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John S. Howie, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant and one Leon Davis were jointly charged by indictment with the crime of murder. At the time of the trial Davis, known as Butch, had not been apprehended. Woods was tried alone and convicted by the jury of the crime of manslaughter. The trial court denied his motion for new trial, and this appeal is from the verdict and judgment, and from the order denying said motion.

The only point seriously contended for as a ground for reversal is that the following testimony offered on behalf of the defendant should have been received, and that it was error to deny a subsequent tender to prove the conversation suggested by the questions propounded to the witness:

"Q. Did you have any conversation at that time with this man you call Butch? A. Well, I didn't particularly have a conversation; Mrs. Woods was talking to him.

"Q. You were present at that time? A. I was present.

"Q. Tell us what was said."

Objection to the question upon the ground that it called for hearsay, and was incompetent and improper, was sustained. Thereafter a tender of proof was made on behalf of the defendant that the witness would swear that she overheard appellant's codefendant admit to Mrs. Woods that he (Davis), and not Woods, committed the murder.

It has repeatedly been held that such evidence is hearsay and incompetent, and we think the rulings of the trial court proper in the instant case. People v. Flood, 41 Cal. App. 373, 182 P. 766; People v. Raber, 168 Cal. 316, 143 P. 317.

We have read the transcript carefully, and are satisfied that the evidence is amply sufficient to warrant the verdict.

The judgment and order denying motion for new trial are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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90 Cal. App. 738

PEOPLE v. CALKINS. (Cr. 1604.)

District Court of Appeal, Second District, Division 1, California. April 9, 1928.

1. Criminal law 🔑1130(2)—Reviewing court need not notice appellant's points, where particular error is not pointed out.

On appeal from conviction for rape, reviewing court is not required to notice points that "trial court committed error in its ruling," that entire action in giving and refusing instructions was erroneous, and that evidence is insufficient to support verdict.

2. Criminal law 🔑730(6)—Argument relating to incidental and collateral matter in rape case held not misconduct justifying reversal, where on objection court informed district attorney argument was unwarranted.

In prosecution for rape, argument of district attorney relating to incidental and collateral matter *held* not misconduct constituting ground for reversal, where on objection court informed him argument was unwarranted, but gave no express direction to jury to disregard it.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Delmar Calkins was convicted of rape, and he appeals. Affirmed.

Ira L. Brunk, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

SHAW, Justice pro tem. [1] Defendant, who was convicted of rape, appeals from the judgment and from an order denying his motion for a new trial. His brief is almost devoid of argument. As to ten alleged errors, he contents himself with setting forth in an appendix to his brief the rulings complained of and declaring as to each one that "the trial court committed error in its ruling." He also states that the entire action of the trial court in giving and refusing instructions was erroneous, without assigning any reason for this statement, and claims that the evidence is insufficient to support the verdict, without pointing out any deficiency therein. We are not required to notice points made in this manner. We have, however, looked at the rulings shown in the brief and see no error in them, and have also examined the record sufficiently to ascertain that there is evidence in support of the verdict and that the action of the court in the matter of instructions appears to be correct.

[2] The other point made is that his motion for a new trial should have been granted because of misconduct of the district attorney in his argument to the jury. This alleged misconduct is shown only by an affidavit which was filed at the hearing of the motion for a new trial. This affidavit shows no prejudicial error. When objection was made to the district attorney's argument, the court at once informed him that it was unwarranted, and while no express direction was given to the jury to disregard the argument, the district attorney formally acquiesced and abandoned the argument. The argument complained of related to a mere incidental and collateral matter, and the misconduct was not of such a grave character as to constitute ground for a reversal under these circumstances.

The judgment and the order denying a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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90 Cal. App. 740

BUFFALO WEAVING & BELTING CO. v. BOYLE MFG. CO. (Civ. 4870.)★

District Court of Appeal, Second District, Division 2, California. April 9, 1928.

Rehearing Denied May 4, 1928. Hearing Denied by Supreme Court June 7, 1928.

1. Sales ⟹384(6)—Contract to purchase straps to be manufactured held breached, as respects damages, as of date of seller's declaration, after extension.

Where seller of automobile luggage straps to be manufactured permitted extensions of delivery period for more than year, date of purchaser's breach as respects damages was fixed by seller's declaration of breach; reasonable time for shipping instructions having expired.

2. Sales ⟹384(6)—Market value of straps to be manufactured on date of breach should have been excluded on objection thereto as basis for damages (Civ. Code, §§ 3300, 3353).

In action for damages for alleged breach of contract under which defendant agreed to purchase automobile luggage straps to be manufactured by plaintiff, testimony by plaintiff's president as to market price of straps on date breach was declared should have been excluded, under Civ. Code, §§ 3300, 3353, on objection that market value was not proper basis for measuring damages.

3. Trial ⟹89—Motion to strike improper testimony of market value solely on ground contract was not breached on date involved held properly denied.

Where objection to testimony of market value as improper basis for measuring damages for buyer's breach of contract to purchase luggage straps to be manufactured was improperly overruled with leave to move to strike, buyer's subsequent motion to strike such testimony on the sole ground that contract was not breached on date in question was properly denied, where trial court correctly determined that contract was breached as of such date.

4. Sales ⟹384(6)—As respects damages, seller's loss for breach of contract to buy straps to be manufactured held difference between manufacturing cost and contract price (Civ. Code, § 3300).

Seller's loss under contract for sale of automobile luggage straps to be manufactured by seller *held*, under the proof, one of loss of profits, being the difference between costs of manufacturing in the finished, ready to deliver state and the contract price, and seller's damages were ascertainable under Civ. Code, § 3300, providing for damages compensating for detriment proximately caused and which in ordinary course of things would be likely to result, and not under section 3353, authorizing recovery of difference between contract price and market value.

5. Sales ⟹383—Evidence held insufficient to authorize seller's recovery of any damages for buyer's breach of contract to purchase straps to be manufactured.

In action for damages for breach of contract under which defendant agreed to purchase automobile luggage straps to be manufactured by plaintiff, evidence *held* insufficient to authorize recovery of any sum as damages.

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

On rehearing. Former opinion superseded, and judgment reversed.

For former opinion, see 262 P. 783.

G. C. DeGarmo and H. B. Cornell, both of Los Angeles, for appellant.

Fredericks & Hanna, of Los Angeles, for respondent.

STEPHENS, Justice pro tem. This is an action for damages for the alleged breach of a contract, under which defendant agreed to purchase a large quantity of web automobile luggage straps from plaintiff. The contract is based on an order and correspondence had between plaintiff and defendant directly and through plaintiff's agent, with headquarters in San Francisco. For convenience, we shall occasionally refer to plaintiff as the "Weaving Company," to defendant as "Boyle Company" or "Boyle," and to the San Francisco representative of plaintiff as "agent." Judg-

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★Rehearing denied. Hearing denied by Supreme Court.

ment went for plaintiff according to the prayer of the complaint, and defendant appeals.

The case is here on a bill of exceptions, which contains some oral testimony and a number of letters. For convenience, the essentials of the letters have been condensed under our own numbers, which do not conform to numbers used in the transcript.

The negotiations begin with letter No. 1, from agent to Boyle, April 22, 1920. Agent solicits business for his principal Weaving Company herein, and states that Weaving Company "would like to have * * * sample of your trunk strap." Advises it would be good time to place order for next season, with shipment later.

Letter No. 2 April 23, 1920. Boyle replies, asking quotations on 50,000 to 75,000 for future delivery; 10,000, immediate delivery.

Letter No. 3, April 27, 1920, agent to Boyle. He has communicated with his principal for low quotations and—

> "We are pretty well sold up on trunk straps, but if we should take on our [sic] order for a quantity of 50,000 to 75,000 for future delivery, I assume it would mean sometime in September or October, and that would give us ample time to get these made up."

Letter No. 4, May 10, 1920, agent to Boyle, quoting $40 per gross f. o. b. Buffalo, subject to change. Wire reply so buckle can be arranged for.

Letter No. 5, May 11, 1920, Boyle Company to agent:

> "We are in receipt of your favor of the 10th inst. quoting $40 per gross f. o. b. Buffalo on quantities of 50,000 to 75,000 1¼" 6' Trunk Straps, as per sample submitted, and herewith inclose our order No. 280 covering 80,000 of same. We would ask you to kindly wire this order in to your factory and ask them to make a 'special rush' of the 10,000 referred to in order. The order is, of course, placed on the understanding that these straps will match up with the samples submitted."

The order was dated May 11, 1920, inclosed with letter No. 5, and, omitting salutation, signature, and two or three additional but nonessential requirements under subtitle "Important Instructions," is as follows:

> "Enter our order as follows, for shipment:
> * * * Route via Santa Fé at Chicago
> Terms ——. Order No. 280.
> Quantity Description
> 80,000 6' Straps made from 1¼" Russet Trunk. Web $40.00 per gross f. o. b. Buffalo.
> Complete with nickle plated buckle and tip, as per sample submitted.
>
> "N. B.—10,000 of the above to be shipped very earliest possible—balance later.
>
> "Important Instructions.—Please acknowledge receipt of this order, show price and state when shipment will be made."

Letter No. 6, May 13, 1920, agent to Boyle, acknowledges order.

Letter No. 7, May 14, 1920, agent to Boyle. Received information permitting him to assume 10,000 will be shipped within a month.

Letter No. 8, Weaving Company to Boyle, May 18, 1920. Acknowledgment of order No. 280. In good position to get off first lot of straps. Only waiting for express shipment of buckles to rush forward. Fortunate webbing on hand.

Letter No. 9, May 24, 1920, agent to Boyle. Sending to-day's mail sample web strap. Different from stock strap; therefore would like approval.

Letter No. 10, May 26, 1920, Boyle to agent:

> Strap O. K. "In regard to shipment of this order, as previously advised, we wish 10,000 straps shipped at the earliest possible moment. The balance of the order, however, we do not want shipped until about the first of next year. * * * We would ask that you take up the matter of shipping instructions with us some time about the 1st of December. * * * We are wondering if we would be protected on this order in the event of a decline in price prior to date of shipment."

Letter No. 11, May 28, 1920, agent to Boyle. Order simply stated, as to delivery after first 10,000, "balance later." Agent quite sure Weaving Company inferred they were to make up and ship from time to time as completed. Weaving Company arranging for raw material on this basis. Writing as to protection against factory price decline. "Manufacturing conditions abnormal; help and raw materials scarce. If you could permit us to make monthly shipments, beginning about July 1st, you would then be sure of a sufficient quantity to take care of your requirements, instead of making shipment to you of the entire order complete, some time after December 1st."

Letter No. 12, June 2, 1920, Boyle to agent:

> Note you have written Weaving Company about price decline. We appreciate factory position. Apart from the 10,000 straps will need none until spring. "We do not think it unreasonable to ask you to protect us against your own decline, a practice quite common in our own business. * * * In regard to shipping instructions, we could agree to your making monthly shipments commencing about the 1st of October and ending January 1st, 1921."

Letter No. 13, June 4, 1920, agent to Boyle:

> Have written Weaving Company about protecting you against factory price decline and reason you ordered early was to be sure having straps in time. "I fully agree with you that as a rule, orders of this kind are taken with a protection against the manufacturer's own decline. I am quite sure there will be no question about this, but would prefer to have this come direct from my principals. * * * Also note your shipping instructions, commencing about October 1/20 and ending January 1/21."

Letter No. 14, June 7, 1920, agent to Boyle:

> "Our people inform me they will protect you against their own decline, although they say

you must take into consideration the fact that they * * * have had to buy this material outright * * * and can get no protection. * * * Now further, with reference to shipment, they state it would be some little time before they complete the first 10,000 straps, and in view of increasing freight congestion * * * they feel it would be well for you to have these monthly shipments coming along to you, and in that way you would be assured of having the straps on hand; whereas if you call upon us to furnish the entire quantity in two or three months we might be held up owing to * * * contingencies that might arise. * * * Furthermore, it would mean we would have to accumulate a lot of web for the next five or six months, before we start on your order. Inasmuch as we are going to protect you in our own decline in price, you will undoubtedly yield to our point of making monthly shipments, as we shall certainly not crowd you with an enormous amount of goods each month. When they wrote their letter they did not have my letter with reference to beginning shipments Oct. 1st and ending about January 1, '21. I am in hopes, however, when they receive these instructions, they will be able to make up the straps and get them ready to ship monthly, beginning October 1st and completing the entire order by January 1, '21. If, however, you will permit us to begin shipments a little earlier, will be glad to have you advise us."

Letter No. 15, June 15, 1920, agent to Boyle:

"They [respondent company] feel inasmuch as you are permitting them to make monthly shipments beginning October 1 and ending January 1, 1921, this is very satisfactory, and as I have already informed you we would protect you in the event of a decline in our own price."

Letter No. 16, July 9, 1920, agent to Boyle. Refers to another order.

Letter No. 17, October 28, 1920, Weaving Company to Boyle. Adjusting shipments to date at $32 per gross.

No. 18, telegram, Boyle to agent, November 30, 1920:

"Cancellation of many orders for automobile accessories necessitate our cancellation of all orders on your files unshipped at this date."

Letter No. 19, November 30, 1920, Boyle to Weaving Company. Incloses telegram sent agent. Regrets necessity of cancellation because of lack of orders.

Letters No. 20 and No. 21, November 30 and December 6, 1920, Weaving Company to Boyle. Acknowledge receipt of concellation telegram and advise consultation with agent. "Asking him to take the matter up with you, as he did the original order."

Letter No. 22, December 7, 1920, agent to Boyle. Gives history of deal and argument:

"At the time you placed this order with us, it was undoubtedly placed in good faith, and our people accepted the same at a fixed price, with the understanding that in the event of a decline on our own price, we would protect you and give you the benefit of same. * * * However, we gave you the benefit of a decline of 20 per cent. unsolicited, and it has been our intention that in the event of our making further declines that we continue to give you the benefit of same on unfilled portion of your order. Now our people do not feel as though they should accept cancellation of this order, as you will recall when it was placed we had to commit ourselves for the hardware, which we purchased at a fixed price, without any protection in the event of a decline by the manufacturer. We have all this material in our plant, and all paid for. Now there is no doubt but what you are going to want these straps as soon as business revives, which we all hope will be shortly after the first of the year. Our people feel you should be willing to allow the order to stand on our books for future shipment. We have a lot of straps all made up for shipment this month, and trust you will permit us to send them along, as they are made up special to your order."

Letter No. 23, December 11, 1920, Boyle to agent:

"Your letter of the 7th inst. regarding cancellation of our order on made up web straps received and contents noted. Your proposal to keep this order on your books for future shipment is agreeable to us, but we wish it to be understood that no part of this order is to be shipped without written instructions from us to that effect." Hopes business conditions will soon permit permission to ship part of order.

Letter No. 24, December 13, 1920, agent to Boyle. Appreciate your position. Believe revival of business about first of year. Believe Boyle probably be asking for shipments by first of year. "If there is any further declines our people propose to give you the benefit of same."

Letter No. 25, December 21, 1920, Weaving Company to Boyle:

"We have heard from our Mr. Wirtner [agent] with reference to your order, and have noted the correspondence which you have had with him. We are very glad indeed that you have decided to keep this order on our books, and we earnestly hope that conditions will improve so that you will find the usual heavy demand for your goods. You will see that we are going to protect you on declines and shall do all in our power to give you good service in every way."

Letter No. 26, October 5, 1921, agent to Boyle. Complains about not receiving orders. Reminds Boyle buckles purchased. Asks for webbing business.

Letter No. 27, November 12, 1921, Weaving Company to Boyle. Calling attention to special buckles carried for Boyle's work, and asks for orders.

Letter No. 28, November 21, 1921, Boyle to agent:

Checked over stock. "* * * We have * * * enough to give us a good start for the coming season. We will, however, undoubtedly be in the market later on for a further supply of this commodity, and you will certainly hear from us as soon as the writer is able to get a better line on what our requirements are likely to be."

Letter No. 29, November 23, 1921, agent to Boyle. Appreciate advising conditions. Very much like to receive your order, but very glad to hold special buckles until your requirements bring you in the market.

Letter No. 30, February 11, 1922, Weaving Company to agent. Expresses disappointment regarding Boyle orders, and says:

> "Their promise to give us an opportunity of figuring when they are in the market does not sound good to us; we want some relief. * * * Our loss on the web is not so serious as the buckles, as we have, of course, other uses for the webbing. If he can't use the straps we want shipping instructions on the buckles which were ordered especially for him. We want no profit and are willing to bill them out to him at cost."

Letter No. 31 February 15, 1922, agent to Boyle. About the same as letter No. 30. Suggests buckles be taken off their hands.

Letter No. 32, February 18, 1922, Boyle to agent. Declines to receive buckles. Hopes for revival of business. "Rest assured that we will place no strap orders without consulting you."

Letter No. 33, March 1, 1922, is a bill for the buckles, sent to Boyle. (But buckles were not shipped.)

Letter No. 34, March 8, 1922, Boyle to agent. Returns buckle invoice. Says charge not in order at this time. Will give additional order in line with agent's order of November 23d.

Letter No. 35 (no date), Weaving Company to Boyle:

> Recites history of deal. Demands shipping instructions for rest of order to specify shipping within three months after receipt of instructions at the factory decline price, if any, not to exceed $40 per gross at time of shipment. "If we do not receive shipping instructions from you as above outlined within the time mentioned, we shall consider you in default and that you have breached your contract with us, and that the modification of the contract to guarantee you against our decline in price having been made on your agreement to take the straps out in a certain time, and you not having done so, that such modification is of no further force or effect, and that the original agreement to pay $40 per gross is reinstated, and that our damage will be the difference between such $40 per gross and the market price, whatever it may be at the time of your default."

Letter No. 36, April 25, 1922, Boyle to Weaving Company. Acknowledges receipt of last letter from Weaving Company. Surprised attitude assumed. States they are purchasing no straps from other source. Assures Weaving Company will purchase from them when in need.

Letter No. 37, February 7, 1923, Boyle to Weaving Company. States conditions are such that they can use 3,000 more straps, and orders same.

Letter No. 38, February 16, 1923, Weaving Company to Boyle. Refers to former correspondence and states they have placed the matter in attorney's hands.

No goods other than the 1,400 gross delivered and paid for were ever shipped. Suit was brought on the 13th of February, 1923, whereby plaintiff sought to recover the sum of $6,755.50 damages, estimated by deducting the market price of straps as of the date of defendant's letter of April 25, 1922, from the contract price. According to the complaint and the testimony of the president of the plaintiff corporation, this sum as damages is arrived at as follows: $40 per gross contract price, less $25.25 per gross market price, times 458 gross undelivered, equals $6,755.50.

The pleadings make it unnecessary for us here to consider the element referred to in the correspondence as "factory decline in price."

Appellant herein (Boyle Company) contends that the original contract was voluntarily nullified and that another and different contract became effective by the exchange of the cancellation telegram, the reply thereto, and appellant's letter of December 11, 1920. The trial court found that the original contract remained in force, and gave judgment in accord with the pleadings and plaintiff's theory of the case.

[1] We are of the opinion that the original contract was never nullified but remained in full force and effect, except that the time of shipping the goods was extended for a reasonable period and that such reasonable time had expired on the 15th of April, 1922, the date of letter declaring a breach of the contract.

[2, 3] George L. Mathewson, president of the respondent company, was called as a witness for the purpose of proving the market value of the straps in question, and after proper qualification was asked:

> "What was the market price of the straps covered by the Boyle Manufacturing Company contract on April 15, 1922?"

To which counsel for appellant interposed the following objection:

> "We object to that question and also the answer on the ground that it is immaterial, irrelevant, and incompetent for the reason that, under the pleadings, the market value is not the basis for the fixing of the damages and is not material."

The court overruled the objection, with leave to move to strike. On pages 77 and 78 of the transcript is the following:

> "At the conclusion of the hearing defendant moved to strike out all of the testimony of the witness George L. Mathewson concerning the market value of such straps and buckles in 1922 on the ground that it was incompetent, irrelevant, and immaterial, in this that no breach

of contract was shown to have been created at that time, and the court thereupon denied the motion."

Mr. Mathewson's testimony was as follows:

> "A. [to question above quoted]: $25.25.
> "Q. Per gross? A. Per gross.
> "Q. Do you know the market price during the balance of the month of April, 1922? A. The same.
> "Q. And you do know it, and that was the price? A. Yes.
> "Q. Do you know the market price during May and June, 1922? A. $25.25.
> "Q. And that is the market price f. o. b. Buffalo? A. Yes.
> "Q. So that the difference then between the contract price of $40 and the market price of $25.25 per gross is $14.75 a gross? A. I base my opinion of market value during this period from August 15, 1922, to July, 1922 [sic], partly upon sales of straps similar to those covered by the Boyle Manufacturing Company contract."

He then testified that sales were made by his (respondent) company of similar straps on June 23, July 19, June 5, June 30, May 15, and June 24, 1922, at $25.25 per gross, and said:

> "Those dates I have just given in my answer to the last question are the dates upon which sales were made by the Buffalo Belting & Weaving Company of similar straps to those covered by the Boyle Manufacturing Company contract at the price I have stated, f. o. b. Buffalo. Those were sales made in the usual course of business."

He further testified that there were other sales on or prior to April 15, 1922, to wit, April 8, May 26, April 24, April 18, April 11, and March 28, 1922, at $25.25 per gross; and that "the market value of these straps as covered by the contract from March 1, 1922, to August 1, 1922, was $25.25 per gross, f. o. b. Buffalo."

We believe the objection to the original question which elicited this testimony was good and should have been sustained; but when counsel for appellant moved to strike Mathewson's testimony he seems to have narrowed the ground of his objection to one point, viz., that *the contract was not breached as of the date stated in the question*—April 15, 1922. Since the date of the breach of the contract was determined by the trial court as of April 15, 1922, and we think correctly so, and this was the sole basis of the motion, the denial thereof was correct. But we are unable to see what use can be made of this evidence.

[4] Paragraph II of appellant's specifications of the insufficiency of the evidence to support the findings is as follows:

> "The evidence is insufficient to justify paragraph IV of the findings reading as follows: 'That all of the allegations of paragraph IV of plaintiff's complaint are true.' The evidence shows that the following allegations of paragraph IV of plaintiff's complaint are untrue: 'And by reason of the facts herein alleged the plaintiff has been damaged in the sum of $6,755.50.'"

And under the subhead "Assignment of Errors" appears the following:

> "The court erred in its rulings as follows: '(3) In concluding as a matter of law that said plaintiff is entitled to a judgment against said defendant in the sum of $6,755.50, or any other amount.'"

The loss sustained by respondent, in the circumstances of this case, was clearly one of loss of profits—the difference between the cost of manufacturing in the finished, ready to deliver state and the contract price. The measure of such damages would have to be ascertained under section 3300 of the Civil Code, and not under section 3353, Civil Code. Utter v. Chapman, 38 Cal. 659, 665; Connell v. Higgins, 170 Cal. 541, 549, 150 P. 769; Hale v. Trout, 35 Cal. 229; Cederberg v. Robinson, 100 Cal. 93, 34 P. 625; Johnson v. Hinkel, 29 Cal. App. 78, 154 P. 487; Lund v. Lachman, 29 Cal. App. 31, 154 P. 295.

[5] There is no contention that the straps were made up, except a monthly installment of them for December, 1920. There is no evidence that they were ever all made up and actually sold in the open market so as to afford the smallest possible loss. On the contrary, the only evidence on the point comes through Mr. Mathewson, president of the respondent corporation:

> "We did not purchase any webbing to fill the contract. We would have webbing. We don't know when we disposed of it, but we simply carried it in stock for years afterwards and sold it out in small lots from time to time. The entire stock of buckles we still have on hand. We have given them to our branch offices and tried to dispose of them in that way, but none of them have been sold."

We think there is no evidence to sustain the finding complained of and above quoted, and no evidence to sustain the judgment for the sum determined upon by the court or any other definite sum.

Judgment reversed.

We concur: WORKS, P. J.; THOMPSON, J.

90 Cal. App. 715

MOSTELLER v. BRAHAM. (Civ. 5132.)

District Court of Appeal, Second District, Division 1, California. April 7, 1928.

1. Sales 🔑398—Rescission judgment held not erroneous for failure to return seller's property, where value was deducted from amount due buyer.

Judgment enforcing rescission of contract of sale of lunchroom reasonably worth $300 at price of $2,500 on ground of seller's false representations *held* not erroneous, on ground that no provision was made for return of property to seller, where $300 was deducted from amount buyer had paid to determine amount due buyer from seller.

2. Contracts 🔑265—Restoration of status quo is not always condition of rescission.

Rescission of contract obtained by fraud will not be denied merely because parties cannot be placed in statu quo if equity can be done.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by H. E. Mosteller against N. C. Braham. Judgment for plaintiff, and defendant appeals. Affirmed.

Fairfax Cosby and Brewton A. Hayne, both of Los Angeles, for appellant.

Carlyle Wynn, of Los Angeles, for respondent.

CONREY, P. J. In this appeal from a judgment enforcing rescission of a contract of sale, the record consists of the judgment roll only. The facts are as shown by the findings. The defendant, for the purpose of inducing the plaintiff to purchase from defendant at a price of $2,500 a certain lunchroom, etc., made sundry representations of fact, which representations were false. Relying upon those representations, the plaintiff agreed to purchase the property at the price of $2,500, of which $1,000 was actually paid to the defendant. Promptly after discovering that said representations were false, the plaintiff gave written notice of rescission and offered to return to defendant the leased premises, together with the personal property therein contained, upon condition that defendant return to plaintiff said sum of $1,000. The personal property connected with said business, including the lease, good will, etc., at the date of the sale did not exceed in value the sum of $300. The defendant refused to return said sum of $1,000, and the plaintiff continued in possession and conducted the business in a proper and well-managed manner for a few months longer and then abandoned it. The court allowed to the defendant, as an offset to said sum of $1,000, the sum of $300 as the value of the property, and gave judgment against the defendant in the sum of $700 and costs.

[1, 2] The principal point urged by appellant is that the judgment made no provision for return of defendant's property concurrently with his payment of the judgment. As the evidence is not before us, we are not able to say just what were the probative facts concerning the condition of the property at the time when the case was tried. Since the court found that said property was worth only $300 and actually allowed that amount in reduction of the sum of $1,000, which otherwise would have been the amount of the judgment, it seems clear enough that no injustice has been done to appellant by the form of relief to plaintiff as accorded by the judgment. The condition of the business of the restaurant after the defendant refused plaintiff's demand for rescission was such that the plaintiff could not reasonably be required to maintain it indefinitely for the benefit of the defendant. "It is not an invariable rule that the rescission of a contract obtained by fraud will be denied merely upon the ground that the parties cannot be placed in statu quo. If equity can still be done between the parties, courts will grant relief to the defrauded party." Green v. Duvergey, 146 Cal. 379, 389, 80 P. 234, 238.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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90 Cal. App. 625

TETENMAN et ux. v. MELEKOV et al. ★ (Civ. 5908.)

District Court of Appeal, Second District, Division 2, California. April 4, 1928.

Rehearing Denied May 4, 1928.

1. Exchange of property 🔑4—Agreement to exchange land and escrow instructions should be construed as one contract (Civ. Code, § 1642).

Under Civ. Code, § 1642, providing that several contracts relating to same matters between same parties and made as parts of substantially one transaction are to be taken together, agreement for exchange of real properties and escrow instructions constitute one contract and should be so considered and construed.

2. Specific performance 🔑29(2)—Parties to contract for exchange of properties held to have construed original agreement by subsequent escrow instructions, documents, and pleadings, resolving all doubts as to descriptions, so that contract could be enforced.

Parties to contract for exchange of real properties which plaintiffs sought to specifically enforce *held* to have construed original agreement and resolved all doubts as to descriptions of properties found in it by subsequent escrow instructions, documents, and pleadings, so that agreement could not be held too indefinite and uncertain to be enforced.

★Rehearing denied.

3. Specific performance ⚷30—Contract for exchange of land held not too indefinite regarding payee of $1,500 cash to be specifically enforced.

Agreement for exchange of real properties *held* not to be too uncertain in regard to payee of $1,500 cash to be enforced in specific performance suit, where agreement, after providing for exchange of equities in properties, called for payment in language, "and $1,500 cash to me," where word "me" in that connection could mean only plaintiffs.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Aaron Tetenman and wife against Leon Melekov and wife and the Standard Construction Company and another for specific performance of an agreement for the exchange of real properties. From a decree for plaintiffs, defendants named appeal. Affirmed, with instructions.

Duke Stone and Hugh L. Dickson, both of Los Angeles, for appellants.

Harry Sherr and Albert Sidney Brown, both of Los Angeles, for respondents.

HAZLETT, Justice pro tem. This action was brought to require defendants Leon Melekov and Mary Melekov, his wife, to specifically perform an agreement of exchange of real properties made between plaintiffs and defendant Leon Melekov. The trial court decreed that defendants Leon Melekov and Mary Melekov specifically perform as prayed for in the complaint, by delivering their deed and paying $1,500 to the use and benefit of plaintiffs according to the agreement and certain escrow instructions made by the parties to carry the agreement into effect.

Defendants Leon Melekov, Mary Melekov, and Standard Construction Company appeal from the decree, but they filed no brief in reply to respondents' brief.

The original agreement was executed on August 7, 1926, is in two parts, the first being a proposition to trade signed by plaintiffs, and the second part an acceptance signed by defendant Leon Melekov, and the descriptions of the properties are somewhat indefinite in some particulars, but the descriptions therein are such that under proper allegations in the pleadings the properties could be identified from them by the use of extrinsic evidence, following the rules announced in Joyce v. Tomasini, 168 Cal. 234, 142 P. 67, and McKevitt v. Sacramento, 55 Cal. App. 117, 203 P. 132. The incumbrances against the properties were also sufficiently identified and described.

Three days after the agreement was made the parties established an escrow with defendant Bank of Italy for the purpose of completing the agreed exchange, and plaintiffs on their part gave their escrow instructions to defendant bank, and defendant Leon Melekov separately on his part gave the bank his escrow instructions. Each of the instructions described the properties by their legal descriptions and the incumbrances against each property.

Plaintiffs put into the escrow their grant deed of their property, running to defendant Standard Construction Company, and defendants Leon and Mary Melekov also put in their grant deed of their property running to plaintiff Etty Tetenman, but defendant Leon Melekov failed to acknowledge it. Each deed described the property intended to be conveyed by it by its legal description as contained in the escrow instructions and in the complaint. Defendant Leon Melekov deposited $500 in the escrow and agreed to deposit $1,000 more later, to be paid to plaintiffs. Before the time limited for closing the escrow arrived, defendant Leon Melekov, without just cause, withdrew the deed and moneys he had placed in the escrow and refused to proceed with the exchange.

The complaint alleges the agreement of exchange, describes the real properties by the legal descriptions as contained in the escrow instructions, and refers to a copy of the original agreement attached to and made a part of the complaint for the terms and conditions of the agreement, and alleges the escrow and that it was made pursuant to and in connection with the original agreement; that plaintiffs had performed the agreement and are ready and able to carry out the agreement on their part; that the agreement and agreed exchange are fair, just, and equitable as to defendants, and a breach of the agreement and escrow by defendant Melekov, and prays for a decree of specific performance.

The answer of defendants Melekov denies the execution of an agreement as alleged in the complaint, and alleges that defendant Leon Melekov and plaintiffs did enter into an agreement of exchange of the properties described in the complaint and at the time therein alleged, but that defendant Leon Melekov was induced to execute the agreement by reason of certain alleged false representations made by plaintiff Aaron Tetenman, because of which alleged false representations he refused to conclude the trade, and denied that plaintiffs performed the agreement on their part or that the agreement was fair, just or equitable as to defendants Melekov.

The evidence produced shows the following additional facts without conflict: That the agreed exchange of properties was fair, just and equitable as to defendants Leon and Mary Melekov, in this, that the net value of plaintiffs' property, after deducting incumbrances, was approximately $11,675, and the net value of the property of defendants Melekov, after deducting incumbrances, together with $1,500 cash to be paid by them, made the net value to pass from them to plaintiffs aggregate $10,500. These values were shown by the evidence produced by plaintiffs and not controverted by defendants.

Defendants Leon and Mary Melekov and Standard Construction Company admitted at the trial that defendant Leon Melekov requested plaintiffs to make their deed to defendant Standard Construction Company, and the escrow instructions signed by defendant Leon Melekov call for a deed running from plaintiffs to that company.

The allegations of false representations made in the answer were not sustained, and appellants do not contend that they were proved. In fact, this appeal is based wholly upon other grounds, as will hereinafter appear.

Appellants contend that the agreement of exchange is so indefinite and uncertain that a court of equity cannot enforce it in all particulars, because: (a) of the differences in the descriptions of the properties as contained in the agreement and in the complaint; (b) the descriptions of defendants' property in the agreement is too uncertain and indefinite; (c) the description of the incumbrances on both properties renders the agreement uncertain; (d) there is uncertainty as to whom the $1,500 should go; (e) plaintiffs' deed was made to defendant Standard Construction Company instead of to the person designated in the agreement or escrow instructions, which rendered the agreement and escrow instructions uncertain, unintelligible and unilateral and made them lack mutuality. Appellants also call attention to the fact that reformation of the agreement was not sought by plaintiffs, and contend that the escrow instructions, which they name in their brief herein "the escrow agreement," and the deed to the defendant Standard Construction Company, constituted an entirely new transaction. They also contend that the proof fails to show that the consideration moving to appellants or to any of them in the exchange was fair and equitable.

[1] The agreement and escrow instructions constitute one contract and should be so considered and construed, as provided in section 1642 of the Civil Code.

[2] Appellants' contentions have no merit. While it is true that the description of either property in the agreement is not as definite as in the escrow instructions and complaint, defendants Melekov admit in their answer that they made an agreement of exchange with plaintiffs, covering the properties fully described in the escrow instructions and complaint, the original agreement was received in evidence without objection, the incumbrances were described in the original agreement, and more definitely described in the escrow instructions, and the evidence shows without conflict that for the purpose of carrying out the original agreement, the parties thereto executed the escrow instructions, and placed their deeds in the escrow. By those subsequently executed papers, documents and pleadings the parties construed the original agreement and resolved all doubts as to the descriptions of the properties found in it. By their acts they showed that they were under no misapprehension as to what was the property to be exchanged.

[3] The contention that there is uncertainty in regard to the payee of the $1,500 cash is an attempt by appellants to fly in the face of the simplest language. In the first part of the agreement plaintiffs call for payment to them of that amount by defendant Leon Melekov in the following language, after providing for the exchange of equities in the properties, to wit: "And $1,500.00 cash to me." The word "me" in this connection can mean only the plaintiffs.

The remaining contentions made by appellants are so clearly without merit and the answers are so obvious that we do not deem it worth while to dignify those contentions by further answering them.

The points made by appellants are unjustifiable; the appeal is frivolous and was taken for the purpose of delaying and harassing respondents and tying up the properties involved in the action, each of which was incumbered by mortgage and appellants' property also by a second incumbrance in the nature of a deed of trust.

The judgment is affirmed, with instructions to the trial court to enter a judgment in favor of respondents and against appellants for the sum of $100 and costs of appeal.

We concur: WORKS, P. J.; THOMPSON, J.

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90 Cal. App. 692

RATHBUN CO v. SIMMONS. (Civ. 3465.)

District Court of Appeal, Third District, California. April 6, 1928.

1. Landlord and tenant ⊂⇒150(1)—Tenant must keep leased premises in repair, in absence of express covenant by landlord to repair.

The rule is well established that, in the absence of an express covenant by the landlord to make necessary repairs, the tenant is the one to keep up the leased premises.

2. Landlord and tenant ⊂⇒150(1)—Though tenant is to make repairs, he cannot be required to repair that over which he has no authority.

The application of the rule, relative to its being tenant's duty to make repairs in the absence of an agreement that the landlord shall make them, cannot be extended beyond leased premises so as to hold the tenant to the mak-

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⊂⇒For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes ing of repairs to part of premises over which he has no control or authority.

3. Landlord and tenant 🔑166(5)—Lessee of lower floor held not required, either impliedly or by contract, to keep roof and drain system in repair.

In suit by tenant against landlord for damage to merchandise resulting from roof and drain system of building becoming defective so as not to shed rain properly, wherein landlord defended on ground of its being tenant's duty to make repairs, *held*, that such tenant, being lessee of ground floor and basement, only, was not by contract, nor was he impliedly, bound to repair roof and drain system over which he had no authority or control.

4. Landlord and tenant 🔑166(10)—Notice to landlord of roof and drain system defects held not prerequisite to action by first floor tenant for damage from rain.

In action by tenant of first floor and basement against landlord for damage to goods resulting from defects in roof and drain system so that rainwater ran into plaintiff's store, *held*, that notice to the landlord of such defects was not a prerequisite to such tenant's bringing his action, since the upper floor was not leased by tenant and he had no control over parts of building in which defect existed.

5. Landlord and tenant 🔑169(7)—Evidence held to support findings of landlord's negligence in not keeping building in repair, resulting in injury to tenant's goods from rain.

Evidence *held* to support findings and judgment of trial court that landlord was negligent in his duty to provide an adequate drainage system for his building and keep it in good state of repair, so as to make him liable to tenant for injury to merchandise from rain as result of defects in building and failure to repair.

6. Landlord and tenant 🔑166(1)—That defective condition of roof causing damage to tenant's goods from rain could not be discovered because of hidden catch basin held no defense without showing custom or propriety of having such basins.

In action by store tenant against landlord for damage to goods from rain because of defects in roof and drain system which it was landlord's duty to repair, that defect was one that could not be discovered because the rainwater catch basin was set underneath a subroof and covered by a screen *held* not a defense, in absence of a showing that it was customary or proper in installing adequate drainage systems for a building of the kind in question to permit drainage systems to be installed in such a manner as to preclude easy inspection.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Rathbun Company, a corporation, against G. C. Simmons. From the judgment, defendant appeals. Affirmed.

Elliott, Atkinson & Sitton, of Sacramento, for appellant.

White, Miller, Needham & Harber, of Sacramento, for respondent.

PRESTON, Justice pro tem. This is an action for damages, brought by plaintiff, as tenant, against defendant, as landlord, on account of damage to plaintiff's merchandise, caused by rainwater from the roof of the demised premises.

The action was tried by the court sitting without a jury, and judgment was entered in favor of plaintiff for the sum of $2,000, from which judgment the defendant prosecutes this appeal.

The defendant and appellant owned a five-story brick building situated in the city of Sacramento and known as "Inverness Building." The first story and basement of the building were leased to respondent and used by it in conducting a ladies' wearing apparel store. The upper stories were leased by appellant to one J. P. Gallagher, who conducted a hotel therein. An open light well, 2 or 3 feet wide by 3½ feet long, extended from the first story upwards, so that under the light well the building is, in effect, but one story high. Respondent's store therefore was partly covered by a subroof, or the floor of this light well, and partly by the floor of the second story. This light well gave ventilation and light to the rooms of the hotel, on the second, third, fourth, and fifth floors of the building. The building is so constructed that the entire roof is drained into the light well. The main roof is drained into a pipe which leads from the upper roof to a point a short distance above the subroof, where it discharges the rainwater falling on the main roof directly on the subroof. The water then flows over the subroof for a distance of about 2 feet to a catch basin or hopper, located in the center of and beneath the subroof, and which is protected by a screen or perforated hood. After entering this hopper or catch basin, the water is discharged into a pipe which is recessed in the north wall of the building, and which conducts it into the basement, from whence it is carried out to the gutter in the street. The particular function of the subroof in the way of carrying water is to carry water from the upper or main roof, because there is a very much larger area of drainage there than is on this lower roof.

The court found, among other facts:

> "That on or about said 8th day of November, 1924, and while the said personal property of said plaintiff was so located and stored in said store as aforesaid, large quantities of rain water were precipitated and deposited upon the roof of that portion of said building immediately over said store and which said roof was then and there in the possession and under the control of said defendant; that said defendant negligently and carelessly permitted and suffered said roof and the drain therein to become in a state of disrepair and incapable of carrying off the rainwater so deposited and precipitated on said roof and then and there negligently and carelessly permitted and caused said rain water

to accumulate in such large quantities upon said roof that by reason thereof, and without any fault on the part of said plaintiff, said rainwater leaked through said drain and said roof and ran into, upon, and flooded said store so occupied by said plaintiff and said personal property of said plaintiff so located in said store, and thereby and in consequence thereof damaged and injured said personal property and the plaster on the ceilings and walls of said store, thereby interfering with the said plaintiff's quiet enjoyment of said demised premises as tenant of said defendant, and that said plaintiff was damaged thereby in the sum of $2,000 lawful money of the United States."

The first and most important question to be determined is, Who, under the terms of the lease, had control of the subroof and drainage system in said building?

On August 11, 1923, the appellant leased to respondent "that certain first story and basement of a five-story brick building, and its appurtenances, known as 'Inverness Building,' for a term of five years from September 1, 1923." Said lease also contained the following provisions:

> "It is further agreed that said party of the first part shall not be called upon to make any improvements or repairs or replacements whatsoever upon the said demised premises, or any part thereof, but said party of the second part [respondent herein] agrees to keep the same in good order and condition at its own expense, including the replacement of all plain and plate glass if broken from any cause, and replace all plaster if broken or damaged from any cause."

The entrance hall and stairway and elevator were excepted from the lease, as was also the basement area containing the elevator machinery and heating plant. The lease further provided:

> "It is also understood and agreed that the party of the first part [the appellant herein] shall not be held responsible for any act or neglect of the tenants in the hotel above the store hereby leased, and it is further understood and agreed that the said party of the second part shall keep the said premises at all times in a neat and sanitary condition as required by the rules and regulations of the board of health and the plumbing ordinances of the city of Sacramento."

[1, 2] Thus it will be seen from the terms of the lease that the lessor (appellant herein) was not to be called upon to make any repairs to the leased premises, and that the lessee (respondent herein) agreed to keep the demised premises in good order and condition. It is clear that these covenants in said lease, however, applied only to the *demised premises;* that is to say, to the premises which by the terms of the lease passed out of the control of the lessor and into the exclusive possession and control of the lessee, and not to any portion of the building not covered by the lease. We find no provision in the lease which places the duty of caring for the drainage system, or the roof, or the subroof, upon either the lessor or the lessee. The rule is well established that in the absence of an express covenant by the landlord to make necessary repairs, the tenant is the one to keep up the leased premises. Capwell Co. v. Blake, 9 Cal. App. 101, 98 P. 51; Longbotham v. Takeoka, 115 Or. 608, 239 P. 105, 43 A. L. R. 1285. The reason for this rule is that the tenant takes the estate as he finds it with its advantages and drawbacks, and if he would protect himself against the expense of betterment, he must either not acquire the tenancy or exact from the landlord a covenant to make the repairs necessary to the enjoyment of the estate. The application of this rule, however, cannot be extended beyond the premises leased; the tenant cannot be held to repair that over which he has no control or authority. In Longbotham v. Takeoka, supra, the court said:

> "Responsibility, whether of the landlord or the tenant, follows and is measured by the control lodged in one or the other. Merely because A is landlord and B is tenant does not excuse A from liability for damage he inflicts upon B by operation of an appliance in the control of the former."

Turning to the testimony in the case, we find that Ralph H. Rathbun, president of respondent corporation, testified that he had no access from his store to the subroof or upper floors of the building, and in order to gain access from his store to this subroof, he would have to go upstairs and get permission from the proprietor of the hotel, in order to get access to the rooms through which he would have to pass in order to go out on this subroof; that he could not see the light well from his store because there was a solid ceiling in the store. Rathbun testified that he had never seen or examined the light well, and in fact did not know there was a light well in the building until after the damage had occurred. Mr. Gallagher, who conducted the hotel on the upper floors, testified as follows:

> "Q. How could you obtain access to this light well from the main floor? A. Well, there is no access for anybody to go through unless they climb through my apartment, and go through the window.
>
> "Q. Is there any means to obtain access to that light well from any other apartment besides your apartment? A. Yes; you can go in through any of those windows, different apartments. They could come in from the other side, from the 'Argus Building,' could climb through there, if they wanted to, and go down there.
>
> "Q. The Argus Building is located where? A. Joins the Inverness Building. * * *
>
> "Q. In reference to those windows which open out upon the light well there, how many windows open out upon the light well, that it is possible to go out and obtain access to the well, what area of the roof? * * * A. It would be the first tier of windows on that floor."

From the foregoing testimony, and other testimony of a similar character, it seems clear that respondent did not have access to the roof or light well, and, in fact, had no knowledge of the system of drainage provided for the building, or even the existence of a light well until after the damage occurred.

[3] From all these facts we conclude, therefore that respondent was not required by the lease to keep in repair the light well and the roof. Neither did he impliedly assume such responsibility. The main roof of the building sheltered the rooms used by appellant's other tenant, Gallagher, as a hotel, and it would be unreasonable, under the facts, to hold that respondent was responsible for the care of the roofs under his lease covering only the ground floor and basement, or that he assumed the care of the roofs or undertook to provide means for the escape of the water from them. On the other hand, from the facts revealed by the record, it seems clear to us that it was the duty of appellant to provide an adequate means for the escape of rainwater falling upon the roof of the building, and also to see that the means employed for that purpose were maintained in good order and condition and capable of serving the purpose, and if he was negligent in this regard, he would be liable to respondent for any damages suffered thereby.

Appellant contends that, even conceding this to be true, still, the evidence fails to disclose any negligence on his part. This contention is based upon the testimony of Mr. Gallagher, the proprietor of the hotel on the upper floors of the building, to the effect that he cleaned the roof on the day before the store was flooded and everything seemed to be in perfect condition as far as outward appearances were concerned, and that, theretofore, no leaks or trouble with the drainage system had been discovered; also, upon the testimony of Mr. Rathbun, the president of respondent corporation, that he, together with Mr. Gallagher, examined the roof on the morning after the flooding of the store and could not ascertain the cause of the leak; and also, upon the testimony of the appellant to the effect that he had never had any complaint from any of the tenants prior to the time of the damage in question that the drainage system was not adequate, and had never prior to the damage to respondent been notified that the drainage system was out of repair.

[4] Upon this testimony, appellant argues that he was entitled to notice of the defects, and unless it is shown he had notice or actual knowledge, or unless the defect was apparent on a reasonable inspection, he cannot be held negligent. The cases cited by appellant upholding this doctrine are not applicable under the facts of the case at bar. In this case, as we have seen, a portion of the property is occupied by one tenant and another portion by the other tenant, and a single system of draining the roof is maintained for the benefit of all. It cannot be successfully contended that it was incumbent upon respondent, who had no care or control over the roof and no right to intermeddle with it, to give appellant notice of the repairs to be made in the roof, especially when the testimony shows without conflict that respondent did not know that the drainage system needed repairing, and did not possess the means of acquiring such knowledge.

The precise trouble with the drainage system was in and around the catch basin or hopper, which was set under the subroof of the building, and it was necessary for the plumber to cut a patch off of the subroof about 16 inches square to gain access to this hopper. When this was done, the plumber found that this catch basin or hopper, as it is called, was nothing more than a square box made of a cheap grade of tin or galvanized iron, set on the top of the drain pipe, and that said hopper had rusted apart, was full of holes, and resembled a "sponge," so the water could go through and percolate from the hopper or basin into the ceiling, and the pipe on which the hopper rested had also decayed and was rusty and full of holes.

[5] There was other testimony to the same effect, which is not necessary to quote, but there is sufficient evidence to support the findings and judgment of the court on the question of negligence.

The question of appellant's liability hinges entirely upon the conclusion that we have reached, that it was his duty to provide an adequate drainage system for his building and to keep it in a good state of repair. Capwell Co. v. Blake, supra, and cases there cited.

The cases cited by appellant relating to patent and latent defects have no application here for, as we have seen, the responsibility for draining the roof was upon appellant, who negligently performed this duty.

[6] There is no merit in the contention of appellant that the dilapidated condition of the catch basin, or hopper, could not be discovered because it was set underneath the subroof and covered by a screen. There is no evidence in the record, that we have been able to discover, which states that it was customary or proper, in installing an adequate drainage system for a building such as the "Inverness Building," to permit the drainage system to be installed or constructed in such a manner that it could not be thoroughly inspected without taking out a portion of the roof and, in the absence of such a showing, appellant was, no doubt, negligent in permitting it to be so constructed.

After a careful consideration of the entire record, we are of the opinion that there is ample evidence to support the conclusions of the trial court upon the question of appellant's negligence.

We think the judgment should be affirmed, and it is so ordered.

We concur: HART, Acting P. J.; PLUMMER, J.

90 Cal. App. 759

TOUSLEY v. DISHMAN et al. (Civ. 5079.)

District Court of Appeal, Second District, Division 2, California. April 10, 1928.

1. Bills and notes ⚷329—Statute making failure of consideration defense against person not holding in due course held not inconsistent, as matter of law, with statute concerning liability of accommodation party (Civ. Code, §§ 3109, 3110).

Civ. Code, § 3109, providing that failure of consideration is matter of defense against person not holder in due course, *held* not inconsistent, as matter of law, with section 3110, providing that accommodation party is one lending name to another without receiving value and is liable to holder for value, though holder knew party to be for accommodation only.

2. Statutes ⚷231—Specific section of Code takes precedence over general section.

Section of Code referring specifically to a matter takes precedence over general section.

3. Bills and notes ⚷497(2)—Plaintiff, to recover against accommodation maker, must show he holds note for value or is innocent holder in due course (Civ. Code, § 3110).

In order to hold an accommodation maker liable for payment of note given without consideration, under Civ. Code, § 3110, plaintiff must show that he is holder for value or that he was an innocent holder in due course.

4. Bills and notes ⚷489(1)—Answer by accommodation makers on note alleging no consideration to defendants and no consideration for executing note, held sufficient, in absence of demurrer, to put question of consideration in issue.

In action by payee on note against defendants claiming to be accommodation makers, answer alleging lack of consideration to defendants and want of consideration for note *held* sufficient, in absence of demurrer for indefiniteness, to put in issue determination of fact whether there was any consideration for note as against plaintiffs not alleging holding for value or in due course.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Herbert F. Tousley against W. B. Dishman and others. Judgment for plaintiff, and defendants appeal. Reversed.

Mulligan & Ryzek, of Los Angeles, for appellants.

Milton K. Young, Lyndol L. Young, William K. Young, and Young & Young, all of Los Angeles, for respondent.

STEPHENS, Justice pro tem. The defendants signed a note payabe to plaintiff, and in this action, which was brought for its collection, they set up the defense that they are only accommodation makers and that no consideration passed in the transaction. The trial court granted a motion for judgment and the pleadings, and defendants appeal.

Appellants cite section 3109 of the Civil Code:

> "Absence or failure of consideration is a matter of defense as against any person not a holder in due course. * * *"

Respondent replies by citing section 3110, Civil Code:

> "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such person is liable on the instrument *to a holder for value*, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." (Italics ours.)

[1, 2] Admitting for the sake of argument only that there is an inconsistency on the face of these two sections of our Code, there is no inconsistency as a matter of law. No principle of our rules of construction is better grounded than that a section of the Code referring specifically to a matter takes precedence over a general section.

[3, 4] Respondents say in their brief:

> "It should be remembered that no issue is raised by the answer regarding the consideration received by the original debtor, that is the party accommodated by defendants. Appellants' defense is that their assumption of respondent's debtor's obligation was not supported by a consideration and is therefore void. Their answer does not assail the obligation assumed as being without consideration and therefore void, but states that their act in assuming the same was without consideration."

But appellants' answer does assail the obligation assumed as being without consideration and therefore void. The note was made payable to plaintiff and at all times remained in his hands. There is nothing in the pleadings to the effect that the plaintiff is a holder for value or that he was an innocent holder in due course. This must be shown before an accommodation maker can be held liable for the payment of a note given without consideration. Section 3110, Civ. Code. Defendants not only allege an entire lack of consideration to them, but "that there has been and is a want of consideration for the said note and the execution thereof." We take it that this is sufficient, at least in the absence of a demurrer for indefiniteness or uncertainty, to put in issue the determination

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of the fact as to whether or not there was ever any consideration for the making, execution, or delivery of the note.

The order granting the motion for judgment on the pleadings is reversed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

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91 Cal. App. 53

PEOPLE v. MURPHY. (Cr. 1026.)

District Court of Appeal, Third District, California. April 13, 1928.

1. Burglary ⚷42(1)—Mere unexplained possession of stolen property is not alone sufficient to justify conviction for burglary.

The mere unexplained possession of stolen property, standing alone, is not sufficient to justify a conviction for burglary.

2. Burglary ⚷42(3)—Evidence additional to mere possession of stolen property held sufficient to warrant conviction of burglary.

In prosecution for burglary, evidence additional to defendant's possession of the stolen property *held* sufficient to warrant conviction.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Joe Murphy was convicted of burglary, and he appeals. Affirmed.

H. K. Landram, of Merced, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

JAMISON, Justice pro tem. Appellant was convicted upon both counts of an information charging him with two separate burglaries, and appeals from the judgment of conviction and from the order denying his motion for a new trial.

His main contention is that the evidence is insufficient to justify the verdict.

As to the first count of the information, the undisputed facts are that on the 4th day of July, 1927, one J. A. Grenier was the owner of a garage in the city of Merced; that on that day he was alone in his garage; that he absented himself therefrom for about 15 minutes and that upon his return he discovered that a number of his tools were missing; that on the 7th day of July, 1927, appellant appeared at the place of business of Darwin E. Kast in Merced, who was a dealer in used cars, and offered to sell and did sell to said Kast a portion of the tools that were stolen from Grenier's garage.

As to the second count of the information, the undisputed facts are that I. D. Harris owned a garage in said city of Merced in September, 1927; that between the 10th and 11th of September, 1927, some one forced an entrance into his garage and took away a number of tools belonging to him. Shortly thereafter appellant appeared at Kast's place of business and offered to sell him a portion of the tools taken from the garage of Harris. Kast refused to purchase any of said last-named tools. Appellant thereupon told Kast that he was going to San Francisco, and asked permission of Kast to leave the tools with him until his return, to which request Kast consented and thereupon appellant left the tools with Kast.

Appellant in his brief admits that the facts proven are sufficient to show that a burglary was committed as charged in the second count of the information and that the proceeds of said burglary were later found in the possession of appellant, but claims that possession of the stolen goods is not sufficient to establish the fact that the burglary was committed by appellant.

[1] It is true that the mere unexplained possession of stolen property, standing alone, is not sufficient to justify a conviction for burglary. 4 Cal. Juris. p. 741, and authorities there cited. But, in the case of People v. Lang, 142 Cal. 485, 76 P. 233, the Supreme Court used this language:

> "The authorities hold that where goods have been feloniously taken by means of a burglary, and they are immediately or soon thereafter found in the possession of a person who gives a false account, or refuses to give any account, of the manner in which he came into the possession, proof of such possession and guilty conduct is presumptive evidence not only that he stole the goods, but that he made use of the means by which access to them was obtained."

See, also, People v. Le Roy, 192 Cal. 498, 221 P. 353. So in the case of People v. Smith, 79 Cal. 555, 21 P. 952, where the evidence showed that a burglary had been committed and a portion of the stolen property was found in the possession of the defendants, and upon their arrest they made different statements to the arresting officer as to how they had obtained the jewelry and gave him false names, the court held that the evidence was sufficient to support the verdict.

[2] In the case under consideration, the evidence shows that on or about the 11th day of September, 1927, a burglary was committed and certain tools belonging to witness Harris were stolen and were shortly thereafter found in the possession of appellant; that appellant took these stolen tools to witness Kast and sold them to him, at that time informing Kast that the tools were some that he had been working with while driving a tractor at Crow's Landing, and that he was leaving there and going to British Columbia. Later, when arrested, he told Deputy Sheriff Gilbert that he purchased the drill, which was a portion of the tools stolen from the Harris Garage and sold by defendant to

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Kast, from a man on the streets of Modesto, a stranger to him.

Appellant further contends that the facts proved in support of count 1 of the information are not sufficient to show that a burglary was actually committed.

According to the undisputed testimony of witness Grenier, his garage was entered on July 4, 1927, during his temporary absence, and a number of tools were stolen. On July 7, 1927, appellant was in possession of these tool endeavoring to sell them to witness Kast. Kast testified that appellant, speaking of one of the tools, a four-inch reamer, said that he had just done a job with it the day before at his place of business in Merced. Later on, endeavoring to sell the reamer to H. E. Olsen, he told Olsen that he came from Oregon and was engaged in wholesale automobile parts business. Later, after being arrested, he told Deputy Sheriff Gilbert that he bought the reamers and other tools from a man walking along the highway some three miles from Merced.

In the case of People v. Hunter, 59 Cal. App. 444, 210 P. 968, where the facts are somewhat similar to the case now being considered, the court said:

> "The testimony and statements made by the appellant in his attempt to account for the possession of the stolen goods were of such character as to in themselves afford evidence of guilt, and the case in its facts is brought clearly within the ruling made in People v. Lang, 142 Cal. 484 [76 P. 232]. What is said in the opinion rendered in that case furnishes ample support to the respondent's position here."

The contention of appellant that the evidence is insufficient to support the verdict is without merit.

Appellant, in his brief, has not called attention of the court to any error in giving or refusing instructions. From an examination of the instructions, we are of the opinion that they fully and fairly presented to the jury the law applying to the facts of this case.

The judgment and the order are affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

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90 Cal. App. 673

TOOGOOD et ux. v. MACK et al. (Civ. 4902.)

District Court of Appeal, Second District, Division 2, California. April 6, 1928.

1. Appeal and error ⚷1011(1)—Trial court's finding on conflicting evidence cannot be disturbed.

Finding of trial court on conflicting evidence cannot be disturbed on appeal.

2. Novation ⚷5—Assignment of agreement providing for delivery of shares of stock, where plaintiffs agreed that assignee should be substituted for assignor, held to have effected novation.

Assignment of agreement which provided for delivery of certain shares of stock, where plaintiffs agreed to accept assignment and agreed that assignee should be substituted for assignor in carrying out terms of contract, *held* to have effected novation.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge pro tem.

Action by Lyman D. Toogood and wife against Frank Mack and another for rescission of a contract and for money had and received. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

Spicer, Meacham & Mason and Bruce Mason, all of Long Beach, for appellants.

Eugene Tincher, of Long Beach, and A. J. Bledsoe, of Los Angeles, for respondents.

VALENTINE, Justice pro tem. This was an action brought for rescission of contract and for money had and received. The court granted a nonsuit as to both defendants. In appellants' reply brief counsel state that appellants are willing that the judgment of the court below as to the respondent Mary Elizabeth Hedges as executrix of the estate of Abraham Dayton Hedges, deceased, be affirmed.

This leaves for consideration only the pending appeal against defendant and respondent Frank Mack, and the sole question on that appeal is whether or not there was a novation effected by the assignment of the agreement which provided for the delivery of certain shares of stock by Mack to Hedges. Appellants state that respondent's contention as to novation goes to the heart of the question, and "if there was a novation then appellants have no cause against respondent"; And further state: "We agree that if there is a novation then the obligations of Mack are dead beyond recall, but we contend there was no novation."

The assignment to Hedges, his acceptance, and an acceptance by appellants, are as follows:

> "October 11, 1921.
>
> "I hereby hereby transfer and assign all my interest in the foregoing contract for a valuable consideration, to A. D. Hedges of Long Beach, California. Frank Mack. [Seal.]"
>
> "October 11, 1921.
>
> "I hereby accept the assignment of the foregoing contract from Frank Mack to me, and I hereby agree to carry out its terms.
> "A. D. Hedges. [Seal.]"
>
> "October 11, 1921.
>
> "We, the undersigned, hereby agree to and do accept the assignment of the foregoing contract by Frank Mack to A. D. Hedges, and we hereby

agree that the said A. D. Hedges shall be substituted for said Frank Mack in carrying out the terms of said contract.

"Lyman D. Toogood. [Seal.]
"Bertha E. Toogood. [Seal.]"

[1, 2] Appellants' contention is that there was a substitution but no novation because no intent to release Mack was shown, and they cite section 1531 of the Civil Code, Carpy v. Dowdell, 131 Cal. 495, 63 P. 778, and other authorities, in support of the proposition that the intent to release is an essential element of novation. Under this rule, however, we think the evidence shows such intention. It is true that there are conflicting statements in the evidence of Mr. and Mrs. Toogood on this point, but the finding of the trial court on this conflicting evidence cannot be disturbed, and, considering this in connection with the other evidence, including the written acceptance quoted above, we think the conclusion of the trial court that there had been a novation was correct. This being the only question we are asked to decide, other points originally made by appellants do not require consideration.

Judgment affirmed as to both defendants.

We concur: WORKS, P. J.; CRAIG, J.

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90 Cal. App. 668

PEDROTTI et al. v. AMERICAN NAT. FIRE INS. CO. OF COLUMBUS, OHIO.★

SAME v. COLUMBIAN NAT. FIRE INS. CO. OF LANSING, MICH.

(Civ. 5627, 5628.)

District Court of Appeal, First District, Division 1, California. April 6, 1928.

Hearing Denied by Supreme Court May 31, 1928.

1. Insurance 🔑665(7)—Evidence held to support findings that statements of value in proofs of loss were not willfully false or made to defraud insurers.

In action on fire insurance policies, evidence *held* to support findings that statements of value in proofs of loss were not willfully false or made with intent to cheat and defraud insurers.

2. Insurance 🔑553(1)—Untrue statement, to avoid policy, must be knowingly and intentionally made to defraud insurer.

Untrue statement in proofs of loss, to avoid insurance policy, must have been knowingly and intentionally made, with intention of defrauding insurer.

3. Insurance 🔑668(6)—Whether false statement was knowingly and intentionally made to defraud insurer is fact question for jury or trial court.

In action on policy, whether false statement was made knowingly and intentionally with intention of defrauding insurer is fact question for jury or trial court.

4. Insurance 🔑665(3)—Evidence held to support finding that vendee of insured property was out of possession, so that policy provision regarding change of possession was not violated.

In action on fire insurance policies under provisions of which change of possession suspended insurance, evidence *held* to support finding that plaintiff's vendee was out of possession, having abandoned contract to purchase at time fire occurred, so that recovery under policy was not prevented.

5. Insurance 🔑665(3)—Evidence held to support conclusion that insured was unconditional owner of property when fire policies took effect.

In action on fire insurance policies, evidence *held* to support trial court's conclusion that when policies took effect and when loss occured plaintiff was sole and unconditional owner, on theory that contract to purchase had been abandoned.

6. Vendor and purchaser 🔑185—Where time is made essential, unexcused failure to perform as provided by contract works forfeiture unless vendor waives default.

Where time is made essential, unexcused failure to perform contract to buy land as provided by contract works forfeiture, unless vendor elects to waive default, and, so far as purchaser's rights are concerned, agreement is terminated.

Appeal fom Superior Court, Marin County; Edward I. Butler, Judge.

Actions by Alex Shevits against the American National Fire Insurance Company of Columbus, Ohio, and against the Columbian National Fire Insurance Company of Lansing, Mich., tried together. From judgments for plaintiff, defendants appeal. On the death of plaintiff pending the appeal, M. J. Pedrotti and W. P. Murray, his executors, were substituted as plaintiffs. Affirmed.

Miller & Thornton, of San Francisco, for appellants.

Jordan L. Martinelli, of San Rafael, and J. F. Riley, of San Francisco, for respondents.

CASHIN, J. The above actions were by stipulation tried together, and appeals were taken by the respective defendants from the judgments entered therein. After the appeals were taken Alex Shevits, who will be hereinafter referred to as the plaintiff, died, and the executors of his last will and testament were substituted as parties respondent.

The action against appellant American National Fire Insurance Company was upon three policies of insurance aggregating $1,950, which became effective on April 1 and November 22, 1922, and May 1, 1923, respectively; that against appellant Columbian National Fire Insurance Company being upon a policy of $1,000, which became effective on December

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★Hearing denied by Supreme Court.

13, 1923. The policies insured plaintiff against loss by fire on a certain dwelling house situated in San Rafael, and contained the following provisions:

> "*Matters Avoiding Policy.*—This entire policy shall be void * * * (b) in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after loss. * * * Unless otherwise prescribed by agreement indorsed hereon or added hereto this entire policy shall be void (b) if the interest of the assured be other than unconditional and sole ownership.
>
> "*Matters Suspending Insurance.*—Unless otherwise provided by agreement indorsed hereon or added hereto this company shall not be liable for loss or damage occurring * * * (g) while the interest, title to or possession of the subject of insurance is changed excepting * * * (3) a change in occupancy of building without material increase of hazard."

On December 31, 1923, the dwelling house was destroyed by fire, whereupon the assured furnished the insurers with proofs of loss in which the sum of $5,858.91 was stated as the value of the building. The defendants denied liability, and as a defense to each cause of action alleged that the plaintiff, with the intent to defraud the insurers, swore falsely in the proofs of loss with respect to the value of the property, and that his interest therein at the time of the fire was other than unconditional and sole ownership. It was also alleged by American National Fire Insurance Company as a defense to recovery upon the policies which took effect on April 1 and November 22, 1922, that the loss occurred while the plaintiff's interest in, title to, and possession of the subject of the insurance was changed, and that such change was without its consent. As a further defense to the policies which became effective on May 1 and December 13, 1923, the respective insurers alleged that the plaintiff was not the sole and unconditional owner of the property on these dates.

The value of the building at the time of the fire and the loss was found to be in excess of the sum of $4,000, the trial court also finding against the defenses alleged by the defendants, and judgments were entered for the amounts of the policies.

[1] The appellants contend that the findings are not supported by the evidence and that the court erred in denying their motions for nonsuit. The testimony shows that the proofs of loss were not prepared by the plaintiff, but by a builder, who estimated the value therein stated from the dimensions and arrangement of the building and a description of the materials used in its construction as given to him by the plaintiff; after measurements made on the premises he estimated the cost of replacement to be $5,858.99, and the proofs of loss were prepared and sworn to accordingly. The plaintiff testified that in his opinion the building at the time of the fire was of the value of "$4,000 to $5,000 or more." Another witness placed the value between $3,500 and $4,000; and it appeared that plaintiff in November, 1922, had agreed to sell the property for $3,000.

[2, 3] Notwithstanding the testimony of the last witness and that the agreement to sell was for less than the value claimed, we cannot say, in view of the testimony of the plaintiff and the builder, that the conclusion of the trial court that the statements of value in the proofs of loss were not willfully false or made with the intention of cheating and defrauding the defendants was unsupported. The rule is well established that an untrue statement, in order to avoid the policy, must have been knowingly and intentionally made with the intention of defrauding the insurer; and whether a false statement was so made is a question of fact for the jury or trial court. Clark v. Phœnix Ins. Co., 36 Cal. 168; Helbing v. Svea Ins. Co., 54 Cal. 156, 35 Am. Rep. 72; West Coast Lumber Co. v. State Investment, etc., Co., 98 Cal. 502, 33 P. 258; Raulet v. Northwestern National Ins. Co., 157 Cal. 213, 107 P. 292; Miller v. Fireman's Fund Ins. Co., 6 Cal. App. 395, 92 P. 332.

The court found that the agreement for the sale of the property was entered into by the plaintiff on November 25, 1922, the consideration being the sum of $3,000, payable partly in cash and the balance in monthly installments with interest; that the vendee on or after said date went into possession but was not in possession on the date of the fire; that on the latter date he had ceased to make payments and had abandoned the property; that his rights under the contract were by its terms forfeited; and that the plaintiff had become the unconditional and sole owner thereof. The contract made time of the essence, and provided that in the event of a failure by the vendee to perform the plaintiff should be released from all obligation in law or equity, and that all sums paid on the purchase price should be retained by him. The testimony sustains the finding as to the date of the execution of the contract. It further shows that no payments were made thereon after February, 1923, and that the vendee was in default upon the dates when the third and fourth policies took effect. It also appears that plaintiff made repeated demands for possession, and, according to his testimony, the vendee removed from the premises about three months before the fire occurred. He further testified that about two weeks before the fire he entered the building and found blankets scattered upon the floor where, he was told, the vendee's children had been sleeping, but found no furniture therein.

[4-6] Under the provisions of the policies a change of possession suspended the insur-

ance; but the testimony of the plaintiff (which the trial court believed) was sufficient to support the finding that the vendee was out of possession at the time the fire occurred. The evidence was also sufficient to support the conclusion of the trial court that when that event happened and at the time when the policies in question took effect the plaintiff was the unconditional and sole owner of the property; that he was such when the first and second policies became effective is beyond dispute, and that the vendee was in default under his contract before the third and fourth policies were issued is clear from the testimony. The contract required no notice in order to place the vendee in default, and no waiver of his default was shown. As held in the following cases, where time is made essential, an unexcused failure to perform provided by the contract works a forfeiture by force of the terms of the contract itself, unless the vendor elects to waive the default, and, so far as the rights of the vendee are concerned, the agreement is terminated: Commercial Bank v. Weldon, 148 Cal. 601, 84 P. 171; Oursler v. Thacher, 152 Cal. 745, 93 P. 1007; Champion Gold Mine Co. v. Champion Mines, 164 Cal. 205, 128 P. 315; Schwerin Estate, etc., Co. v. Slye, 173 Cal. 170, 159 P. 420; Fresno Irrigated Farms Co. v. Canupis, 39 Cal. App. 184, 178 P. 300; Andrews v. Karl, 42 Cal. App. 513, 183 P. 838.

We are satisfied that the findings in each of the above cases were fully sustained by the evidence, and that the motions for nonsuit were properly denied.

The judgments appealed from are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

204 Cal. 39

PEOPLE v. ELLIS. (Cr. 3072.)

Supreme Court of California. April 13, 1928.

1. Criminal law ⚷178—Defendant, discharged before selection of jury, held not put in jeopardy.

Where defendant, arraigned on information charging bigamy, entered plea of not guilty, and on day of trial venire was present from which to select jury, but before selection of jury, defendant asked that venire be excused from courtroom, and moved to discharge defendant which was granted, jeopardy had not yet attached.

2. Criminal law ⚷105—Indictment and information ⚷196(5)—Objections to information that court lacks jurisdiction, and that information states no offense, are not waived by plea of not guilty, and may be asserted at any time (Pen. Code, §§ 1012, 1004, subds. 1, 4, and § 1238, as amended by St. 1897, p. 195).

Under Pen. Code, § 1012, grounds of objection to information specified in section 1004, subds. 1, 4, that court lacks jurisdiction over offense, and that information states no public offense, are not waived by plea of not guilty, and may be asserted at any time, even in arrest of judgment, from which state may appeal under section 1238, as amended by St. 1897, p. 195.

3. Criminal law ⚷302(1)—Code, empowering district attorney to move for dismissal of prosecution and authorizing court to dismiss, confers no privilege on defendant (Pen. Code, § 1385).

Pen. Code, § 1385, authorizing district attorney to move for dismissal of cause, and empowering court to dismiss in furtherance of justice, confers no privilege on defendant.

4. Criminal law ⚷1024(2)—Oral motion for discharge for lack of jurisdiction and failure to charge offense, made before impaneling jury, held similar to demurrer, entitling state to appeal from order dismissing information and discharging defendant (Pen. Code, §§ 995, 1005, 1004, subds. 1, 4, and § 1238, subd. 2, as amended by St. 1897, p. 195).

Where defendant, prior to impaneling of jury, requested venire to be excused, and orally moved for discharge on ground that court had no jurisdiction over offense, and that information did not charge an offense, which motion was granted, situation was same as though court had permitted defendant to withdraw plea of not guilty and afforded opportunity to demur under Pen. Code, § 1004, subds. 1 and 4, section 1005, rather than section 995, specifying grounds for setting aside information, and hence people were entitled to appeal under § 1238, subd. 2, as amended by St. 1897, p. 195, from order dismissing the information and discharg-

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ing defendant, who had not been put in jeopardy.

5. Bigamy 🔑4—Information charging defendant with marrying outside state while having wife living, and thereafter cohabiting in state, held sufficient to charge offense of bigamy (Pen. Code, §§ 281, 1106).

Under Pen. Code, § 281, providing that person having husband or wife living, who marries another, shall be guilty of bigamy, and, under section 1106, providing that charge may be sustained on proof that second marriage took place out of state, accompanied by cohabitation in state, information charging defendant with marrying outside state while having another wife living, and cohabiting in state, was sufficient to charge offense of bigamy, though second marriage was made outside state.

6. Statutes 🔑231—Codification of prior acts without change is presumed to carry same interpretation as given original acts (Pen. Code, §§ 281, 1106; St. 1850, p. 244, St. 1861, p. 415).

In absence of clear legislative intent to contrary, it will be presumed that codified act, Pen. Code, §§ 281, 1106, specifying crime of bigamy, carries same interpretation as original act under St. 1861, p. 415, and St. 1850, p. 244; readoption of provisions without change operating to adopt interpretation theretofore placed thereon by courts.

7. Bigamy 🔑1—To constitute crime of "bigamy," first marriage need not be performed within state, if second marriage occurs in state (Pen. Code, §§ 281, 1106).

Under Pen. Code, §§ 281, 1106, to constitute crime of "bigamy," first marriage need not be performed within state, but it is sufficient if second marriage occurs in state, even though first marriage occurred in foreign state or foreign country.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bigamy.]

8. Bigamy 🔑1—Legislature has power to punish persons cohabiting in state, though both first marriage and second bigamous marriage occurred out of state.

Power of Legislature to protect society by punishing individuals cohabiting in state, if second bigamous marriage occurred out of state, though first marriage also occurred out of state, cannot be questioned.

9. Bigamy 🔑1, 11—Code, constituting evidence of cohabitation in state following marriage outside substitute for second marriage in state, is both substantive law and rule of evidence (Pen. Code, § 1106).

Pen. Code, § 1106, providing that, on trial of bigamy, proof that second marriage took place out of state, accompanied by proof of cohabitation in state, is sufficient to sustain charge, *held* intended both as rule of evidence and rule of substantive law, and to constitute evidence of cohabitation in state following marriage outside state a complete substitute for second marriage within state.

In Bank.

Appeal from Superior Court, Solano County; William T. O'Donnell, Judge.

Henry W. J. Ellis, also known as Henry J. Ellis, was charged by information with bigamy. From an order of the superior court dismissing the information, the People appeal. Reversed, with directions.

Superseding opinion of District Court of Appeal, 260 P. 384.

U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and Brantley W. Dobbins, Dist. Atty., of San Francisco, and Leo C. Dunnell, Deputy Asst. Atty., of Richmond, for the People.

Joseph M. Raines, of Fairfield, Russell F. O'Hara, of Vallejo, and Theodore W. Chester, of Sacramento, for respondent.

PRESTON, J. This record presents but two questions: (1) May the people appeal under the facts here shown? and (2) if they may so appeal, does the information state a public offense over which the court below had jurisdiction? As we have been led to the firm conclusion that both questions must be answered in the affirmative, they will be considered in the order stated.

On January 24, 1927, the district attorney of Solano county informed against the defendant, attempting to charge him with the offense of bigamy, using language here material as follows: "The said Henry W. J. Ellis, * * * on or about the 27th day of September, A. D. nineteen hundred and twenty-six, at Kansas City, state of Missouri, and before the filing of this information, did knowingly, willfully and feloniously marry one Ida Lou Johnson, the said defendant being then and there the lawful husband of another person, to wit, Alice Burton Ellis, then and there living, the marriage of said defendant and said Alice Burton Ellis not having been annulled, * * * said defendant and said Ida Lou Johnson Ellis having on or about the 2d day of October, 1926, and ever since said date, cohabited together as husband and wife, in Vallejo township, in the county of Solano, state of California. * * *"

In due course, the defendant was arraigned on said information, and thereafter, and on February 7, 1927, entered a plea of not guilty without having theretofore interposed a motion to set aside or a demurrer to the said information. The cause was then set for trial for March 29, 1927, and was thereafter regularly postponed with the consent of defendant until April 26, 1927. On the date last mentioned, the cause was called for trial, and a venire was present from which to select trial jurors. At this juncture, and before the selection of the jury, defendant, through his counsel, asked that the venire be excused from the courtroom. This was done, and thereupon counsel for defendant orally stated to the court that he objected to further proceedings in the cause, upon the ground that the court had no jurisdiction over the offense charged, and upon the further ground that the facts charged in the information did not constitute an offense punishable by law, and said counsel, upon the same grounds, moved for a discharge of the defendant. The matter was argued, and later, on April 28, 1927, the clerk's minutes recite the following as having occurred:

> "Counsel having presented their respective arguments and the matter having been submitted, the court now grants the motion of the defendant asking that defendant be discharged, and orders the defendant discharged and the court further orders that in the interest of justice the action be dismissed."

The reporter's transcript also shows the following version of the proceedings had on the same day:

> "The Court: It is ordered that the objections of the defendant to the court proceeding with the trial of the case be sustained, and it is further ordered that the motion of the defendant, asking that the defendant be discharged be, and the same is granted, and it is further ordered that the action be dismissed.
>
> "Mr. Dobbins: And, your honor, also that we now give notice, at this time, of appeal."

Mr. Dobbins was the district attorney, and represented the people. There is no question made as to the regularity of the form of the appeal taken.

[1] It thus appears that, before a jury was impaneled, the defendant moved for a dismissal of the action and for his discharge, asserting lack of jurisdiction over the offense, and also that the information stated no public offense. It should be noted that, at the time of this action, the plea of defendant had not been formally withdrawn, nor was the motion in writing. It should also be noted, however, that jeopardy had not yet attached. People v. Hawkins, 127 Cal. 372, 59 P. 697; In re Harron, 191 Cal. 457, 466, 217 P. 728; People v. Hinshaw, 194 Cal. 1, 227 P. 156; Ex parte Wilson, 196 Cal. 515, 238 P. 359. Ordinarily an order dismissing a felony charge prior to the impaneling of the jury does not place the defendant in jeopardy. People v. Campbell, 59 Cal. 243, 43 Am. Rep. 257; Ex parte Clarke, 54 Cal. 412.

[2] Section 1238 of the Penal Code, as amended in 1897 (St. 1897, p. 195), gives to the people the right of appeal in the following cases:

> "(1) From an order setting aside the indictment or information; (2) from a judgment for the defendant on a demurrer to the indictment, accusation or information; (3) from an order granting a new trial; (4) from an order arresting judgment; (5) from an order made after judgment, affecting the substantial rights of the people."

The grounds upon which defendant moved the court for a dismissal of the action are grounds of demurrer specified in section 1004 of the Penal Code, subdivisions 1 and 4. It is also to be noted that, under section 1012 of the Penal Code, these two grounds of objection are not only proper grounds for demurrer, but are not waived by a plea of not guilty, and may be asserted at any time, even in arrest of judgment. People v. Welton, 190 Cal. 236, 238, 211 P. 802.

[3] The right of the district attorney to move for this dismissal of the cause in furtherance of justice or the right of the court to likewise act in furtherance of justice and to dismiss an action under section 1385 of the Penal Code is not here involved, for the reason that the motion was not made either by the district attorney or upon the court's own initiative, and, furthermore, the reasons for the dismissal are not set forth in an order entered upon the minutes of the court. This section apparently confers no privilege upon the defendant. People v. Montgomery, 36 Misc. Rep. 326, 73 N. Y. S. 535, 537.

[4] From the above situation it appears that, if the defendant had demurred to the information upon the grounds later urged, the people would have had an appeal from the judgment made upon an order sustaining such demurrer. It is also true that, had the defendant been convicted and the motion here under consideration been made in arrest of judgment and granted, the people would have had the right of appeal. It is impossible to distinguish the present situation from a case where a demurrer had been interposed, sustained, and a judgment rendered for the defendant before the entry of a plea of not guilty. In other words, the situation is the same as though the court had permitted withdrawal of the plea of not guilty and had also permitted an opportunity to demur, as provided in sections 1004 and 1005 of the Penal Code, with a resultant judgment discharging the defendant after sustaining the same. The defendant is in no position to urge a lack of power in the people to appeal because the court indulged him in this behalf so long as the proceeding occurred prior to the impaneling of the jury, and thereby fell short of putting him once in jeopardy.

The learned Attorney General also contends that the order made by the court was tantamount to an order setting aside the information. None of the grounds specified for setting aside an information appear to cover the case before us. Pen. Code, § 995. We think it more properly comes under subdivision 2 of section 1238, and that the attorney for the defendant had in mind the grounds of demurrer above referred to under subdivisions 1 and 4 of section 1004. The authorities cited by respondent in support of his contention that the people have been given no appeal are not in point, and may be disposed of as follows:

People v. Richter, 113 Cal. 473, 474, 45 P. 811, and People v. Higgins, 114 Cal. 63, 64, 45 P. 1004, are cases which arose under section 1238 as it read prior to the amendment of 1897. In other words, at the time these two cases were handed down, there was no appeal allowed from an order setting aside an indictment or information, and the cases manifestly relate to attempted appeals from orders so made.

People v. Hollis, 65 Cal. 78, 2 P. 893, is not in point, as the dismissal there was upon the ground of failure to prosecute, which is neither a ground for demurrer nor a ground for setting aside an indictment or information.

People v. More, 71 Cal. 546, 12 P. 631, was an appeal from an order dismissing an action pursuant to section 1385 where the court on its own motion and in furtherance of justice dismissed said action; therefore it is not a case even now covered by section 1238.

People v. Knowles, 27 Cal. App. 498, 155 P. 137, and the several other allied cases involving similar actions and reported in the same volume, are not in point, for the reason that in those cases the orders appealed from were not orders specified in said section 1238, but were dismissals of actions after jeopardy because the rights of the defendant had been invaded by taking him before the grand jury, and thus violating his constitutional right to refrain from giving testimony against himself.

There is no case which we can find, nor has any been called to our attention, requiring the court to dismiss an appeal by the people made under the circumstances here set forth. It is our view that to give the people the right of appeal from a judgment following an order sustaining a demurrer and from an order made in arrest of judgment based upon these same grounds, and yet to deny them an appeal, where, through the courtesy of the court or lack of opposition on the part of the people, the motion did not take the form of a written demurrer would be to sacrifice substance for form.

[5] The second branch of the case involving the question of the sufficiency of the information to charge a public offense must also, as above stated, be resolved in favor of the people. It is true that section 281 of the Penal Code reads as follows: "Every person having a husband or wife living, who marries any other person, except in the cases specified in the next section, is guilty of bigamy," and so reading would, standing alone, be inapplicable to a second marriage without the state. State v. Stephens, 118 Me. 237, 107 A. 296. But it is also true that section 1106 of said Code makes the following provisions:

> "Upon a trial for bigamy, it is not necessary to prove either of the marriages by the register, certificate, or other record evidence thereof, but the same may be proved by such evidence as is admissible to prove a marriage in other cases; and when the second marriage took place out of this state, proof of that fact, accompanied with proof of cohabitation thereafter in this state, is sufficient to sustain the charge."

[6] It is further true that these two sections are but a codification of the statute of 1861 (Stats. 1861, p. 415), which in turn was founded upon the statute of 1850 (Stats. 1850, p. 244), each of which read as follows:

> "Bigamy consists in the having of two wives or two husbands, at one and the same time, knowing that the former husband or wife is still alive. * * * It shall not be necessary to prove either of the said marriages by the register or certificate thereof, or other record evidence, but the same may be proved by such evidence as is admissible to prove a marriage in other cases, and when such second marriage shall have taken place without this state, cohabitation in this state, after such second marriage, shall be deemed a commission of the crime of bigamy. * * *"

It will be presumed, in the absence of clear legislative intent to the contrary, that the codified act carries the same interpretation as the original one. "The readoption of these provisions without change in effect adopted the interpretation theretofore placed thereon by the courts. * * *" People v. Dist. Court of Appeal, 193 Cal. 19, 20, 222 P. 353; see to the same effect Pen. Code, § 5; Lindsay-Strathmore I. Dist. v. Superior Court, 182 Cal. 315, 333, 187 P. 1056, and People v. Webb, 38 Cal. 467.

[7, 8] The contention of respondent that it was not the legislative intent to include, in the definition of "bigamy," cases, where the second marriage occurred without the state of California, is largely based upon the proposition that section 1106 is found under a division title and topical head of the Code respecting evidence. While this is true, it is also true that the plain, unambiguous language not only announces a rule of evidence, but also declares substantive law. The conclusion that cohabitation in this state was intended to be sufficient is the more readily deduced when it is considered that the first marriage need not, under our own decisions, be performed within the state of California. In other words, bigamy may be punished in this state, if the second marriage occurs here, even if the first marriage occurred in a foreign state or even in a foreign country. People v. Giesea, 61 Cal. 53; People v. Priestley, 17 Cal. App. 171, 176, 118 P. 965; 7 Cor. Juris, p. 1160. Under these holdings, it is not even required that the information contain an allegation of the time or place of the first marriage. If, then, the first marriage need not occur in the state, it is well within reason to say that cohabitation in this state after a second bigamous marriage occurring also out of the state should be punishable here upon legislative declaration to that effect. The power of the Legislature to so protect society against such an immoral act cannot be questioned. It has been well stated in the case of State v. Stewart, 194 Mo. 345, 92 S. W. 878,

112 Am. St. Rep. 529, 5 Ann. Cas. 963, as follows:

> "The prototype of our statutes on the subject of bigamy and bigamous cohabitation is found in the statute 9 George IV, chapter 31, section 22, which provides that 'if any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of felony,' etc. This statute is to all intents substantially reaffirmed in 24 & 25 Victoria, chapter 100, section 57. Many of our sister states have followed the statute of 9 George IV, conforming it to our American conditions. That the General Assembly of Missouri has the power, for the protection of good morals and to punish indecency, to make the cohabitation of a man and woman begun under a bigamous marriage in another state, a felony in this state, there can be no sort of question, and it is practically conceded by the learned counsel for the defendant in this case that if the General Assembly had denominated the offense which it denounced in section 2169 of the Revised Statutes of 1899, a felony, only and not bigamy, there could be no constitutional objection to it. Indeed, a similar statute is found in many of our sister states. Thus it is provided by section 4933 of the Iowa Code that, 'If any person who has a former husband or wife living marry another person or continue to cohabit with such second husband or wife he or she, except in the cases mentioned in the following section, is guilty of bigamy.' * * *"

[9] Many states have statutes similar to our own; the only distinction worthy of note being that such declaration is in the same paragraph defining the offense. But the language of section 1106 cannot be held to be a mistake or error on the part of the legislative body, for its language is too clear, plain, and ample in its scope to admit of any other construction than that it was intended to constitute evidence of cohabitation in this state, following marriage outside the state, a complete substitute for a second marriage within the state.

The judgment is reversed, with directions to the court below to set aside the said order and proceed in due course with the disposition of the case.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

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204 Cal. 31

CUNNING v. HUMBOLDT COUNTY.

(S. F. 12586.)

Supreme Court of California. April 13, 1928.

1. Counties 🔑206(3)—Rejection of claim by supervisors does not bind claimant.

In absence of fraud, the approval of a claim by the local board of supervisors is conclusive on the county, but board's rejection of the claim does not prevent claimant's bringing action at law to establish it.

2. Trial 🔑141—Trial court may direct verdict for party having burden, where evidence is not substantially conflicting or facts are admitted.

In the absence of substantial conflict in the evidence as to facts determining case, or where facts are admitted, trial court may properly direct verdict for the party upon whom the burden of proof rests.

3. District and prosecuting attorneys 🔑3(5)—Evidence of services rendered district attorney at agreed rate in assisting in enforcement of liquor laws, where not substantially contradicted, warranted direction of verdict against county (Pol. Code, § 4307, subd. 2).

In action against county under Pol. Code, § 4307, subd. 2, for services rendered district attorney at agreed rate in detection of crime in regard to violation of liquor laws and in gathering evidence, and for use of cars for such purposes, evidence of services actually performed under agreement with district attorney *held* to warrant trial court's direction of verdict in plaintiff's favor, where there was no substantial conflict in the evidence.

4. District and prosecuting attorneys 🔑3(5)—Incidental performance of sheriff's duties held not to prevent plaintiff's recovery for services rendered district attorney in enforcement of prohibition law (Pol. Code §§ 4157, 4187, and § 4307, subd. 2).

In action against county under Pol. Code, § 4307, subd. 2, for services rendered district attorney in detection of crime and gathering of evidence to be used in prosecutions for violation of prohibition law, fact that claimants, in performance of their duties, were required at times to trench upon duties of other county officers as in the matter of serving warrants and making raids, *held* not to preclude recovery of agreed compensation under sections 4157, 4187, on ground that claimants were performing services of sheriffs and constables and thus receiving increase in salary by being relieved of performance of their duties.

5. Officers 🔑100(1)—Payment of persons employed by district attorney to assist in enforcement of prohibition law held not to increase compensation of county detective during term (Pol. Code, § 4249, subd. 9, and § 4307, subd. 2; Const. art. 11, § 9).

Employment of persons to assist district attorney in detecting crime and gathering evidence in enforcement of prohibition laws under Pol. Code, § 4307, subd. 2, and payment of their agreed claims, *held* not to constitute increase in compensation of county detective during term of office, in violation of Const. art. 11, § 9, and Pol. Code, § 4249, subd. 9, since detective is merely an appointive officer, holding at the pleasure of the appointing power.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

6. District and prosecuting attorneys 🔑3(5)—District attorney's authorization of use of privately owned automobiles by persons hired in detection of crime held not improper (Pol. Code, § 4307, subd. 2).

In absence of showing that automobiles had been purchased for and assigned to the exclusive use of the district attorney's office, district attorney did not exceed bounds of propriety in authorizing use of privately owned automobiles and paying reasonable compensation therefor in connection with hiring men to assist in detection of crime and prosecutions under prohibition law, under Pol. Code, § 4307, subd. 2.

7. District and prosecuting attorneys 🔑3(5)—Testimony as to availability of county cars held inadmissible in action against county for services and for use of privately owned automobiles in assisting district attorney in enforcing prohibition law (Pol. Code, § 4307, subd. 2).

Where it was not shown that particular automobiles were assigned for exclusive use of district attorney's office, rejection of evidence as to availability of county cars for county work *held* not error in action against county under Pol. Code, § 4307, subd. 2, for personal services rendered and for agreed compensation for use of privately owned automobiles in assisting district attorney in detection of crime in connection with enforcement of prohibition law.

In Bank.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by John Cunning against Humboldt County for personal services. Judgment in plaintiff's favor, and defendant appeals. Affirmed.

Superseding opinion of District Court of Appeal (256 P. 841).

John F. Quinn, of Eureka, for appellant.

H. C. Nelson, of Eureka, for respondent.

PER CURIAM. This action was instituted to establish as county charges several claims theretofore rejected, either in whole or in part, by the board of supervisors of the defendant county. From the judgment entered upon a directed verdict, the defendant appeals. The complaint consists of six separate causes of action, each for personal services alleged to have been performed and expenses incurred during the month of July, 1925—either by the plaintiff personally or his assignors—while assisting the district attorney of the defendant county in the detection of crime and the gathering of evidence to be used in the prosecution of criminal cases. Section 4307 of the Political Code has to do with county charges, and subdivision 2 thereof, so far as pertinent here, enumerates as such "the traveling and other personal expenses of the district attorney, incurred in criminal cases arising in the county, * * * and all other expenses necessarily incurred by him in the detection of crime and prosecution of criminal cases. * * *" The employment of the plaintiff and his assignors by the district attorney during the period designated finds authority in the provisions of this section.

[1, 2] In the absence of fraud, the approval of a claim by the local board of supervisors is conclusive upon the county. County of Yolo v. Joyce, 156 Cal. 429, 432, 105 P. 125. However, the converse does not necessarily follow, and, upon the rejection of a claim by such board, the claimant may bring an action at law and establish his claim against the county as fully and effectively as it would have been established by a favorable order of the board in the first instance. Thiel Det. Co. v. Tuolumne County, 37 Cal. App. 423, 429, 173 P. 1120. In the instant case, as we have seen, the verdict for plaintiff was rendered in response to a direction of the trial court to that effect. It is settled that, in the absence of substantial conflict in the evidence as to the facts determinative of a case, or where such facts are admitted, the trial court may, with propriety, direct a verdict for the party upon whom the burden of proof rests. O'Connor v. Witherby, 111 Cal. 523, 528, 44 P. 227; Los Angeles F. & M. Co. v. Thompson, 117 Cal. 594, 600, 49 P. 714; Kohn v. Nat. Film Corp., 60 Cal. App. 112, 116, 212 P. 207. This being so, the question to be determined upon this appeal would seem to be whether there is any substantial evidence in the record which would warrant a verdict favorable to the defendant county or a reduction of the amount awarded to the plaintiff under the judgment. We are decidedly of the opinion that the lower court properly granted the plaintiff's motion for a directed verdict. The district attorney, appearing as a witness for the plaintiff, testified, among other things, that during the month of July, 1925, the period covered by the rejected claims, he employed eight men, including the claimants, to do the character of work for which the claims involved herein were presented; that during that month these men were employed principally in "securing evidence in the detection of crime in regard to the violation of the liquor laws," but that "very usually there was other work they did during that time"; that they were employed "to detect the commission of crime and to secure evidence for the prosecution of criminal cases" generally; that a "big part of their work" was "raiding" places where intoxicating liquors were manufactured or sold; that the men were paid at the rate of $5 a day during the time they were actually working and the cost of their meals and their hotel expenses when away from their homes; that this wage rate had for several years been paid by the county for this class of service; that "they had to use automobiles, as their work took them all over the entire county"; that he agreed to pay each of them who used his own automobile at the rate of

15 cents a mile; that the supervisors had fixed that rate "for the use of what they termed 'dry squad cars'"; that from three to five of such employees would ride in each automobile; that the dangers of the work were such that it was necessary for the employees to travel in groups for their own protection; that "there wasn't a day or an hour outside of the time they had to sleep but what there was work to do"; that at various times during the month of July, 1925, "anywhere from one to a dozen complaints of law violations were made daily; some were made by telephone, some are made in person by people calling at the office, some are made by letter"; that the character of these complaints was such as to require immediate action if the offenses reported were to be officially detected and investigated and diligently prosecuted; that the complaints coming into his office during July, 1925, were sufficient in number to keep the claimants "busy every hour of their employment, and I could have used 50 per cent. more if I could have gotten the men to work, I had that much work ahead of me"; that he intrusted to the county detective the immediate detail of dividing the men into squads and dispatching them to the scene of possible violations of the law; that "invariably if they were to enter buildings they had search warrants"; that "sometimes if they know in advance of a car and person bringing it, they obtain search warrants of the courts" to search automobiles; that "generally one man carries the search warrant and the others assist him * * * searching and procuring the evidence"; that he "made no requests for their appointment as deputy sheriffs"; that, as "a small accommodation" to the sheriff, he would send one of the employees for a few minutes to take a prisoner from the county jail to "the justice of the peace, or bring him across to the courthouse"; and that he did not "know of any cars whatever that had been assigned to the use of the district attorney's office, either during the month of July or any other month." At this point it may be said that all of the claimants had been deputized by the sheriff, but the record, on the whole, tends to indicate that they did not receive any compensation as such. Without attempting to give a synoptical statement of the testimony of each of the several claimants it may be said that they testified, in substance, as to their employment by the district attorney to assist in the detecting of crime and the gathering of evidence to be used in the prosecution of criminal cases. Each also stated that his claim, as presented, was correct and represented only such sums as were owing to him for services actually rendered and expenses actually incurred in the county service under his appointment and assignment by the district attorney. The testimony of said claimants also discloses that much of their time was given over to detecting violations of the liquor law and securing evidence in such cases.

[3] This summary of the evidence furnishes sufficient foundation upon which to predicate a holding that the plaintiff had produced ample evidence to sustain the burden resting upon him of establishing the necessity for, and the reasonableness of, the charges contained in the several claims sued upon. The defendant county utterly failed, in our opinion, to produce any evidence substantially conflicting with that offered by the plaintiff. In fact, practically all of its evidence was adduced by way of cross-examination of the plaintiff's witnesses. Such cross-examination did not serve to weaken, in any material respect, the effect of the direct testimony of said witnesses. As we have said, the absence of substantial conflict in the evidence justified the trial court's action in directing a verdict for the plaintiff.

[4] We attach no particular significance to the fact that the claimants in the performance of their duties were required, at times, to trench upon the duties of other county officers in the matter, for instance, of serving warrants and making raids. In Cunning v. Carr, 69 Cal. App. 230, 233, 230 P. 987, 988, the plaintiff sought and had issued a writ of mandate compelling the auditor of Humboldt county to pay certain claims against said county, which claims had theretofore been passed upon and allowed by the board of supervisors. The claims represented sums alleged to be owing to the plaintiff therein or his several assignors for services rendered to the district attorney's office in the detecting of crime and the gathering of evidence to be used in criminal cases. Upon the appeal it was urged that the plaintiff's assignors "were really traffic officers and officers employed by the district attorney to enforce the provisions of the Volstead Act [27 USCA], as adopted by the Wright Act of this state" [St. 1921, p. 79]. In disposing of this contention the opinion declares that:

> "While the conclusion might be drawn from the testimony in this case and set forth in the transcript that the assignors of the respondent acted at times in the capacity of traffic officers, and also what is popularly termed 'a dry squad' and at times made arrests, under the law of this state, it is the work to be performed or the duties to which one may be assigned that determines his status as an officer or an employee. The mere fact that an employee may perform services not coming strictly within the duties imposed upon him by reason of his employment, or which may be exercised by him in common with other citizens of the state, does not, it seems to us, change his status from that of an employee to that of an officer, or from that of an officer to that of an employee. * * *
>
> "Were the assignors of the respondent performing services which the laws casts upon sheriffs and constables, and so, in one sense, increasing their salaries by relieving them of the performance of duties required by law?

Section 4157 of the Political Code requires the sheriff to preserve the peace, to arrest and take before the nearest magistrate all persons who attempt to, or who have committed a public offense, prevent and suppress affrays, etc., attend courts, serve processes, and perform certain other duties enumerated in the section. Section 4187 of the same Code in relation to the duties of constables sets forth that such officers shall serve all processes, attend justice courts in their townships, and act in certain other capacities. Neither one of said sections requires either a sheriff or any constable to act in the capacity of sleuth or detective. Thus it follows that if any one is employed by the district attorney to perform services outside of the duties cast by law upon the sheriff or a constable, none of the provisions of the state Constitution relating to the salaries of such officers are in any way affected, nor does the fact that such persons may go further and make arrests as private individuals may do, after having completed their investigations, in any wise cause their employment to trench upon the inhibitions of the Constitution relating to the increase of the compensation of such officers by relieving them of the performance of certain duties."

In the same case, the court, in speaking of subdivision 2 of section 4307 of the Political Code, above quoted from, declares:

> "The section itself expressly authorizes the payment of all expenses necessarily incurred by the district attorney in the detection of crime and prosecution of criminal cases. It does not limit the employment for the purpose of detection of crime to any particular specified cases. The district attorney may not know, and probably does not know, in the first instance, the persons guilty of crime. If he did, there would be no necessity under the statute for employing some one to detect the criminal. The district attorney may be conscious that the penal laws of the state are being violated, and is yet absolutely unable to place his hand on the violator. That this is true in regard to violators of the motor vehicle laws and the liquor laws of the state does not render the employment of some one to detect the guilty parties any less within the provisions of the Code sections than if the circumstances coming to the attention of the district attorney indicated that some one had committed the crime of murder. In that case the statute gives the district attorney the authority to employ some one to detect the offender. The fact also that violators of the motor vehicle laws and the liquor laws are constant and continuous does not tie the hands of the district attorney in regard to the employment of some one to detect the offenders, but, on the contrary, increases the necessity and almost imperatively demands the exercise by the district attorney of the powers conferred upon him by the provisions of section 4307 of the Political Code."

It may be said that the Legislature, since the decision in Cunning v. Carr, supra, has amended subdivision 2 of section 4307 of the Political Code, in a manner not material to the instant cause, by omitting therefrom expenses incurred in detecting and procuring evidence of violations of the motor vehicle act.

[5] We find no merit in the appellant's contention that the employment of the claimants and the payment of their claims constitute an increase in the compensation of the county detective in violation of article 11, § 9, of the Constitution. Subdivision 9 of section 4249 of the Political Code provides for the appointment of such officer by the district attorney of the appellant county. In Bayley v. Garrison, 190 Cal. 690, 692, 214 P. 871, 872, the following is approved:

> "The general rule, however, seems to be that this constitutional prohibition against changing the salary of a public officer during his term of office applies only to officers who have a fixed and definite term, and does not apply to appointive officers, who hold only at the pleasure of the appointing power."

To the same effect is Harrold v. Barnum, 8 Cal. App. 21, 23, 96 P. 104. Therefore, if it be assumed, without deciding, that the employment of the claimants herein results in an increase of the county detective's compensation, it cannot be said to violate the constitutional provision, for that officer is merely an appointive officer holding at the pleasure of the appointing power.

[6, 7] Nor do we find any merit in the appellant's further contention that the trial court erred in sustaining objections to two questions asked of a member of the board of supervisors as to the availability of county cars for county work. Objections to these questions were promptly interposed, and sustained, upon the ground that the evidence thus sought to be elicited was incompetent, immaterial, and irrelevant and not the "best evidence" upon the subject. We are of the opinion that evidence merely tending to show that the appellant might have had certain automobiles available for general county purposes would be immaterial to and inadmissible in an action of the nature of that here involved, both because of the broad and comprehensive powers conferred upon the district attorney by the provisions of subdivision 2 of section 4307 of the Political Code, and the peculiar character of the work to be performed by his office in the detecting of crime and the securing of evidence to be used in the prosecution of criminal cases. It cannot be denied that this work was, and is, such as demands the continuous presence and the immediate availability of the agencies necessarily required in the pursuit and apprehension of law violators. From the questions propounded to the witness it is evident that the evidence sought to be adduced would not have shown that certain automobiles had been purchased for and assigned to the exclusive use of the district attorney's office. In the absence of such a showing it cannot be said that the district attorney exceeded the bounds of propriety, when, in conformity to the provisions of subdivision 2 of section 4307, supra, he authorized the use of

privately owned automobiles. As already stated, the reasonableness of the charge therefor was established upon the trial. We find no error in any of the rulings complained of by the appellant.

The judgment appealed from is affirmed.

203 Cal. 641

COLLIER v. LINDLEY et al. (S. F. 12714.)

Supreme Court of California. March 26, 1928.

1. Trusts 🔑51—Provision for payment of $500 to named person conditioned on validity of trust held improper attempt to secure judicial determination in advance of controversy (Code Civ. Proc. §§ 1138–1140).

Provision of trust agreement for payment to named person sum of $500 conditioned on trust or some portion thereof *held* an attempt to engage attention and compel labors of several courts in order to effectuate judicial determination of validity or invalidity of trust in advance of any real contest or controversy, in violation of the spirit and intent of Code Civ. Proc. §§ 1138–1140.

2. Perpetuities 🔑8(1)—Transfer of property to trustees in perpetuity to promote improvements in government and economic conditions and other connective matters held valid; "eleemosynary" "charitable" (Const. art. 20, § 9).

Transfer of property to trustees in perpetuity for advancement of methods of government and working and economic conditions and to assist in education, strengthening prohibitive legislation affecting intoxicants and narcotics, promoting justice for American Indians, and preserving right of free speech and assembly *held* valid, under Const. art. 20, § 9, forbidding perpetuities except for "eleemosynary" purposes; the term "eleemosynary" as used therein being synonymous with "charitable" as used and understood in trusts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Eleemosynary; Second Series, Charitable.]

3. Charities 🔑21(1)—Element of indefiniteness of beneficiaries in charitable trust is no objection to its validity.

Element of indefiniteness of beneficiaries in charitable trust is not only not an objection to its validity, but as a rule is of the essence of all charitable trusts of a public or quasi public character.

4. Charities 🔑22(1)—Trust held not invalid for uncertainty because of provision to encourage and support industrial co-operation that "justice" may be done to employer and employee.

Trust to promote improvements in methods of government and working conditions and to improve economic conditions and assist in education and in promoting justice for Indians *held* not invalid for uncertainty in empowering trustees to indorse, encourage, and support industrial co-operation to end that justice may be done to employer and employee alike; meaning of term "justice" as used therein being a constant and perpetual disposition to render every man his due.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Justice.]

5. Charities 🔑4—Courts will endeavor to carry attempted charitable trust into effect, if possible, consistently with law.

Courts of equity possess enlarged powers in giving effect to trust for charitable uses and will endeavor to carry attempted charitable donations into effect if it can be done consistently with rules of law.

6. Charities 🔑21(1)—Clause authorizing trustees to extend aid to Indians in attaining justice held not invalid for uncertainty.

Clause in trust instrument authorizing trustees to extend aid to particular Indians or groups of Indians in attaining justice *held* not invalid because of uncertainty in respect to beneficiaries.

7. Charities 🔑4—Trust authorizing trustees to promote government improvements and assist in other connected matters by lawful means held not invalid as investing trustees with indefinite powers.

Trust instrument authorizing trustees to promote improvements in government methods, working and economic conditions, and to assist in education and promoting justice for Indians and other connected matters, and requiring that means used in furtherance of such purposes should be lawful means *held* not invalid as investing trustees with indefinite powers.

In Bank.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Controversy without action between John Collier and Francis H. Lindley and others to establish the validity of a certain trust. Judgment for defendants, and plaintiff appeals. Affirmed.

Alan H. Critcher, of San Francisco, for appellant.

Louis Bartlett, of San Francisco (J. Wiseman Macdonald, of Los Angeles, of counsel), for respondents.

RICHARDS, J. This proceeding has arisen out of an endeavor on the part of John Randolph Haynes and his wife, Dora Haynes, to procure a final ruling of the courts upon the validity, in whole or in part, of a certain trust sought to be established by them and each of them under the name of "the John Randolph and Dora Haynes Foundation." The method employed to secure such ruling is to be found in the terms of a clause in the document whereby said trust was sought to be created, and which reads as follows:

"Paragraph Sixteenth. In the event that this instrument does not create a valid, charitable

> trust, or, if it be finally adjudicated that any purpose set forth herein be invalid, the sum of $500 out of the corpus of the estate shall belong to, and be forthwith paid to, John Collier."

[1] The present litigation was initiated in the superior court in and for the county of Alameda in the form of a proceeding instituted by the said John Collier under the provisions of sections 1138, 1139, and 1140 of the Code of Civil Procedure, which provide for the submission of controversies without action upon agreed facts for the purpose of procuring a declaratory judgment thereon. It nowhere appears from the record herein that John Collier, the institutor of this proceeding, is related to the creators of said purported trust, or is in any wise interested in the corpus or carrying into effect thereof except as to that relationship or interest which exists by virtue of the provisions of the foregoing clause in said document. An examination of the above-quoted clause will show that said John Collier was not by its terms required to institute or to defend any action or proceeding begun by those directly interested therein for the purpose of having said purported trust declared to be valid or invalid, or to enforce any of the other terms or provisions thereof. He is, in short, required to create no controversy, and to perform no service whatever in order to be entitled to receive and to have judgment for the sum of $500 to be paid him as provided therein. The provision for the payment to him of the sum of $500 conditioned upon said trust or some portion thereof being invalid is nothing more nor less than a thinly veiled attempt to engage the attention and compel the labors of the several courts of record of this state in order to effectuate a judicial determination of the validity or invalidity of said trust at once and in advance of any real contest or controversy between the parties in interest therein over its properties or provisions, and as such we hold it to be in plain violation of the spirit and intent of the sections of the Code of Civil Procedure above referred to, as well as of the general principle that courts should only be employed in the adjudication of actual as distinguished from moot questions and controversies when these are brought before them in the regular and orderly course of litigation by those parties only who are directly interested in their adjudication. We therefore unreservedly disapprove the insertion in documents or agreements of clauses of the character and intent of that above quoted, which have for their manifest purpose that of inviting and encouraging litigation in regard to matters with relation to which no real cause of action has arisen; and in the instant case we would have no hesitation in carrying our aforesaid disapproval to the extent of ordering a dismissal of this appeal but for the fact that there are certain questions of public interest which are involved therein and which arise entirely apart from the interest of the parties to the immediate proceeding.

The document by the terms of which John Randolph Haynes and his wife, Dora Haynes, have undertaken to create and to devote certain of their properties to sustain a trust under the title of "the John Randolph and Dora Haynes Foundation" is before us, and the substance and terms thereof, after the recitals of the properties to be allocated thereto and the trustees to be invested therewith, reads in part as follows:

> "Paragraph Sixth. The trustees shall hold the said trust estate in trust for the following uses and purposes:
>
> "Section I. To promote and assist in promoting and obtaining, maintaining and making improvements in the structure and methods of government, national, state and/or local, by obtaining, protecting, preserving, and/or furthering, by any or all legitimate ways,
>
> "(a) Investigating the causes of industrial ac- public utilities.
>
> "(b) Direct legislation, now known as the Initiative, Referendum, and Recall.
>
> "(c) Such improvements in the direct, popular nomination and election of public officials as will enable the electorate to vote more intelligently and efficiently; simplify nomination and election procedure; and insure a more adequate representation in government of the important groups.
>
> "(d) Assisting in the making, amending, and/or reviewing of city charters, county charters, and state and national Constitutions.
>
> "Sec. II. (a) To improve living conditions of the working people by investigating the causes of poverty, preventing the operation of such causes, and remedying or ameliorating the conditions resulting therefrom, by any legitimate means.
>
> "(b) To study, investigate and encourage the introduction into the United States of America of the co-operative system of selling and purchasing food, household and other requirements, under the system generally known as the 'Rochdale System of Co-operation.'
>
> "Sec. III. To improve working conditions for men, women, and children by:
>
> "(a) Investgating the causes of industrial accidents and diseases; including, among other things, the relation of hours of labor to the health of workers, and the conditions under which work is performed;
>
> "(b) Helping, by all lawful means, to prevent the continuance of conditions inimical to the health, welfare, and safety of workers, and helping to secure better working conditions for them.
>
> "Sec. IV. To induce, encourage, and support industrial co-operation, to the end that justice may be done to employer and employee alike, and harmony be established and maintained between them, and industrial hatred and strife abolished, thereby benefiting mankind in general.
>
> "Sec. V. To encourage and give educational opportunities for the study of—

"(a) Governmental problems and reforms furthering 'government of the people, by the people, and for the people';

"(b) Industrial problems with special reference to improvements in living and working conditions of the working people;

"(c) Social problems with special reference to improvements in health, sanitation, and morals of the working people;

by paying wholly, or partially, lecturers and instructors on matters included in this section V, and/or by furnishing appropriate books and literature on these matters, and/or by donations to institutions or organizations to be applied in furthering the causes in this section designated, and/or by assisting in obtaining or supporting, or helping to enforce legislation for such purposes, or any of them.

"Sec. VI. To further the improvement of the human race by aiding and encouraging the science of Eugenics, which deals with the heritable qualities of the human race; and by aiding and encouraging the practicable application of the principles of that science.

"Sec. VII. To assist in securing, maintaining, enforcing and strengthening prohibition and other legislation, national, state and/or local, affecting the manufacture, and use, and/or disposition of alcoholic beverages and/or intoxicating liquors and/or narcotic drugs by all lawful means and/or by investigating the operation and enforcement of laws and ordinances relating to those questions, and the results flowing therefrom.

"Sec. VIII. To promote justice for the American Indian in the United States by assisting in procuring legislation and/or by stimulating the proper enforcement of legislation to that end, and/or by assisting individual, or bodies of, Indians in obtaining that justice.

"Sec. IX. To assist in preserving and strengthening the rights of the citizens of the United States to 'freedom of speech * * * and peacefully to assemble, and to petition the government for redress of grievances,' by donations to particular institutions or bodies, operating wholly or partially, permanently, or temporarily, for those purposes.

"Paragraph Seventh. In properly carrying out and aiding all and any of the purposes and objects of the trust, the trustees in general shall have full power and authority:

"Sec. I. To employ and pay attorneys, lecturers, writers, investigators, and such assistants and employees of every kind as they may deem necessary.

"Sec. II. To buy, print, publish, and/or distribute, by mail or otherwise, to whom they may think proper, appropriate pamphlets, cards, notices and information;

"Sec. III. To buy and distribute, by mail or otherwise, to whom they may think proper, copies of appropriate newspapers, magazines, and books.

"Sec. IV. To disseminate by all lawful means such information as in the judgment of the trustees may be useful in carrying out the purposes of this trust.

"Sec. V. To draft and/or assist in drafting, appropriate bills and acts, laws, and other proposed legislation, and use all lawful means to have them introduced, passed, made effective, and enforced."

[2] The trust thus sought to be created is in perpetuity to the trustees designated in the document establishing the same and to their successors to be chosen in the manner therein provided. The amount and value of the property with which the trustees are to be thus invested is but a comparatively small portion of the estate and properties of the creators thereof, and it is not for that reason objectionable to the provisions of law limiting the amount of a testator's or trustor's property which may be devoted to charitable uses. The immediate questions which are therefore presented to us for determination are as to whether the transfer of the properties set forth in said document to trustees in perpetuity for the advancement of the purposes which are set forth with so much detail in the foregoing excerpts from said instrument, or any considerable portion of such purposes, is void as in violation of the Constitution and laws of this state against perpetuities.

The Constitution of this state provides in section 9 of article 20 thereof that, "No perpetuities shall be allowed except for *eleemosynary* purposes." The term "eleemosynary" as thus used in the Constitution has been held to be synonymous with "charitable" as used and understood in treatises and decisions upon the subject of trusts (Estate of Sutro, 155 Cal. 727, 734, 102 P. 920; Estate of Cogswell, 113 Cal. 129, 45 P. 270, 35 L. R. A. 269), and in the last above-cited case the term "charitable trust" is defined to be:

> "A donation in trust for promoting the welfare of mankind at large, or of a community, or of some class forming a part of it, indefinite as to numbers and individuals. It may, but it need not, confer a gratuitous benefit upon the poor. It may, but it need not, look to the care of the sick or insane. It may, but it need not, seek to spread religion or piety. Schools and libraries, equally with asylums, hospitals, and religious institutions, are included within its scope. It is impossible to enumerate specifically all purposes for which an eleemosynary trust may be created. The difficulty is inherent in the subject-matter itself. With the progress of civilization new needs are developed, new vices spring up, new forms of human activity manifest themselves, any or all of which, for their advancement or suppression, may become the proper objects of an eleemosynary trust."

In the case of People v. Dashaway Ass'n, 84 Cal. 114, 24 P. 277, 12 L. R. A. 117, it was said by this court that:

> "The enforcement of charitable uses cannot be limited to any narrow and stated formula. As has been well said, it must expand with the advancement of civilization and the daily increasing needs of men. New discoveries in science, new fields and opportunities for human action, the differing condition, character, and wants of communities and nations, change and enlarge the scope of charity, and where new necessities are created new charitable uses must be established. The underlying principle

is the same; its application is as varying as the wants of humanity."

With the foregoing broad interpretation of the term "charitable uses" in mind, let us turn to the declared purposes embraced in the trust to be considered in the instant case. These have above been stated at length, but have been more briefly summarized by the respondent herein (and which summary the appellant herein admits in the main to be correct) to be as follows:

> "I. Promoting and assisting in promoting improvements in the structure and methods of government in the United States.
>
> "II. Improving living and working conditions for the working people.
>
> "III. Improving the economic conditions of the country.
>
> "IV. Assisting co-operation between employer and employee.
>
> "V. Assisting education.
>
> "VI. Aiding the practicable application of the science of Eugenics.
>
> "VII. Strengthening prohibitive legislation affecting intoxicants and narcotics.
>
> "VIII. Promoting justice for the American Indians.
>
> "IX. Preserving the right of free speech and assembly."

The appellant herein does not seriously contend that the foregoing résumé of the purposes for which the present trust is sought to be created does not bring it generally within the scope of "charitable uses" as defined in the foregoing decisions of this court. This being so, it is unnecessary to make more than a passing reference to such cases as Jackson v. Phillips, 14 Allen (96 Mass.) 539, upon which the appellant herein mainly relies, and which was decided in 1867, interpreting a trust attempted to be created by will in 1861, and which had for its purposes the creation of "a public sentiment that will put an end to human slavery in this country" and also "to secure the passage of laws granting women * * * the right to vote, to hold office, to hold, manage and devise property and all other civil rights enjoyed by men." As to the first of these declared purposes the Massachusetts Supreme Court held the trust to be valid, but as to the second invalid. The passing of the epoch in which this decision was written has caused its language to have little relation to social problems and its conclusions touching the political and other rights of women to be widely dissented from in later decisions from other jurisdictions. The trend of modern authority has been toward the upholding of trusts which have for their object the creation of a more enlightened public opinion, with a consequent change in laws having to do with human relations and rights in a republic such as ours; and hence it is that bequests of money to trustees for the attainment of woman's suffrage and other rights in the United States have been upheld. Garrison v. Little, 75 Ill. App. 402. Trusts for the promotion of prohibition have been sustained. Haines v. Allen, 78 Ind. 100, 41 Am. Rep. 555. Trusts for the distribution of Henry George's "Progress and Poverty" and "Problems of the Times" have been approved. George v. Braddock, 45 N. J. Eq. 757, 18 A. 881, 6 L. R. A. 511, 14 Am. St. Rep. 754. The most recent decision dealing generally with the matter of promoting improvement in the structure and methods of government is to be found in the case of Taylor v. Hoag, 273 Pa. 194, 116 A. 826, 21 A. L. R. 946, wherein the Supreme Court of Pennsylvania upheld a trust whereby the net income of the sum of $150,000 was to be devoted "to promote improvements in the structure and methods of government, with a special reference to the initiative, referendum, and recall; proportional representation; preferential voting; ballot reform; the simplification of municipal, state and national government and the revision and remaking of city charters, state Constitutions, and our national Constitution with a view to promote efficiency and popular control of government." Following a review of the foregoing cases the court says:

> "We are led to conclude that a trust for a public charity is not invalid merely because it contemplates the procuring of such changes in existing laws as the donor deems beneficial to the people in general or to a class for whose benefit the trust is created. To hold that a change in a law is in effect an attempt to violate that law would discourage improvement in legislation and tend to compel us to continue indefinitely to live under laws designed for an entirely different state of society. Such view is opposed to every principle of our government based on the theory that it is a government 'of the people, by the people and for the people', and fails to recognize the right of those who make the laws to change them at their pleasure when circumstances seem to require. With the wisdom of the proposed change the courts are not concerned."

The reasoning of the foregoing decision, while it is referable more especially to proposed reforms in legislation, is equally applicable to such social and economic changes as would in the opinion of the donors tend to bring about a more harmonious relationship between employers and employees, or ameliorate conditions among the so-called "working classes," or achieve a more equitable distribution of the fruits of production, or improve the status and condition of any particular race or class of our citizenship or population. The ideas of the creators of the trust along these several lines may be altruistic to the point of seeming to be impractical or even foolish, but it does not follow that the trust would for that reason, if otherwise unobjectionable from the viewpoint of ethics or morals, be invalid. As it is tersely but truly said in Zollman on Charities, at page 149, "a charitable gift may be both absurd and valid." It is our conclusion from an examination of the foregoing summary of the purposes which the creators of this trust had in mind in its formation that there is nothing in any of them which contravenes either public policy or public morals, and that in so far as the purposes themselves are concerned we can find no reason for holding all or any of them to be invalid.

[3-5] The main attack which the appellant makes upon this trust is not so much upon the expressed purposes of its creation, taken as a whole, as it is upon certain of the details thereof with respect to which he urges that these are too indefinite to be given effect. This charge of indefiniteness which the appellant makes against certain of the provisions of this trust is twofold. It is directed, first, against the beneficiaries of the trust, and, second, against the powers and functions of the trustees who are to seek to carry its provisions into effect. As to the first of these, it may be stated generally that the element of indefiniteness in the beneficiaries of a charitable trust is not only not an objection to its validity, but, as a rule, is of the essence of all charitable trusts of a public or quasi public character. This principle was well established by this court in the case of Fay v. Howe, 136 Cal. 599–601, 69 P. 423. The trust in that case was in the nature of a bequest of the sum of $5,000, "the income to be used in aid of deserving aged native born in the town of Southboro, Mass., needing such aid." This trust was objected to as being void for uncertainty, and this court in dealing with that objection said:

> "In the case of a private trust there must be certainty as to the beneficiaries, but in charitable trusts individuals are not named, for the reason that, if named, the gift becomes a donation to individuals, and, losing the character of indefiniteness as to persons—which is the essence of a charitable trust—it is no longer a charitable trust. Inherent in every charitable trust is the very characteristic against which appellant's argument points—namely, indefiniteness of beneficiaries."

The appellant points a particular objection at the language of section II of paragraph 6 of the trust instrument because of the use therein of the terms "working people" as being a phrase which is meaningless as defining any particular class of people, but it is evident that this is a hypercritical objection, since not only have such phrases as "the working classes" attained a very definite signification in our modern life, but the very context of the trust instrument in which it occurs illuminates its meaning and application by defining with much detail the particular functions which the trustees are to perform in the way of improving "living conditions of the working people." They are to "investigate the causes of poverty," with a view to "preventing the operation of such causes." They are to investigate and encourage the introduction of "the co-operative system of selling and purchasing food * * * generally known as the 'Rochdale system of co-operation.'" The section in the trust instrument immediately following the one under criticism (section III) pursues the subject further with an amount of detail too long to quote, but rendering perfectly clear the meaning of the term "working people" which the donors intended should be the beneficiaries of the activities of the trustees in carrying into effect this clause. The appellant urges the charge of indefiniteness against two other particular clauses in said trust instrument, viz., section IV of paragraph VI and section VIII of paragraph VI thereof. The first of these empowers the trustees "to induce, encourage, and support industrial co-operation to the end that *justice* may be done to employer and employee alike, and harmony be established and maintained between them, and industrial hatred and strife abolished, thereby benefiting mankind in general." By the second of these clauses the trustees are empowered "to promote *justice* for the American Indian in the United States by assisting in procuring legislation, and/or by stimulating the proper enforcement of legislation to that end and/or by assisting individual or bodies of Indians in attaining that justice." The emphasis with which the appellant urges his objection to each and both of these clauses is laid upon the word "justice," which, he argues, is entirely too indefinite as to its meaning to support these particular trusts. As to the first of these clauses thus objected to, it would seem to be manifest that the way in which "justice" between employer and employee is to be attained is by the principle and practice of industrial co-operation; and thus the meaning of the term "justice" as used by the creators of this trust is indicated and might be very well and truly expressed in the definition which Justinian has given us of that word, viz., "The constant and perpetual disposition to render every man his due." As thus defined there is no uncertainty in the purpose of the creators of this trust as expressed in clause VI of paragraph VI of this document. Whether that purpose can be achieved by the means which the trustees are empowered to promote is a matter with which the courts, in the first instance at least, have nothing to do, but which, at the last analysis, they might have power to direct under the exercise of their equity jurisdiction in the control over trusts. As to the objection which the appellant urges against clause VIII of paragraph VI of said trust instrument, it must be conceded that a greater state of indefiniteness exists. The trustees are empowered "to promote *justice* for the American

Indian." This they are to do "by assisting in procuring legislation and/or by stimulating the proper enforcement of legislation to that end." The meaning assigned to the word "justice" as above defined clarifies somewhat the purpose which the creators of this particular trust had in view, since it may not be denied that there was a large measure of injustice meted out to the Indian in the earlier history of our republic, and it might also be conceded for the sake of argument that there still remains a large degree of inefficiency in the administration of legislation aimed at the correction of that ancient wrong through the lifting of the American Indian up to the level and stature of those equal rights and duties pertaining to American citizenship. That the correctness of these assumptions may be disputable would not render the effort of the creators of this trust abortive, nor would the fact that the powers of the trustees in attainment of the end they had in view are not more exactly defined necessarily render the trust itself invalid. As we have seen, courts of equity possess enlarged powers in giving effect to trusts for charitable uses. In the exercise of these powers this court has declared in a leading case that:

> "Courts look with favor upon all attempted charitable donations and will endeavor to carry them into effect if it can be done consistently with the rules of law. A bequest intended as a charity is not void, and there is no authority to construe it to be legally void if it can possibly be made good." Estate of Hinckley, 58 Cal. 457; Estate of Willey, 128 Cal. 1, 60 P. 471; Estate of Merchant, 143 Cal. 537, 77 P. 475.

[6, 7] In Estate of Hinckley, supra, from which the foregoing excerpt is taken, the court learnedly and exhaustively discussed the power of the courts of this state to assume equitable jurisdiction over the administration of trusts clearly charitable in their nature, and in so doing to apply the doctrine of cy-pres as a judicial power in directing trustees to carry into effect a general lawful and charitable intent on the part of the creators of the trust when such intent is manifest when the trustees are named and when the beneficiaries of the trust are ascertainable. The final sentence in the foregoing clause aids somewhat in determining its validity, since it is therein provided that the trustees are to be empowered to extend aid to particular Indians or groups of Indians in attaining those ends which the term "justice" as above defined connotes. We are therefore of the opinion that this particular clause in the trust instrument ought not in the first instance to be held invalid. We are thus brought to the second objection which the appellant urges against the validity of this attempted trust foundation treated as a whole, which is that the powers and functions with which the trustees thereof are invested are too indefinite to justify the court in upholding it and by so doing in creating in them a perpetuity with practically unlimited powers. When, however, we take this lengthy and evidently carefully prepared document by the four corners and read it as a whole, we find that the statement of the appellant in urging this particular objection must be taken with much modification. In the first place, it is evident from the reading of this document as a whole that the methods of exercise of the powers and functions with which its trustees are to be invested are in the main educational. The manifest object of the creators of this trust was that of the formation and direction of an enlightened public opinion with relation to the particular subjects to which in its detail it is related, and as the result of that educated and enlightened opinion to bring about the adoption of concrete legislation or the acceptance of certain clearly stated social or economic reforms. The instrument is not lacking in certain definite directions to the trustees along these identical lines. The trustees are to conduct investigations as to the causes and prevention of poverty among working people and are also to investigate and encourage the adoption of a co-operative system of marketing; and generally to encourage and support industrial co-operation as between employers and employees. They are to afford educational opportunities for the study of governmental, industrial, and social problems and reforms, and they are to accomplish these objects by employing lecturers and instructors and by furnishing appropriate books and literature and by donations to institutions and organizations to be applied in the furtherance of the foregoing purposes. They are to buy, print, publish, and distribute pamphlets, newspapers, magazines, and books "and to disseminate by all lawful means such information as in the judgment of the trustees may be useful in carrying out the purposes of this trust."

The foregoing will sufficiently indicate the scope of the general powers with which the trustees of this foundation are by its specific terms invested. That the means which these trustees are to thus employ in the furtherance of its purposes are to be "lawful means" is expressly stated in the document itself, and by such expression the creators of the trust have relieved its trustees of the imputation of the appellant that this was a so-called "lobbying trust" to bring about legislation of various kinds by disreputable and unlawful methods. In a word, we find nothing in this trust which conveys the remotest suggestion that the trustees thereof are to employ or that they would be justified in employing other than the usual upright, open, and approved methods by which foundations charitable in character and educational in method are wont to carry on their work. The present trust differs in no essential respect from numerous other like foundations in various parts of the country which are devoted to the achievement of some, though not, perhaps, of all, of the objects of this particular foundation, and which have been generally aproved by the courts. The creators of this trust having, as recited therein, devoted a large part of their lives and a considerable portion of their fortune unselfishly to the promotion of the particular ideas of political and social reform which they are now seeking to have perpetuated beyond the period of their natural lives through this foundation, are to be commended rather than criticized for their desire to render permanent their life work. This method of achieving immortality is all too rare, and while we may not all agree upon the question as to whether or not certain details of these projected reforms in our political or social life are practical or even altogether desirable, we may not for that reason hold this foundation to be invalid by virtue of the defects in its creation which are urged by the appellant herein.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.; PRESTON, J.

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204 Cal. 51

SCHWAN v. SUPERIOR COURT IN AND FOR ORANGE COUNTY et al.
(S. F. 12824.)

Supreme Court of California. April 14, 1928.

1. **Executors and administrators ⟹151—Guardian and ward ⟹45—Abortive attempt to amend one section of statute relative to execution of trust deed by executors, administrators, and guardians does not preclude execution under other section sufficient to authorize exercise of such power without amended section (Code Civ. Proc. § 1577, and § 1578, as amended by St. 1927, p. 831).**

The abortive attempt by the Legislature at its 1927 session to amênd Code Civ. Proc. § 1577, does not preclude the execution of trust deeds by executors, administrators, and guardians, because of the provisions of Code Civ. Proc. § 1578, as amended by St. 1927, p. 831, which contains the essentials to make it sufficient, without section 1577, to authorize such execution.

2. **Executors and administrators ⟹151—Guardian and ward ⟹45—Section relative to execution of trust deeds by executors, administrators, and guardians confers on such persons right to execute trust deeds (Code Civ. Proc. § 1578, as amended by St. 1927, p. 831).**

Code Civ. Proc. § 1578, as amended by St. 1927, p. 831, is sufficiently broad in itself to confer a substantive right authorizing the execution of trust deeds by executors, administrators, and guardians.

3. **Statutes ⟹181(2)—That construction of statute renders another statute redundant does not affect such construction.**

That construction of a statute renders another statute redundant does not affect such construction.

4. **Executors and administrators ⟹151—Statute permitting execution of trust deeds by executors and administrators held applicable, though decedent died prior to passage of amendment (Code Civ. Proc. § 1578, as amended by St. 1927, p. 831).**

Code Civ. Proc. § 1578, as amended by St. 1927, p. 831, providing for the execution of trust deeds by executors, administrators, and guardians, *held* applicable to an estate, though decedent died prior to passage of the amendment.

In Bank.

Application by Lucy C. Schwan, as executrix of the estate of Susie M. Whitman, deceased, for writ of mandate prayed to be directed to the Superior Court of the State of California in and for the County of Orange and James L. Allen, as Judge thereof, to require said judge to hear and determine petitioner's application for an order authorizing execution of a deed of trust. Writ granted.

O'Melveny, Millikin & Tuller, Louis W. Myers, and Pierce Works, all of Los Angeles, and Albert Launer and Harold A. McCabe, both of Fullerton, for petitioner.

Scarborough, Forgy & Reinhaus, of Santa Ana, for respondents.

Henry E. Monroe, of San Francisco, amicus curiæ for California Pacific Title & Trust Co.

WASTE, C. J. Petitioner herein seeks by writ of mandate to compel the respondents superior court and the judge thereof to hear and determine an application filed by her as executrix of the estate of the above-named decedent, for an order authorizing the execution of a deed of trust, which is to serve as security for a promissory note sought to be executed to pay off and discharge a certain note, and mortgage securing the same, already existing and constituting an incumbrance upon the real property of the estate. Application for the order was made under the provisions of section 1578 of the Code of Civil Procedure as amended in 1927 (Stats. 1927, p. 831), which prescribe, among other things, the proceedings to be taken by an executor, administrator, or guardian applying for an order authorizing the execution of a deed of trust upon any property of the estate of which he is in charge. Notice of the hearing of the application was duly given, but the respondent judge of the court below refused to hear the matter upon the ground that the court was without jurisdiction to make the order prayed for.

Prior to the amendment of section 1578, supra, it was already provided in section 1577 of the Code that, whenever in any estate in course of administration, or in any guardianship proceeding pending, it shall appear to the superior court, or to a judge thereof, to be of advantage to raise money upon a note or notes to be secured by a mortgage of the real property of the decedent, or of the minor, that may be done on obtaining an order in due course therefor. The procedural steps necessary to be taken were to be found in section 1578. At the 1927 session of the Legislature two companion bills were introduced, one of which provided for the amendment of section 1577 by incorporating therein an express grant to executors, administrators, and guardians of the additional power to execute trust deeds upon property in their charge. The second bill provided for such an amendment to section 1578 as would cause its procedural provisions to conform to the proposed amendment of section 1577, by adding thereto express references to deeds of trust. Each of these bills passed the two houses of the Legislature, but only one of them, that amending the procedural section, 1578, was signed by the Governor. Respondents therefore urge that, while it was obviously the intent of the Legislature in passing both bills to grant to executors, administrators, and guardians the power to execute trust deeds, and to prescribe the precedure therefor, inasmuch as the bill purporting to amend the substantive provisions of section 1577 was not signed by the Governor, and therefore failed to become law, the power to execute trust deeds was not granted.

[1] We are unable to agree with the respondents' contention that the abortive attempt to amend section 1577 precludes the execution of trust deeds by executors, administrators, and guardians. The provisions of section 1578, as amended in 1927, supra, are sufficiently extensive, in and of themselves, to prescribe not only the procedural steps necessary to the execution by such persons of trust deeds, but to grant the substantive right to exercise such power. The language of section 1578, as so amended, supports this conclusion. After prescribing the procedural steps essential to the obtaining of a court order authorizing the execution of a trust deed, that section, so far as pertinent here, declares that:

> "If, after full hearing the court or judge is satisfied that it will be for the advantage of the estate to mortgage or execute a deed of trust of the whole or any portion of the real estate, an order must be made authorizing, empowering and directing the executor or administrator, or the guardian of such minor or incompetent person, to make such mortgage or to execute such deed of trust, and a promissory note or notes to the lender for the amount of the loan, to be secured by such mortgage or deed of trust.
> * * *
>
> "After making the order to mortgage, or execute the deed of trust, the executor, administrator, or guardian of a minor or incompetent person shall execute and deliver the note or notes for the amount and period specified in the order, and shall execute, acknowledge and deliver a mortgage, or deed of trust, of the premises, setting forth in the mortgage, or deed of trust, that it is made by the authority of the order, and giving the date of such order. * * *
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> "Every note or notes and mortgage, or deed of trust, so made shall be effectual to mortgage or convey by means of a deed of trust, all right, title, interest and estate which the decedent, minor, or incompetent person had in the premises described therein at the time of the death of such decedent, or at the time of the appointment of the guardian of such minor or of such incompetent person, or prior thereto, and any right, title or interest in said premises acquired by the estate of such decedent, minor, or incompetent person, by operation of law or otherwise, since the time of the death of such decedent, or the appointment of the guardian of such minor or incompetent person.
>
> "Jurisdiction of the court to administer the estate of such decedent, minor, or incompetent person shall be effectual to vest such court or judge with jurisdiction to make the order for the note or notes, and mortgage, or deed of trust, and such jurisdiction shall conclusively inure to the benefit of the mortgagee named in the mortgage, or the trustee and beneficiary in the deed of trust, his or their heirs and assigns."

[2, 3] This language of the section is sufficiently broad to confer the substantive right authorizing the execution of trust deeds by executors, administrators, and guardians. To reply that such a construction of section 1578 renders section 1577 redundant does not suggest a different conclusion, for it may be safely said that such a condition probably exists as to many of our laws.

[4] The testatrix in the present case died in 1924, and the question is raised whether or not the amended statute (1927) applies to an estate in a case where the decedent died prior to the passage of the act. We are of the view that it does, for the reason that the purposes for which a deed of trust may now be authorized by the court are the same as those for which the power previously existed to permit the due execution of a mortgage. The statute has not been changed in that respect. The Legislature has not imposed any greater burden upon the property of the decedent than that which existed at the time of her death. It has merely enacted a remedial statute prescribing a different mode of procedure for raising money for the needs of the estate, to carry out such objects as were provided for by the law in force at the time of the decedent's death. Murphy v. Farmers' & Merchants' Bank, 131 Cal. 115, 63 P. 368, 731; Estate of Benvenuto, 183 Cal. 382, 191 P. 678.

Let a peremptory writ of mandate issue directing the respondents to entertain, hear, and determine the application of the petitioner below for permission to execute a deed of trust upon the property of the estate.

We concur: CURTIS, J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; LANGDON, J.

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204 Cal. 107

WINSKY v. DE MANDEL et al.

(S. F. 12329.)

Supreme Court of California. April 21, 1928.

1. Automobiles ⚷9—Ordinance forbidding parking vehicles at intersections to obstruct pedestrian travel held valid (Ordinance of City and County of San Francisco 1857, § 19; California Vehicle Act, §§ 130, 131).

Ordinance 1857, § 19, of City and County of San Francisco, forbidding any person to park vehicle at intersection so as to obstruct passage of pedestrian at crossings, *held* valid as not conflicting with California Vehicle Act, §§ 130, 131 (St. 1923, pp. 558, 560), such sections not relating to matter of leaving vehicles standing at street intersections; hence ordinance was properly admitted in action for damages for death proximately resulting from violation of such ordinance.

2. Automobiles ⚷173(2)—Truck driver and employer held negligent in violating ordinance requiring parking of vehicle to not obstruct pedestrian travel (Ordinance of City and County of San Francisco 1857, § 19).

Truck driver parking truck at intersection so as to obstruct pedestrian travel, in violation of Ordinance 1857, § 19, of City and County of San Francisco, and his employer, *held* guilty of negligence as respected death of child at intersection proximately resulting from parking vehicle in violation of ordinance.

Department 2.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by James N. Winsky against Edward H. De Mandel, the North Star Laundry Company, and one Williams. Judgment for plaintiff against defendants last named, and such last-named defendants appeal. Affirmed.

Ford, Johnson & Bourquin and E. L. Chloupek, all of San Francisco, for appellants.

Leo A. Cunningham, of San Francisco, for respondent.

RICHARDS, J. The plaintiff commenced this action for damages for the death of his minor daughter of the age of 8 years, who was killed at the intersection of Guerrero and Seventeenth streets in the city of San Francisco by being struck by an automobile driven by the defendant De Mandel, while in the act of crossing the street at said intersection, and in so doing in going around a laundry truck owned by the North Star Laundry Company and being operated by Williams, one of its employees, and which truck had been by said Williams left standing upon such intersection in an angular position and directly in the path of pedestrian travel. Upon the trial of the cause before the court, sitting with a jury, the verdict of the latter absolved the defendant De Mandel from liability, but otherwise found in favor of plaintiff against the defendant North Star Laundry Company and also against its employee Williams, fixing the plaintiff's damage at $2,500. The last-named defendants appeal from the judgment entered upon such verdict.

[1, 2] Practically the only question of law presented upon this appeal relates to the validity of an ordinance of the city and county of San Francisco, numbered section 19 of Ordinance 1857 thereof, which makes it unlawful for any person to leave standing any automobile or other vehicle in such position at any intersection of the streets thereof so as to obstruct the passage of pedestrians at the crossings thereon. The trial court, over the objection of the appellants, permitted the introduction of this ordinance in evidence, and instructed the jury that if they found that the defendant Williams had so left standing the laundry truck, which he was engaged in driving for his codefendant the North Star Laundry Company, as not to keep the passage of pedestrians clear, they should find him and consequently his employer guilty of negligence. Appellants urge that the trial court was in error in the admission of said ordinance in evidence and in giving such instruction, for the reason that the ordinance is in conflict with sections 130 and 131 of the California Vehicle Act (Stats. 1923, pp. 517, 558, 560). A reference to these sections will, however, disclose that they do not relate to the matter of leaving vehicles standing at street intersections so as to interfere with the passage of pedestrians upon the regularly provided crossings for the use of pedestrians thereon. This being so, there is no conflict between the state law regulating the approach by vehicles to such intersections and the manner and way of turning vehicles thereon and the ordinance of the municipality in question, which relates solely to the interference with pedestrian travel which would result from the stopping or leaving standing of motor or other vehicles upon the crossing at street corners. The jury in the instant case found upon sufficient, though somewhat conflicting, evidence that the defendant Williams had left his employer's laundry truck standing upon the crossing at the intersection of said streets provided for the use of pedestrians, and that the plain-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tiff's daughter, a child of the age of 8 years, and hence not ordinarily chargeable with contributory negligence, while attempting to go around said laundry truck in order to negotiate said crossing, was struck by the car driven by De Mandel, who was himself without negligence; that it was the negligent act of Williams in violation of the terms of said ordinance which was the proximate cause of the death of said child. We find no error in the admission of said ordinance in evidence or in the giving of the instruction complained of. With relation to the other instructions of the court as to which the appellants offer some criticism, we find that the instructions, when read as a whole, fully and fairly presented the law applicable to the case.

The judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.

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204 Cal. 94

MURPHY et al. v. LACEY et al.★
(S. F. 12127.)

Supreme Court of California. April 21, 1928.

Hearing Denied in Bank May 21, 1928.

1. Reformation of instruments ⚿37—Cross-complaint, seeking reformation of contract sued on to conform to true intent and purpose, held properly allowed (Civ. Code, § 3399).

In action for recovery of money alleged to be due under terms of contract for sale of real estate, court properly permitted defendants to file cross-complaint under Civ. Code, § 3399, setting forth intent, understanding, and true agreements, and praying that contract be revised and reformed to conform thereto.

2. Reformation of instruments ⚿44—Evidence to explain meaning of terms of agreement held properly allowed after allowance of cross-complaint seeking reformation of agreement (Code Civ. Proc. §§ 1856, 1860; Civ. Code, § 3399).

In action by purchasers under contract for sale of real estate for recovery of deposit made by prospective purchaser, which plaintiffs claim under agreement that they were to succeed to and receive all benefits of seller under contract with such other purchaser, court did not err in admitting evidence under Code Civ. Proc. §§ 1856, 1860, explaining meaning of such agreement, after allowing cross-complaint under Civ. Code, § 3399, seeking reformation of agreement to conform to alleged true meaning of contract.

Department 1.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Leland S. Murphy and another against E. V. Lacey and another for money had and received. Judgment for defendants, and plaintiffs appeal. Affirmed.

Robert B. Gaylord, of San Francisco, for appellants.

Charles W. Byrnes and Robert L. McWilliams, both of San Francisco, for respondents.

SEAWELL, J. Plaintiffs, as the assignees of one L. J. Brown, brought an action against E. V. Lacey and Veronica E. Lacey on two counts for the recovery of the sum of $2,000. The first count stated a case for money had and received growing out of the same statement of facts specifically pleaded in the second count. Said facts are substantially as follows: On June 5, 1924, defendants E. V. Lacey and Veronica E. Lacey entered into a contract whereby said defendants agreed to sell to plaintiffs' assignor, L. J. Brown, and he agreed to purchase from them at the agreed purchase price of $150,000, certain real property situate in the city and county of San Francisco. Said contract further provided that said sale was subject to a prior subsisting agreement of sale of said real property entered into by defendant Lacey as seller and one T. J. Neilan and others as purchasers. The parties to said contract referred to said agreement of sale existing between Lacey and Neilan and others at the agreed price of $160,000 net to Lacey and concluded this subject of the agreement in the following language:

> "All right, title and interest in said agreement of sale with T. J. Neilan et al., being hereby sold, assigned and transferred to L. J. Brown for a consideration of one ($1.00) dollar, receipt of which is hereby acknowledged and included in the sale price of this property for the said sum of one hundred fifty thousand ($150,000.00) dollars net; it being understood that the purchaser under this contract succeeds to and receives all benefits on the seller's part under the Neilan contract."

Concurrently upon the execution of the Neilan agreement to purchase, he deposited the sum of $1,000 with said Lacey as a part payment on account of said contract, and the same thereafter became forfeited by reason of the failure of said Neilan and others to perform the terms of their contract. Said $1,000 was in the hands of Lacey some time before the contract was made by him with plaintiffs' assignor. It is for the recovery of this deposit sum, which plaintiffs were led into the error of believing to be $2,000, that the action was commenced in the lower court.

[1] It is the claim of plaintiffs that by the plain terms of the portion of the contract above quoted they are entitled to everything received by Lacey from Neilan. By their answer defendants allege that said quoted portion of the contract did not express the true intent, purpose, or agreement of the parties thereto, and that the understanding and agreement intended to be made was that, in the event Neilan consummated his

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★Hearing denied in bank.

agreement to purchase said real property for said agreed price of $160,000, which was regarded as uncertain by the parties of the transaction, plaintiffs' assignor was to profit to the extent of the difference between that sum and the price he agreed to pay, to wit, $150,000, less the $1,000 theretofore paid to said Lacey, and, in the event of a forfeiture of Neilan's option, Brown was to pay Lacey $150,000 net for said real property. By cross-complaint defendants set forth in detail the intent, understanding, and true agreements of the plaintiffs' assignor and Lacey, and prayed that the said contract be revised and reformed to conform thereto. Civ. Code, § 3399. The trial court properly permitted the cross-complaint to stand.

While there was a conflict in some respects in the evidence as to the intent of the parties to said contract, it was not such a conflict as would preclude the court from finding that the transaction was intended to be in harmony with the version given by the defense. In fact, the contention of the defendants as to the understanding of Lacey with respect to the agreement, which was intended to be reduced to writing and which was prepared by his adversary, examined in the light of the circumstances of the transaction, comports far better with the rule of rationality that a person in the transaction of business takes ordinary care of his own concerns and does not wittingly enter into an obviously unwise or foolish agreement than would the contrary contention made by appellants.

[2] We are not prepared to say that it was error for the trial court, even in the absence of a pleading for the revision of the contract, to have admitted evidence under sections 1856, 1860, Code of Civil Procedure, to explain what was meant by the term, "it being understood that the purchaser under this contract succeeds to and receives all benefits on the seller's part under the Neilan contract," which was rendered more or less uncertain by the fact that respondent Lacey, long prior to entering into a second contract of sale of said real property for the sum of $150,000 had received $1,000 in cash from Neilan on account of a contract upon which there remained an unpaid balance of $159,000. Whether the benefits referred to were to reach backward and include the $1,000, or whether appellants were buying all the enforceable rights and benefits then and thereafter to accrue under the Neilan contract, are matters of uncertainty examined in the light of facts and circumstances of the transactions. However this may be, the trial court was fully warranted by section 3399, Civil Code, in its ruling allowing the cross-complaint which sought relief by way of revision of said instrument to conform with the understanding of respondents and what the court found to be the understanding of appellants' assignor.

Aside from what has already been said, there is another circumstance which doubtless weakened appellants' contention of the understanding of the parties to the Brown contract. Appellants went through with the contract made with Lacey on the theory that he was to receive $150,000 net for his property from appellants. Deeds were passed, and some time elapsed before claim was laid to the $1,000 paid to Lacey under the Neilan agreement. The delay in demanding said $1,000 paid to Lacey under the Brown contract seems to have been suggested by afterthought.

Judgment affirmed.

We concur: CURTIS, J.; PRESTON, J.

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204 Cal. 84

PEOPLE v. LEIN. (Cr. 3052.)

Supreme Court of California. April 20, 1928.

1. Criminal law ⟾780(2)—Refusal to instruct on corroboration of accomplice held proper, where witness testified only as to purchasing whisky from defendant and loading it on witness' automobile (Pen. Code, § 1111).

Where prosecuting witness, in trial for possessing intoxicating liquor, testified that he purchased whisky from defendant, helped latter carry some of it from cotton patch near defendant's shack, emptied it into other containers, and, with additional quantity produced by defendant, loaded them on his automobile, court did not err in refusing to instruct jury as to corroboration of accomplice's testimony under Pen. Code, § 1111; purchaser's possession of liquor after consummation of sale not being possession of seller.

2. Criminal law ⟾741(1), 742(1)—Witnesses' credibility and weight of testimony are exclusively for jury.

The credibility of the witnesses and the weight to be given their testimony are matters exclusively for the jury to determine.

3. Criminal law ⟾1159(4)—Judgment on conviction of possessing intoxicating liquor cannot be disturbed for insufficiency of confessed bootlegger's and perjurer's testimony, where evidence was sharply conflicting.

Where evidence was sharply conflicting, judgment on conviction of possessing intoxicating liquor cannot be disturbed on ground of insufficiency of evidence in that prosecuting witness was a confessed bootlegger and admitted testifying falsely at preliminary hearing to avoid incriminating himself.

4. Criminal law ⟾991(2)—Judgment directing imprisonment for over 90 days on conviction of possessing intoxicating liquor is void to such extent (National Prohibition Act tit. 2, § 29 [27 USCA § 46]; Pen. Code, § 1205).

Under National Prohibition Act tit. 2, § 29 (27 USCA § 46), and Pen. Code, § 1205, judgment of $1,000 fine or confinement in county jail one day for every $2 of fine, not exceeding six months, on conviction of possessing intoxicating liquor, is void to extent that it directs imprisonment beyond period of 90 days.

In Bank.

Appeal from Superior Court, Riverside County; Wm. H. Ellis, Judge.

H. N. Lein was convicted of possessing intoxicating liquor, and he appeals. Modified, and affirmed as modified.

Superseding opinion, 260 P. 363.

Fred L. Hamblin, and Kelley & Hews, all of Riverside, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., John D. Richer, of Los Angeles, and Albert Ford, Dist. Atty., of Riverside, for the People.

SHENK, J. In the county of Riverside the defendant was charged by information with having intoxicating liquor unlawfully in his possession. He pleaded guilty to conviction of a similar prior offense, and pleaded not guilty to the offense charged in the information. On the trial the jury returned a verdict of guilty as charged. The trial court pronounced judgment that defendant pay a fine of $1,000 or be confined in the county jail one day for each $2 of the fine, the total period of confinement not to exceed six months. The defendant appeals from the judgment.

[1] The defendant's first contention is that the prosecuting witness Trivet was an accomplice; that the corroborating evidence was insufficient to convict the defendant under the provisions of section 1111 of the Penal Code; and that the trial court should have given an instruction covering the provisions of that section of the Code. For the purposes of this opinion it is necessary to state only that said witness testified that he purchased 50 gallons of whisky from the defendant; that he helped the defendant carry some of the liquor from a cotton patch near the defendant's shack and emptied it from its containers into certain other containers, and, together with an additional quantity which defendant produced from "somewhere outside," loaded the containers on his automobile. Just prior to driving away he and the defendant became engaged in a quarrel, as a result of which he shot at and wounded the defendant. There is no evidence in the record that Trivet aided or abetted defendant in obtaining possession of the liquor. If Trivet's testimony be believed, and we must assume that the jury believed it, the transaction was a purchase and sale of liquor which was already in the defendant's possession. In legal contemplation Trivet's possession commenced when the sale was consummated and he drove off with it. The later possession of the purchaser is not the possession of the seller. There is not in such cases an identity, but merely a similarity of offenses. The possession of each was separate and distinct. People v. Galli, 68 Cal. App. 682, 230 P. 20. The trial court did not, therefore, commit error in refusing to instruct the jury as requested.

[2, 3] The defendant further contends that, as Trivet was a confessed bootlegger and admitted that he had testified falsely at the preliminary hearing because he did not want to incriminate himself on a charge then pending but since dismissed, there is no substantial testimony in the record to sustain the verdict. There was evidence on behalf of the defendant to the effect that Trivet stopped his automobile at defendant's place and tried to hold him up for money; that the defendant called for his gun, which his son brought to him; and that Trivet shot and wounded the defendant as a result of the episode which the defendant relates. The record presents a sharp conflict in the evidence. The credibility of the witnesses and the weight to be given their testimony were, of course, matters exclusively for the jury to determine. In this state of the record the judgment cannot be disturbed on the ground of the insufficiency of the evidence.

[4] However, the judgment in its entirety cannot stand in view of the provisions of section 29 of title 2 of the National Prohibition Act (Fed. Stats. Ann. 1919 Supp. p. 215 [27 USCA § 46]), providing for a maximum jail sentence of 90 days for the second offense, and the provisions of section 1205 of the Penal Code, which are that:

> "* * * The judgment must specify the extent of the imprisonment, which must not exceed one day for every two dollars of the fine, nor extend in any case beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted."

The judgment is therefore void to the extent that it directs imprisonment beyond the period of 90 days. People v. Cencevich, 64 Cal. App. 39, 220 P. 448.

The judgment is modified by striking therefrom the following: "* * * And that he will not be confined in the county jail under any circumstances for more than a period of six months." And in lieu thereof the following is ordered inserted: "Provided, however, that the duration of such imprisonment for default in the payment of said fine shall not exceed 90 days." As so modified, the judgment is affirmed.

We concur: RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

204 Cal. 55

SALLES v. LOANE et al. (S. F. 12021.)

Supreme Court of California. April 18, 1928.

1. Executors and administrators 🔑221(4)—Evidence held to show agreement between remaindermen and deceased life tenant for sale of property, and deposit of remainder in joint and survivorship account.

Evidence *held* to show agreement between life tenant of real property and remaindermen for expenditure of portion of proceeds of realty and deposit of balance in bank in name of life tenant and remaindermen in joint and survivorship savings account, with right in life tenant to make withdrawals during his lifetime.

2. Life estates 🔑4—Agreement for sale of life estate and deposit of proceeds subject to withdrawals by life tenant held to terminate life estate.

Where life tenant and remaindermen agreed to sale of property, division of portion of proceeds between remaindermen, and deposit of remainder in joint and survivorship savings account with right in life tenant to make withdrawals, *held* that result was to extinguish life estate, and one of remaindermen could not deny such result and seek to recover against life tenant's estate one-half of proceeds deposited in bank.

Department 1.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Alice A. Salles against Albert S. Loane and another, executor and executrix of the last will of Abraham Loane, deceased, upon a rejected claim against the estate of Abraham Loane, deceased. Judgment for defendants, and plaintiff appeals. Affirmed.

Aitken & Aitken and Marion Vecki, all of San Francisco, for appellant.

Harry F. Sullivan, of San Francisco, for respondents.

PRESTON, J. This is an appeal from judgment in favor of defendants, sustaining their rejection of claim presented by plaintiff against the estate of Abraham Loane, deceased.

The facts as found by the court follow: Upon the death of one John Loane, there was distributed to Abraham Loane, for the full term of his natural life, with remainder to his two daughters, Alice A. Salles and Mabelle Donahue, share and share alike, certain real property occupied by a lessee, who had the privilege, under an option clause in the lease, of purchasing said property within a specified time for the sum of $15,000. The lessee duly exercised said option, and received a deed to the property from Abraham Loane as life tenant and from his said daughters as remaindermen, paying these parties the sum of $15,000 therefor.

Said three parties thereupon agreed to and did expend $1,000 of said sum for the adornment of a family cemetery plot; $2,000 thereof was given to Alice A. Salles, and $2,000 to Mabelle E. Donahue. This left a balance of $10,000, which they deposited in joint and survivorship savings accounts in two banks under written agreement executed by all three of them, "by virtue of which it was understood and agreed by said three parties and the respective banks in which said moneys were so deposited, that the moneys therein deposited might be withdrawn upon the written order of either of the three persons whose names were signed to the contract, and without reference to the original ownership of the moneys deposited."

Pursuant to this agreement, and to their further mutual understanding that said sum of $10,000 and interest thereon should be drawn upon by said Abraham Loane during his lifetime for his maintenance and support, and that upon his death the balance thereof should belong, share and share alike, to his said daughters, Abraham Loane withdrew from time to time during the remaining six years or so of his life from said savings accounts various sums, which he used for his support, all withdrawals being so made by him with the consent and knowledge of his said daughters and pursuant to the agreement above set forth. Upon his death the total sum remaining on deposit was $2,559.04, one-half of which, or $1,279.52, was paid to Alice A. Salles and the other half to said Mabelle E. Donahue.

Thereafter the last will and testament of said Abraham Loane was duly admitted to probate, whereupon Alice A. Salles presented to defendants herein, as executor and executrix, her claim against his estate for the difference between half of said $10,000, to wit, $5,000 and the sum of $1,279.52 theretofore received by her as aforesaid, or $3,720.48. Said claim was promptly rejected and this action brought to recover thereon.

Finding that Abraham Loane did not convert to his own use any portion of said sum of $10,000 to which he was not entitled, and that plaintiff had knowledge of the withdrawals made by him, the court concluded that she was entitled only to said sum of $1,279.52 already received by her, wherefore judgment was duly entered in defendants' favor, and plaintiff has appealed.

Appellant's chief attack is directed against the finding that the parties for the purpose of effacing the life estate of Abraham Loane, entered into the agreement as above set forth. In other words, appellant contends that the life estate was not eliminated when said sum of $10,000 was deposited in joint and survivorship bank accounts, but that, when the estate in the real property was changed by sale of the land into an estate in money, the life estate of Abraham Loane therein, with remainder over to his two daughters, continued; hence, as life tenant, he was entitled to use of the earnings of said estate of $10,000 only, but he could not dissipate or spend the principal sum which he held as trustee for the remaindermen.

[1] Even if it were true in this case that upon sale of the property Abraham Loane became the owner of a life estate in the proceeds thereof and a trustee of the principal sum for the benefit of his daughters, nevertheless it was within the power of the parties to, and, under the evidence, they did, change the status of such estate by their said agreement, the effect of which was to terminate the life estate of Abraham Loane, to make partial distribution to the remaindermen, and to bank the balance in the name of all three parties in joint and survivorship savings account for their benefit, subject, however, to withdrawals by the father during his lifetime. The evidence compels the conviction that the agreement between Abraham Loane and the two daughters was as found by the court.

[2] If the effect of the sale and the subsequent action of the parties and their purpose was merely to transmute the life estate in the real property into a life estate in the money received from sale thereof, it is plain that both plaintiff and her sister erred in accepting $2,000 each out of the $15,000 received; neither was it proper in such case to expend $1,000 thereof for a vault. In other words, if it was not the intent and purpose of the parties to efface the life estate, but their intention was to enforce it and to limit the father during his lifetime to use of the earnings of the principal sum, and to hold him liable as trustee for their benefit, then surely he was entitled to have, not only earnings from $10,000, but earnings from the undiminished principal sum of $15,000.

Having consented to a one-third depletion of what she now alleges was an estate held by her father for life and in trust for the benefit of herself and her sister, and having accepted as her own $2,000 thereof, how can plaintiff now take advantage of that fact and urge any claim that her understanding of the situation was other than what her acts and conduct plainly showed it to be—namely, an understanding that they were terminating the life estate, a portion of which was being distributed to and accepted by her as one of the remaindermen, and the rest of which she and her sister were reserving subject to such withdrawals from it as their father might care to make?

Mabelle Donahue, whose testimony is uncontradicted, stated that, before the $15,000 was received, its disposition was fully discussed by all the parties, and the agreement as found by the court was reached. Her position was that she did not care how much of the money her father used, so long as she had enough to buy an automobile. The deposit agreement signed by the parties is set forth in the record. It specifically provides for withdrawals "without reference to the original ownership of the moneys deposited." The evidence, including testimony of witnesses from the banks, shows that the passbooks were in the possession of Abraham Loane at all times, as without them he would have been unable to withdraw money.

The record abundantly supports all of the findings and the judgment. The case of Conneally v. S. F. Savings, etc., Soc., 70 Cal. App. 180, 183, 232 P. 755, and cases cited therein, are in point and support our conclusion.

Judgment affirmed.

We concur: CURTIS, J.; SEAWELL, J.

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204 Cal. 97

WINCHELL v. STRAWBRIDGE et al. ★

(S. F. 12296.)

Supreme Court of California. April 21, 1928.

Hearing Denied in Bank May 21, 1928.

1. Action 🔑38(4)—Complaint held to combine three causes of action in one count, and not reconcilable as for conspiracy (Pen. Code, § 563).

Complaint combining three attempted causes of action in one count, predicated on alteration of books of corporation, in violation of Pen. Code, § 563, on institution of suit in justice's court, and on institution of suit, followed by judgment and execution thereon in a different justice's court, *held* subject to demurrer as being irreconcilable as a cause of action for a civil conspiracy.

2. Pleading 🔑18—Complaint attempting to state cause of action for deceit, fraud, collusion, and conspiracy held demurrable for uncertainty and ambiguity.

Complaint attempting to state cause of action for deceit, fraud, collusion, and conspiracy, stating that plaintiff operated a garage but did not own it, with a later statement for damages because of taking property from garage under execution sued out on judgment, *held* demurrable for uncertainty and ambiguity.

Department 1.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by O. H. Winchell against O. W. Strawbridge and others. Judgment for defendants, and plaintiff appeals. Affirmed.

★Hearing denied in bank.

A. H. Carpenter, of Stockton, for appellant.
Joe Huberty, of San Andreas, and Maurice R. Carey, of San Francisco, for respondents.

PRESTON, J. This is an appeal from a judgment for defendants, based upon an order sustaining both general and special demurrers to the amended complaint, plaintiff having declined the opportunity offered by the court to amend his pleading a second time.

The so-called amended complaint is an anomaly, being in reality but a jumble of conclusions. No one word or phrase would properly characterize or serve to define the attempted cause of action. The attorney for appellant himself describes it as follows:

> "This action was brought against a justice of the peace, a corporation, and two lawyers in San Francisco for unlawfully altering the books and records of said corporation, and for deceit, fraud, collusion, and conspiracy to thereby cheat and defraud the plaintiff herein. * * *

Later in his brief he seems to call it an action for malicious prosecution. The pleading would appear to be an effort to state a combination of various causes of action, to wit, a suit for a civil conspiracy, mixed with a suit for malicious prosecution, upon which is superimposed a privately conducted criminal prosecution under section 563 of the Penal Code.

The document has as its prelude a short biographical sketch of each defendant, with a vitriolic recital of the alleged nefarious part he played in the drama. The facts gleaned from this dramatic effort seem to be that plaintiff, C. H. Winchell, during the time in question operated a garage business known as the Winchell Garage in San Andreas, Calaveras county, Cal. He denies that he did more than to "operate" the institution, without defining the word, other than to say that he never at any time owned the same or any interest therein. Defendant Gates Company, a corporation, was doing business presumably at San Francisco, and claimed to have sold goods, wares, and merchandise to plaintiff and to one Annie E. Winchell in the sum of $345.72. The claim of the corporation for said sum was assigned for collection to C. W. Strawbridge, who thereafter reduced it to the jurisdiction of the justice's court, and on the 25th day of February, 1924, sued both C. H. and Annie E. Winchell in the justice's court of the city and county of San Francisco for said debt. Service of summons was quashed, and later a suit was brought by the same party against the same defendants in the justice's court of San Andreas township, county of Calaveras, Cal., which latter court was presided over by the defendant C. F. Walter. Why the justice of the peace at San Francisco in whose court the cause was begun was omitted as a defendant cannot be ascertained from the document; however, the attorney for plaintiff in both said actions is made a defendant herein.

The latter cause was instituted on April 19, 1924. On April 26th following, plaintiff here (defendant there) appeared by demurrer, and presumably the other defendant appeared in the same way at the same time. Thereafter, and on July 10th the docket of the justice of peace shows the following entry: "No appearance demurrer overruled, and twenty days given to answer." Thereafter and on July 23d said defendants (plaintiff here and his codefendant, Annie E. Winchell) requested in writing of the justice of the peace that an oral answer be noted in the docket. On October 7th, approximately three months after the overruling of the demurrer, judgment by default was entered in favor of plaintiff and against both defendants for $283.07. Later an execution issued on said judgment and the same was levied upon 100 gallons of oil, 4 oil containers, and other equipment of the garage of the alleged value of $400, and the action of the sheriff was such that he "thereby dismantled the garage and prevented the plaintiff from operating the same for want of proper and sufficient equipment and supplies for a period of five months, and plaintiff thereby lost the use of said garage and all the income thereof for the period aforesaid, and his trade as such garage operator and mechanic was thereby injured and ruined, to his damage in the sum of $5,000." Plaintiff adds the sum of $2,000 to his claim for damages, alleging fraud, oppression, and malice, and ends said alleged amended complaint with a prayer for $7,200 and costs.

The allegations of the pleading contain a healthy sprinkling of such words and phrases as "unlawfully," "fraudulently," "falsely fabricated," "fraudulently forcing the plaintiff," "fraudulently changing the name of the said real debtor," "null and void"; it many times appearing therein that plaintiff "did not owe or incur" the debt, "fraudulently forcing the plaintiff herein to pay the said claim which he neither incurred nor owed," "that said Annie E. Winchell was the sole and only debtor on the books and bills of the said Gates Company," "fraudulently compelling plaintiff to pay the said debt of Annie E. Winchell," etc.

The defendants, other than defendant Walter, demurred to the complaint upon some five major grounds, with more than twenty added special grounds of demurrer, alleging, among other things, the failure to separately state two or more united causes of action, also uncertainty, unintelligibility, and ambiguity, and defendant Walter filed a separate demurrer, adding still further grounds. The court sustained the demurrers and, plaintiff having declined to amend, judgment passed for the defendants.

[1] The recitals given above are amply sufficient to justify the ruling of the court below sustaining these demurrers. Admittedly plaintiff has combined three attempted causes of action in one count, to wit, an attempted cause of action predicated upon alteration of the books of the corporation in violation of section 563 of the Penal Code, one predicated upon the institution of a suit in the justice's court of the city and county of San Francisco, and one predicated upon the institution of a suit followed by a judgment and execution thereon in the justice's court of San Andreas township, Calaveras county. The allegations of the pleading cannot be reconciled as the statement of a cause of action for a civil conspiracy, as the acts themselves are not connected in such a way that they could form parts of a single conspiracy.

[2] Moreover, numerous grounds of uncertainty and ambiguity exist in the pleading—for example, the pleader states that he operated the garage, but did not own it or any interest in it; then later he asks for $5,000 damages because of the taking from the garage of $400 worth of property under the execution sued out on said judgment. How he can claim $5,000 as damages for loss of use of and income from property in which he claims no interest certainly presents an issue of ambiguity and uncertainty. Likewise there is no allegation that Annie E. Winchell did not own the equipment; if she did own it, the judgment and execution being also against her, said levy was proper because throughout the pleading plaintiff points to said Annie E. Winchell and declares her to be the person who owed the debt. The relation of Annie E. Winchell to plaintiff is not disclosed, but enough does appear to show that he is willing to hide behind her skirts.

The entire pleading is an absurdity upon its face, and cases of this character should not be allowed to clog the calendars of the courts.

The judgment is affirmed, with $100 as damages to respondents for a frivolous appeal.

We concur: CURTIS, J.; SEAWELL, J.

204 Cal. 63

ADAMS v. SOUTHERN PAC. CO. et al.
(S. F. 9886.)

Supreme Court of California. April 19, 1928.

1. Master and servant ⚷30(4)—Railroad conductor's act in associating himself with illicit bar and permitting use of his houseboat for prostitution held to warrant dismissal.

Alleged action of railroad conductor in associating himself with illicit bar, where liquor was sold in violation of company's rules, and in permitting houseboat which he owned to be conducted for purpose of prostitution, *held* such as to warrant railroad in dismissing him for conduct unbecoming conductor.

2. Master and servant ⚷43—Railroad employee held not entitled to have question of dismissal for infraction of rules submitted to jury.

Railroad employee is not entitled to have jury decide whether or not infraction of rules established by railroad warranted dismissal, where reason was from standpoint of employer, acting in good faith, wholly true.

3. Master and servant ⚷32—Conductor could not recover against railroad for maintaining record showing discharge for unbecoming conduct, if record was true.

If former railroad conductor was in fact guilty of conduct unbecoming a conductor he could not recover against railroad for maintaining record showing such circumstance as reason for his discharge.

4. Master and servant ⚷32—Railroad employee admitting ground for dismissal was not entitled to investigation.

In action by former railroad employee for damages resulting from record of discharge, open and fair investigation of complaint against employee, required by rule of railroad company, was not necessary under Civ. Code, § 3532, where employee admitted commission of acts complained of.

5. Judgment ⚷631—Satisfaction of judgment for former conductor in libel suit against person complaining to railroad held bar to recovery against railroad for record showing alleged false reason for discharge.

In action by former railroad employee against railroad for damages for railroad's record of discharge showing discharge was for conduct unbecoming conductor, satisfaction of judgment in libel suit brought by conductor against person making complaint of his conduct to railroad *held* bar, where prior action adjudicated right of conductor to all damages sustained by reason of inability to secure employment as conductor arising out of statement made on his discharge.

6. Judgment ⚷584—Bar from satisfaction of judgment arises from fact of compensation, not from particular form of action.

Bar arising from satisfaction of judgment proceeds not from any particular form in which action is brought, but arises from fact that party complaining has been compensated for his injury.

In Bank.

Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Action by James M. Adams against the Southern Pacific Company and another. Judgment for plaintiff, and defendants appeal. Judgment of superior court reversed, and case remanded, with directions.

For opinion of District Court of Appeal adopted by Supreme Court, see 257 P. 551.

Ford & Johnson, of San Francisco, for appellants.

Theodore A. Bell, of San Francisco, and E. S. Bell, of Oakland, for respondent.

PER CURIAM. In this action the respondent's petition for a hearing in this court after decision by the District Court of Appeal, First Appellate District, Division One, was granted and the appeal was considered by this court. The case is unique in this jurisdiction, and we have given careful attention to the matters urged by respondent for an affirmance of the judgment of the trial court in favor of the plaintiff, which judgment was reversed by the District Court of Appeal. We have reached the conclusion, however, that the opinion of the District Court of Appeal, heretofore filed herein, meets our views upon each and every matter therein discussed, and we accordingly adopt such opinion as the opinion of this court, as follows:

This is an appeal from a judgment in favor of respondent upon the verdict of the jury awarding respondent $5,000 damages in an action in tort growing out of the alleged maintenance by appellants of a record showing an alleged false reason for the discharge of respondent from his position as conductor on a train of appellant corporation. The case is one of first impression in this state; other jurisdictions have adjudicated actions of a somewhat similar although not identical nature.

The facts about which there is no controversy are that respondent, James M. Adams, entered the employ of appellant Southern Pacific Company in 1891, as a brakeman, and through promotion became a conductor, continuing to work without interruption in those capacities until December 31, 1910, at which time he was discharged. It is the custom among railroads throughout the country to issue on demand of an employee leaving the service a statement showing the reason therefor. This statement is variously referred to in the record as a clearance, clearance card, service card, and service letter. The clearance card merely shows the date of entering the service of the employer, the capacities in which service was rendered, the date of leaving the employment, and the reason for the severance of relations between the employer and employee. A typical clearance is such as was used in this case, the part of the clearance objected to and forming the basis of the action reading, "Dismissed for conduct unbecoming a conductor." It is likewise a custom among the railroads in employing men with past railroad experience to require the presentation of a "clearance" from the last employer. For some time prior to December 31, 1910, the respondent had been passenger conductor on the branch line running generally between Vallejo and Suisun. On that date he was relieved from duty, and in July of the following year at his own request was furnished with a clearance card which gave the reason of his discharge, "Dismissed for conduct unbecoming a conductor."

The complaint alleges that this entry in the clearance card regarding the reason for the dismissal is false and that a clearance of this character has prevented respondent from gaining railroad employment since the date of his dismissal and will continue to act as a bar so long as the record is maintained by the appellant railroad.

It appears from the record that on December 1, 1910, one W. H. Cameron, of Napa, wrote to Charles S. Fee, then general passenger agent of the Southern Pacific Company, complaining of the conduct of respondent in the course of his work on November 27, 1910. It was charged by Cameron that on that day respondent Adams was disorderly and intoxicated while on duty. Suit was instituted by Adams against Cameron, and Adams recovered judgment against Cameron for $5,000 as damages for libel, the damage suffered being that he lost his position with the Southern Pacific Company and was permanently deprived from obtaining railroad employment. This judgment was settled in full by the Southern Pacific Company, the case being Adams v. Cameron, 27 Cal. App. 625, 150 P. 1005, 151 P. 286.

The issue most stressed at the trial was the truth or falsity of the charge contained in the letter from Cameron to the general agent of the company that appellant was on November 27, 1910, disorderly and intoxicated while on duty.

Appellants urge as ground for reversal: (1) That the evidence is insufficient to sustain the judgment in the following particulars: First, the evidence wholly fails to show that the entry on the records of the Southern Pacific or the clearance card itself prevented Adams from obtaining other railroad employment; second, that the entry on the records and on the clearance card is true and justifiable; third, that the judgment is in excess of any damages the plaintiff could possibly have sustained. (2) That the clearance card and record were privileged communications, made in good faith and not actionable. (3) That the satisfaction of judgment in the case of Adams v. Cameron included all damages which the plaintiff seeks in this action and is a bar to recovery. (4) The action is barred by the statute of limitations. (5) Errors of law consisting of numerous errors of court in rulings on the admission and rejection of evidence. (6) Errors of the court in its instructions to the jury.

The evidence is without dispute—in fact, it was admitted by respondent when testifying as a witness that he operated two business enterprises outside of his employment, one of which at least was in violation of the company rules, one a stage line at Cement and the other a loan office in Oakland, where he loaned money to railroad employees at 5 per cent. interest per month; that he owned an ark or houseboat which was conducted as a house of prostitution and which he leased to a certain individual, and while he claims he did not know at the time of leasing the purpose for which it was to be used, he learned not long after that it was used for the purpose of prostitution; that he was treasurer and one of the organizers of an improvement club at Vallejo, which was nothing more than an illicit bar conducted for the sale of liquor contrary to law and which was closed by the chief of police of Vallejo for violation of the liquor laws, and that he frequented this club where liquor was sold in violation of the rules of the company. It is also a fact that the officers of appellant corporation knew of the ownership by respondent of the houseboat, of his connection with the Vallejo club and his frequenting this club where liquor was sold in violation of the company rules at the time the clearance card was issued.

[1] The railroad is not bound to retain in its service as a conductor a man who brought disrepute upon himself or his employer by association with an illicit bar and who visited such bar where liquor was sold in violation of its rules; it is not bound to retain an employee who owned and let an ark or houseboat which he had knowledge was being used for the purpose of prostitution nor a man who engaged in foreign business operations in violation of its rules.

The reason assigned for discharging respondent from his position is "dismissed for conduct unbecoming a conductor." If conducting an illicit bar which the chief of police found necessary to close and letting an ark or houseboat which he had knowledge was being conducted as a house of prostitution and receiving as rent money earned from such prostitution is not conduct unbecoming a conductor, it would be difficult to know what constitutes such unbecoming conduct. It would seem that such conduct is unbecoming in any self-respecting man of any walk of life or engaged in any occupation. If the fact be true that the party discharged had conducted himself in a manner unbecoming the position he occupied, he is no worse off if his discharge clearance is founded upon an offense of which he is not guilty, if in fact he be guilty of an offense equally flagrant known to his employer at the time and coming under the same general designation. Even if it be held that respondent was not guilty of the charge of disorderly conduct and being intoxicated while on duty, there is no question but that he was guilty of the other offenses mentioned, for he himself in this action so testified, and it further appears that the other offenses were known to appellants at the time of his discharge.

[2] The question arose as to who is to be the judge of what constitutes ground for dismissal—what constitutes conduct unbecoming a conductor. The court permitted the jury to decide this question. The court in instructing the jury with reference to respondent Adams' connection with the social and improvement club during his employment with the company charged, "and if you further believe that his connection with said club constituted conduct unbecoming a conductor, then your verdict must be for the defendants." And the court also in instructing the jury with reference to respondent Adams' ownership of the houseboat, which was used for the purpose of prostitution, concluded such instruction, "and if you further believe that such ownership of such houseboat, coupled with a knowledge by the plaintiff as to the purpose for which said boat was being used, constituted conduct unbecoming a conductor, then your verdict must be for the defendants." In other words, the jury was permitted to determine what acts in its judgment would constitute conduct unbecoming a conductor.

An employee is not entitled to have a jury decide whether or not his infraction of the rules established by his employer warrants dismissal. Where the reason was, from the standpoint of the railway company acting in good faith, wholly true, a judgment against such company should not stand. St. Louis S. W. Ry. Co. v. Hixon, 104 Tex. 267, 137 S. W. 343; St. Louis S. F. Ry. Co. v. Inman (Tex. Civ. App.) 137 S. W. 1153; St. Louis S. W. Ry. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703, L. R. A. 1917B, 1108.

[3] In the instant case the undisputed testimony shows that respondent Adams was guilty of offenses which the company was amply justified in determining were such as would justify his discharge because of "conduct unbecoming a conductor," and that the true ground for his discharge operating upon the minds of the officials who discharged him was in fact that assigned on the clearance card. This being the case, a jury was not entitled to substitute its opinion in the place of the opinion of the employer. If respondent Adams was guilty of conduct unbecoming a conductor and his discharge was justified, it naturally follows that a recovery may not be had.

[4] Respondent urges that a reversal of the judgment will render the rule of the railroad company, under which it cannot discharge an employee except upon an open and fair investigation, a nullity. Answering this contention it is sufficient to say that the law does not require idle acts. Civ. Code, § 3532. As respondent admitted to the officers of the company before his discharge that he had committed the acts enumerated, an open investigation was not required, as it would be idle to investigate charges, the truth of which is admitted by the person charged.

[5] Appellants contend that the satisfaction of judgment in the case of Adams v. Cameron includes all damages which Adams as plaintiff seeks in this action, and is a bar to recovery here. An examination of the complaint in Adams v. Cameron, which was introduced in evidence in this case, shows that he attributes his discharge to the Cameron letter dated December 1, 1910. Paragraph VI of the complaint details the damage alleged to have been sustained. Included in this damage is the loss of wages and his permanent inability to again obtain employment as a railroad conductor, setting forth that he has no trade or occupation other than railroad brakeman and conductor and that by reason of his discharge on the ground of conduct unbecoming a conductor it will be impossible for him to secure employment with said railroad company or with any other railroad company; that the various railroads which operate in California have and maintain a system of exchange references through which each railroad company is apprised of the reason or cause of an employee's discharge; that no other railroad company will employ a man discharged for conduct unbecoming a conductor and that no railroad company will employ a new man either as a brakeman or conductor who has passed the age of 45 years; that he was then 47 years of age, and that this rule would therefore act as a permanent bar to new employment, "and that by reason of the premises and the said acts and words of defendant, this plaintiff has been permanently deprived of the income and earnings which would otherwise accrue to him from his employment as a railroad conductor in said state of California, to his damage," etc.

Paragraph XX of the complaint here sets forth that by reason of the issuance of the alleged false clearance, "plaintiff at all times since July 18, 1915, has been and will be, and will continue to be unable to obtain employment with the defendant corporation, or with any other railroad company operating its lines in the state of California, * * * and now is deprived thereby of the right and opportunity to pursue and follow his said calling."

In the Cameron Case respondent sought and received damages because of his inability to obtain work as a conductor in California by reason of the alleged false clearance, and here he seeks damages against appellants for the identical injury for which he was compensated in the former action. The judgment in the Cameron Case was satisfied. With the satisfaction of this judgment Adams was fully compensated for all damages sustained by him by reason of his inability to secure employment as a conductor arising out of the statement in his clearance. It is elementary that there can be but one satisfaction for any given wrong. If the Cameron letter was false and the railroad acted upon this false letter in such a manner as to do injury to Adams, there was a choice open to him to sue one or all of the persons causing such injury. Adams elected to sue Cameron and obtained a judgment, which judgment was paid. In the present action he seeks to recover for a portion of the same injury from appellants. He is not entitled to be paid twice; there can be but one satisfaction.

Respondent urges that the action against Cameron was an action for libel committed by him in writing and publishing the letter known in this case as the "Cameron letter"; that appellants were not parties to that action and were not bound by it in any way and that therefore this action is not barred by the satisfaction of judgment in the Cameron case, and cites us to a number of authorities, both in this state and from other jurisdictions. We agree with the rule announced in these cases, but the facts are not similar to those presented here. The California cases cited are De La Guerra v. Newhall, 55 Cal. 21; Owens v. McNally, 124 Cal. 29, 56 P. 615, and Curtin v. Salmon River Co., 141 Cal. 308, 74 P. 851, 99 Am. St. Rep. 75. In the De La Guerra Case the court held that a judgment for defendants in an action for the trespassing of defendants' cattle on the plaintiff's land was not a bar to a subsequent action for a similar trespass occurring prior to those alleged in the former action. In the Owens Case the court held that a former adjudication against the enforcement of a contract by the uncle to will property to the niece is not a bar to the enforcement of an executed gift of land made to her by her uncle in his lifetime, and in the Curtin Case the court held that a judgment in a former suit to foreclose an invalid mortgage, which failed because the security was held to be void, is not a bar to a subsequent action on the note, in which the note is shown to have been ratified by the conduct of the corporation. In these cases the subsequent actions were not predicated on the same acts complained of in the former actions and did not demand damages for the identical injury as here, and the damage demanded had not been adjudicated and fully satisfied.

[6] The authorities in this state and in other jurisdictions, as far as they have been brought to our attention, seem to be uniform to the effect that the bar arises not from any particular form in which the action is brought, but arises from the fact that the party complainant has been compensated for his injury.

The first decision in this state upon this question is Tompkins v. Clay Street R. Co., 66 Cal. 163, 4 P. 1165, in which the court uses this language:

> "Every party contributing to the injuries of plaintiff was liable to the full extent of the damages by her sustained. Her injuries gave her

but a single cause of action. If she had brought a separate action against the Sutter street company, and recovered a judgment therein, and such judgment had been satisfied, she could not subsequently have maintained another action for the same injuries against the Clay street company, inasmuch as the conclusive presumption would be that she had already received full compensation for all damages by her sustained. Damages resulting from the same wrongful transaction are ordinarily inseparable; she could not recover part from one and part from the other defendant. * * * It is to be observed, when the bar accrues in favor of some of the wrongdoers, by reason of what has been received from or done in respect to one or more of the others, that the bar arises *not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent.*" (Italics ours.)

In Butler v. Ashworth, 110 Cal. 614, 43 P. 4, 386, the defense was set up that a judgment obtained prior to the action had been entered against the city and county of San Francisco. The first action against the city alleged damage from the overflow of sewage caused by a choked condition of the sewer. The second action was against Ashworth as superintendent of streets for damage due to the breaking of the sewer. In that case the court says:

> "But the plaintiff in support of her appeal claims that this wholesome rule has no application to this case, for the reason, as she contends, that the cause of action stated in her suit against the city and that stated against these defendants are not the same, and that the defendants in the two actions are in no sense joint tort-feasors. That the act relied upon as producing the injury in the action against the city was the delay in making repairs to the sewer, * * * while these defendants are charged with an act of commission, the making of repairs in such a negligent manner as to directly conduce to the injury complained of. * * * It is nevertheless perfectly apparent that plaintiff's contention is more specious than sound, and that there exists in fact no real difference between the causes of action stated in the two actions. Formal differences there may be, but in matters of substance there are none. In both actions the inducing, proximate cause of the damage and injury alleged is the invasion of her premises by the overflowing sewage, caused by the broken and choked condition of the sewer. That is the essential fact alleged alike in both counts of her action against the city, and in the complaint in this case. That is the fact constituting the gist of the action in both cases, and, as we have seen, it was one and the same overflow—in other words, the same fact which produced the alleged damage in both cases. * * * This was the fault of the city and the defendants, her officers, alike. Whether it was caused by their joint or several acts is immaterial. It would be subordinating substance to mere form to say that these two actions do not under the circumstances rest upon one and the same cause. This being so, and it appearing that plaintiff had been once compensated for the injury suffered, the court below was right in denying her a second award of damages for the same act."

In Union Associated Press Co. v. Press Publishing Co., 24 Misc. Rep. 610, 54 N. Y. S. 183, in an action for libel founded upon the publication by defendant in its newspaper of an article charging plaintiffs with the execution of a fraudulent scheme whereby the news was intercepted during its transmission by means of wire-tapping, the court uses this language:

> "Here the allegations of the defense disclose the fact that the plaintiff actually recovered damages in an action brought against the party then charged with being responsible for the publication, in this defendant's newspaper, of the libel in suit. Damages were recovered not merely for the act of the Associated Press in communicating the matter to this defendant, independently of the publication, but for the injury done by the publication itself, which was alleged to have been instigated by the Associated Press. This being the situation, there appears to be no escape from the conclusion that the plaintiffs, when prosecuting their actions against the latter corporation, elected to proceed, for the particular libel, against the party who was responsible, jointly with the present defendant, for the perpetration of the wrong, and, accordingly, that the satisfaction of the judgment then recovered operated to release this defendant, as a joint tort-feasor, from further liability."

It would serve no useful purpose to discuss the remaining assignments of error, as it follows from what has been said that the judgment must be reversed.

The cause is remanded, with directions to the trial court to enter judgment for the defendants.

204 Cal. 59

COOLEY v. FREEMAN et al. (S. F. 12247.)★

Supreme Court of California. April 18, 1928.

Hearing Denied in Bank May 17, 1928.

Highways 🔑113(5)—Surety's obligation to pay for material and labor by subcontractor held not affected by contract between highway commission and original contractor (St. 1919, p. 487).

Under St. 1919, p. 487, relative to liability of surety for materials, provisions, provender, and other supplies or teams used for or about performance of work, surety guaranteeing payment for materials used by contractor in constructing portion of state highway *held* liable for material and labor furnished by subcontractor without regard to terms of contract between highway commission and original contractor.

Department 1.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by W. L. Cooley against Orvill V. Freeman and Samuel J. Whiting, copartners

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★Hearing denied in bank.

doing business under the firm name and style of Freeman & Whiting, American Indemnity Company, and others. Judgment for plaintiff against defendants named, and defendants named appeal. Affirmed.

Knight, Boland & Christin and F. Eldred Boland, all of San Francisco, for appellants.

Arnold C. Lackenbach, of San Francisco, and J. E. McCurdy, of San Mateo, for respondent.

PRESTON, J. Respondent, as a subcontractor, furnished material and performed labor which was utilized in the construction of a portion of the state highway in San Mateo county. The item here in dispute relates to what is known as an "overhaul charge"—a charge of so much per cubic yard for hauling material for "shoulders" or elevated borders along said highway when finished; such hauling being from a place without the right of way, and more than 300 feet from a certain point in the zone of use. In default of payment respondent sued the contractor and his surety for the disputed item, and recovered judgment against both of them, from which they have both appealed.

In this connection it should be noted that no showing for reversal of the judgment as to the contractor is made. The amount of the item, if legal, is likewise not in dispute. The surety, American Indemnity Company, a corporation, urges, however, that the contract between the California highway commission and the contractor is the measure of its liability, and, as the claim of respondent would not be allowable under that contract, if made by the contractor, it necessarily cannot be allowed against it when made by the respondent in this action. No time need be spent in ascertaining whether the contractor could or could not prevail as against the California highway commission, for it may be conceded, for the purposes of this case, that the contractor could not have recovered this item as against it.

The test of the liability of appellant surety hereunder is not what the rights of the contractor and highway commission are under the construction contract, but is: Did respondent furnish material and perform labor which was utilized in the construction work covered by the contract for public work between the highway commission and the contractor, which said work was the subject of the indemnity agreement made by appellant and sued upon herein? There is no contention concerning the affirmative answer made by the court to this inquiry. The fact also is that the work of respondent was accepted.

The liability of the surety is controlled by the provisions of the Public Works Statutes of 1919, c. 303 (Stats. 1919, p. 487), as it read in 1924, the date of the contract herein. Said statute providing for the indemnity bond thereunder read in part as follows:

> "* * * And must provide that if the contractor, person, company, or corporation, or his or its subcontractor, fails to pay for any materials, provisions, provender or other supplies, or teams, used in, upon, for or about the performance of the work contracted to be done, or for any work or labor done thereon of any kind, that the surety or sureties will pay the same in an amount not exceeding the sum specified in the bond, and also, in case suit is brought upon such bond, a reasonable attorney's fee, to be fixed by the court. * * *"—Section 1.

The obligation of appellant surety company in this behalf is as follows:

> "That if the above bounden * * * shall fail to pay for any materials, provisions, provender or other supplies used in, upon, for or about the performance of the work of constructing, under the foregoing contract, a portion of the state highway in the county of San Mateo, or shall fail to pay any person, company or corporation renting or hiring teams or implements or machinery for or contributing to said work to be done, or any person who has performed work or labor upon the same, or any person who supplies both work and materials therefor, and as required by the provisions of an act of the Legislature, approved May 10, 1919. * * *"

There is, therefore, no escape from the conclusion that this obligation is in nowise affected by the terms of the contract between the highway commission and the original contractor, nor by a question of whether the contractor has breached his contract with the state. The obligation of the surety is to supply to persons in the class of respondent a quick, reliable, and sufficient means of payment. No lien law is available to persons performing labor or furnishing materials which go into the construction of public works.

A similar situation under another statute, the Vrooman Act (Stats. 1885, p. 147), was before this court in the case of Los Angeles Stone Co. v. Nat. Surety Co., 178 Cal. 247, 173 P. 79. The whole subject is there exhaustively treated, and the contention of respondent here made sustained, and the contention of appellants refuted. The whole opinion is in point, and need not be set out.

This holding was followed by Hub Hdw. Co. v. Aetna Accident, etc., Co., 178 Cal. 264, 269, 173 P. 81. A similar holding was also made in Associated Oil Co. v. Commary-Peterson Co., 32 Cal. App. 582, 163 P. 702. Many federal and state authorities to the same effect could be cited.

The case of Roberts v. Security, etc., Co., 196 Cal. 557, 238 P. 673, is not in point, as the building contract there involved was between private parties, and the mechanic's lien law was applicable to the situation. The undertaking there involved bore no reference to the Statutes of 1919, nor was the obligation itself in form similar to the one before us. We can find no merit whatsoever in this appeal.

Judgment affirmed.

We concur: CURTIS, J.; SEAWELL, J.

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204 Cal. 73

BUCHANAN v. BANTA et al. (S. F. 12291.)

Supreme Court of California. April 19, 1928

1. Landlord and tenant 🔑291(13)—Lessor's testimony held not to show surrender, forfeiture, and nonassignment of lease, where he permitted assignees to take possession and accepted rentals.

Plaintiff's testimony in unlawful detainer as to surrender and forfeiture of lease and nonassignment thereof by him is immaterial, where record shows that he not only failed to exercise option to forfeit lease for violations thereof or to give notice of such intention, but, with full knowledge of assignment by lessee, permitted assignees to take possession, and thereafter accepted specified rentals from them without protest.

2. Landlord and tenant 🔑104—Breach of covenant not to assign lease entitles lessor only to forfeit lease.

On breach of covenant in lease that it shall not be assigned without lessor's previous consent, lessor has only the option to forfeit lease; assignment not being void, but only voidable at option of lessor, who must exercise it according to law.

3. Landlord and tenant 🔑108(1)—Failure of assignees to tender additional rent, reserved for last three months, until after unlawful detainer suit, held not to authorize forfeiture, in view of deposit amply securing lessor.

That lessee's assignees neglected to tender additional rent, specified in lease for last three months of term, until after commencement of lessor's action in unlawful detainer, *held* not to authorize forfeiture where deposit, applicable to payment thereof, amply covered amount due at beginning of such period, and lease did not require that such additional sum be paid before exhaustion of deposit.

Department 1.

Appeal from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Action in unlawful detainer by Warren G. Buchanan against J. O. Banta and others. Judgment for plaintiff, and defendants appeal. Reversed.

Ramsey Probasco, of Oakland, and Clarence De Lancey, of San Francisco, for appellants.

J. E. Rodgers and A. F. Bray, both of Martinez, for respondent.

PRESTON, J. Appeal from judgment in favor of plaintiff in an action in unlawful detainer. The sole question is whether, under the circumstances shown by the evidence, defendants held possession of plaintiff's property under a month to month tenancy after surrender of lease by operation of law, as found by the court, or whether they held under an assignment of lease by operation of law, as contended by said defendants.

Plaintiff, as lessor, leased said property for garage purposes for a period of five years at a monthly rental of $200, with a $25 monthly increase for the last three months of the term. Upon execution of the written lease, he accepted, to secure performance of its covenants, the sum of $600, which was to be applied on account of the payment of the last three months installments of rental thereunder. The lease also provided that no assignment thereof should be made without the written consent of the lessor.

In January, 1925, a few months prior to expiration of the term, the lessee agreed to make for the benefit of his creditors an assignment of all his business assets, including said lease, to defendants as a committee representing the principal creditors; their purpose being to carry on the business only until such time as it could be disposed of to the advantage of all concerned. This committee called upon plaintiff lessor to discuss the situation, especially with respect to taking over the lease. Plaintiff refused to give them an assignment thereof or to do anything in the matter until he first consulted his attorneys. At a subsequent interview, the committee had with them a document assigning the lease and other assets for the benefit of the creditors executed by the lessee, and also executed by many of the creditors, which instrument contained the following covenant:

> "To pay the costs and charges of these presents * * * which specifically includes the payment of rent to Warren Buchanan according to the terms of the aforementioned lease."

A place had been provided thereon for signature by the said lessor, but, although he examined the paper, for an unexplained reason it was never signed by him.

As to the conversation between the parties at their various meetings and as to their resulting agreement and mutual understanding, the evidence is in sharp conflict. Plaintiff testified that he positively refused at all times to assign the lease, but permitted the creditors to go in under a month to month tenancy until such time as they could dispose of the business. The three defendants and an interested attorney testified that it was understood that the creditors were taking possession under an assignment of the lease with the benefit of all its provisions, for were it otherwise they would have refused to attempt any adjustment of the lessee's affairs by taking over his business. It was also understood by these parties that, in the event of a final sale of said business during the term of the lease, the privilege of taking an assignment thereof would be extended to the purchaser.

At any rate, the creditors entered into possession, and on January 29, 1925, paid the rental, then about two weeks overdue, for the period from January 15th to February 15th. Thereafter they continued to pay the monthly rental up to commencement of the last three months of the term; that is, up to May 15, upon which date under the lease the initial payment of $600 should have applied upon the then due installment. On May 28th, no rental having been received, plaintiff duly notified defendants to surrender the premises within three days. After their failure so to do, he instituted this action, and obtained judgment against them in the sum of $600, $200 rental, and $400 damages.

[1] Among other things, the court found that, prior to said purported assignment, the lessee had violated and surrendered the lease to plaintiff, and the assignment by said lessee was without plaintiff's knowledge, consent, or acquiescence; that possession of the premises by defendants was under a month to month tenancy; that plaintiff had not waived any right or claim that he had in declaring the lease forfeited, nor was he estopped from declaring said forfeiture. These findings state fairly respondent's position on this appeal, namely, that of implied surrender of said lease by operation of law (Welcome v. Hess, 90 Cal. 507, 27 P. 369, 25 Am. St. Rep. 145; Steel v. Thompson, 59 Cal. App. 192, 210 P. 430; Triest v. Goldstone, 173 Cal. 244, 159 P. 715, and like cases), and the taking possession thereafter of the premises by appellants under a month to month tenancy.

[2] The rule set forth in the above cases is sound, but it is to be noted that none of them involve the question of assignment. In other words, if, as contended by appellants, the evidence establishes an assignment by operation of law, the rule announced in said cases has no applicability to the facts here, nor can any support whatsoever be found in the record for the findings made by the trial court; that is, plaintiff's testimony, which stands alone, as to said alleged surrender, forfeiture, and nonassignment by him of the lease, becomes immaterial when admittedly his actions belied his words, and the record proves that he not only utterly failed to exercise his alleged option to forfeit said lease for violations thereof, or to give any notice of such intention on his part, but, on the contrary, with full knowledge of said assignment by the lessee to appellants, he permitted them to take possession of the premises, and thereafter accepted from them without protest the rentals specified in the lease. The law is that, where there is a clause in a lease that it shall not be assigned without previous written consent of the lessor, and this covenant is breached, the lessor has only the option to forfeit the lease for such breach; the assignment is not void, but voidable only at the option of the lessor, which option he must exercise according to law. Garcia v. Gunn, 119 Cal. 315, 319, 51 P. 684; Potts Drug Co. v. Benedict, 156 Cal. 322, 327, 104 P. 432, 25 L. R. A. (N. S.) 609; Randol v. Tatum, 98 Cal. 390, 33 P. 433; Baker v. Maier, etc., Brewery, 140 Cal. 530, 74 P. 22; Gray v. Maier, etc., Brewery, 2 Cal. App. 653, 657, 84 P. 280; Blessing v. Fetters, 40 Cal. App. 471, 181 P. 108; Jones v. Maria, 48 Cal. App. 171, 191 P. 943.

[3] The fact that appellants neglected to tender the $25 per month additional rent for the last three months until after commencement of this action has no significance, as at the beginning of said period the $600 deposit amply covered the $225 then due, and the lease did not provide that said additional sum of $75 should be payable prior to exhaustion of the $600 fund.

The recent companion cases of Miller v. Reidy (Cal. App.) 260 P. 358, and Reidy v. Miller (Cal. App.) 260 P. 361, are directly in point, and discuss all questions here to be determined. The facts of said cases are similar to those of the case at bar, and the material provisions of the lease involved therein are practically identical with the provisions of the lease here. In said cases the provision against assignment without written consent of the lessor had been violated and demand made by him upon the sublessee to remove from the premises or return possession to the lessor, but said sublessee did neither. The court held:

> "He who claims a forfeiture must have closed every avenue of escape to his opponent. Mindful that the law provides other remedies more consonant with justice, courts avoid enforcing covenants for forfeiture wherever possible. Such agreements are rarely tolerated. Spangler v. Spangler, 11 Cal. App. 321, 104 P. 995.
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> "If the assignment were to be regarded as a breach of the lease, the evidence is sufficient to support the finding that the right to take advantage of such breach was waived by the lessors. It is true that in accepting each month's rent from Reidy, Dr. Miller executed a receipt in the following language: 'Received from P. M. Reidy three hundred dollars for rent of premises at * * * for the month of * * * without prejudice to any of my rights under the lease of said premises.' This was a clear attempt to eat the cake and still keep it. His actions belie his words. Waiver is a question of intention. Alden v. Mayfield, 164 Cal. 6, 127 P. 45; Jones v. Della Maria, 48 Cal. App. 171, 191 P. 943; Myers v. Herskowitz [Horskowitz] 33 Cal. App. 581, 165 P. 1031. For the lessors month after month to accept rents specified in the lease, and at the same time declare that there was a forfeiture, results in an irrecon-

cilable inconsistency. * * * If an unauthorized assignment had been made, the lessors had the right to declare the term at an end, or they could have waived the breach and let the lease continue. Nowhere within that agreement, nor in the law, is there a stipulation or provision that they might do both."

Judgment reversed.

We concur: CURTIS, J.; SEAWELL, J.

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90 Cal. App. 722

ETCHEVERRY v. HARTFORD ACCIDENT & INDEMNITY CO. (Civ. 5806.)

District Court of Appeal, Second District, Division 1, California. April 7, 1928.

1. Corporations 🔑503(2)—County in which was land on which attachment obtained by corporation was levied held place for action on bond given by it (Const. art. 12, § 16).

Within Const. art. 12, § 16, declaring corporation may be sued in the county where the obligation or liability arose, liability on bond given by corporation on obtaining writ of attachment arose in the county in which was the land on which the writ was levied, and not the county in which the writ was issued; it being, according to the declaration of the landowner, the execution of the writ on his property which prevented him from securing rents or returns therefrom, because renters would not plant it with the attachment thereon.

2. Costs 🔑260(1)—Appeal appearing taken for delay, damages will be imposed and added to costs.

The appeal appearing to the court to have been taken for the purpose of delay, $100 ordered imposed as damages to be added to costs of appeal.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Fred J. Etcheverry against the Hartford Accident & Indemnity Company. From order denying motion for change of venue, defendant appeals. Affirmed.

Henry Haves, of Los Angeles, for appellant.

Byron J. Walters, of San Diego, for respondent.

HAHN, Justice pro tem. The action out of which this appeal arises is one for recovery upon a bond given upon the issuing of a writ of attachment in another action, which was originally filed in the superior court in and for the county of Los Angeles, but subsequently was transferred to the superior court in and for the county of San Diego, where the case was tried and judgment rendered in favor of the defendant. The writ was executed by levying upon farm land owned by respondent herein and situate in San Diego county.

The present action to recover on the bond was filed in the superior court in and for the county of San Diego. Prior to the filing of the answer, defendant filed its demurrer, and also gave notice of a motion to transfer the case for trial to the superior court in and for the city and county of San Francisco. The grounds for the motion as set forth in the notice are "that the place where the principal business of the corporation is transacted, is the City of San Francisco, County of San Francisco, State of California, and not the County of San Diego, and furthermore, upon the ground that the residence of the said corporation is the County of San Francisco, State of California"; also "that it is an action against a corporation, and was instituted in a county in which the contract was not made, nor was to be performed, nor where the obligations or liabilities arose, nor where the breach occurred."

The court denied the motion to transfer the case, and the defendant appeals from that order.

[1] While appellant in its brief presents several questions with argument and some citations, there is really but one question properly before the court on this appeal, and that is: Was the superior court in and for the county of San Diego the proper forum for the instant action to be filed and tried in?

We are of the opinion that the answer must be in the affirmative. The place for the filing and trial of an action against a corporation is provided for in section 16 of article 12 of the Constitution of the state of California. This section reads as follows:

> "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

The obligation or liability which forms the basis of plaintiff's action arose when the levy of the writ of attachment was made upon plaintiff's real estate situate in the county of San Diego. The mere issuing of the writ of attachment by the clerk of the superior court in Los Angeles county created no liability against the defendant bonding company. It was the execution of the writ upon plaintiff's property situate in San Diego county, which, according to his complaint, prevented him from securing any rental or returns therefrom, because renters would not plant the land to crops as long as the attachment lay upon the land. Vesper v. Crane Co., 165 Cal. 36, 130 P. 876, L. R. A. 1915A, 541; Maskell v. Barker, 99 Cal. 642, 34 P. 340.

There is no merit in this appeal, for respondent clearly has the right to maintain his action in the superior court in and for San Diego county.

[2] Inasmuch as it appears to us that the appeal was taken for the purpose of delay, it is ordered that the sum of $100 be imposed as damages, and that the same be added to and become a part of the costs awarded to the respondent on this appeal.

The order is affirmed.

We concur: CONREY, P. J.; YORK, J.

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90 Cal. App. 717

FARMERS' BANK OF CAMARILLO v. GOODRICH et al. (Civ. 5804.)

District Court of Appeal, Second District, Division 1, California. April 7, 1928.

1. Bills and notes ⇐489(1)—Answer alleging execution of note with payee's name left blank, and unauthorized insertion of payee's name, and negotiation, raised issue of constructive fraud in action on note.

In action on note against makers and indorsers, answer of makers alleging that note was placed in another's custody under specific conditions, and for particular purposes, with payee's name left blank, and that person having custody inserted name of payee and negotiated note without authority, raised issue of constructive fraud in negotiating and delivery of note.

2. Appeal and error ⇐994(3)—Determination of trial court sitting as jury as to credibility of witness' contradictory statements is conclusive.

Determination as to credibility of conflicting statements of witness is solely for trial court sitting as a jury, and his conclusion may not be disturbed on appeal.

3. Bills and notes ⇐525—Evidence in action on note held to sustain finding that note, claimed to have been fraudulently transferred, came into plaintiff's hands after maturity.

In action on note, in which makers asserted fraud in negotiation and delivery thereof, evidence *held* sufficient to sustain trial court's finding that note was past due when it came into plaintiff's hands, and that plaintiff was therefore not holder in due course.

4. Bills and notes ⇐351—Holder receiving note after maturity held subject to all defenses available as against payee.

Where note came into hands of holder after maturity, holder suing thereon was subject to all the defenses which could be raised against the original payee of the note.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by the Farmers' Bank of Camarillo against Dwight P. Goodrich, Jennie Goodrich, and others. From a judgment for defendants named, plaintiff appeals. Affirmed.

Clair S. Tappaan and Glenn E. Whitney, both of Los Angeles, for appellant

James L. Allen and James L. Davis, both of Santa Ana, for respondents.

HAHN, Justice pro tem. Plaintiff appeals from a judgment rendered in favor of defendants Dwight P. Goodrich and Jennie Goodrich in an action upon a promissory note executed by the said Goodriches and indorsed by defendants Herman Fisher and M. A. Fleming.

The complaint is in the usual form, and, among other matters therein set forth, alleges that the note in question was on the date it bore executed by the defendants Dwight P. Goodrich and Jennie E. Goodrich, and thereafter was delivered to the defendant Herman Fisher, the payee named in the note; that subsequently and before maturity thereof and for a valuable consideration the note in question was indorsed and delivered by Herman Fisher to M. A. Fleming, who before maturity of the note and for a valuable consideration indorsed and delivered it to the plaintiff bank, the then holder and owner of the note. Defendants Fisher and Fleming defaulted, but defendants Dwight P. Goodrich and Jennie E. Goodrich, the alleged makers of the note, answered, specifically denying all of the material allegations of the complaint concerning the execution and delivery of the note. In addition, they set up in their answer two special affirmative defenses, the material matters of which may be briefly summarized as follows:

First. That on May 18, 1923, which is the date that the note sued on bears, defendants Goodrich executed "an incomplete and conditional promissory note," a copy of which is set forth in the answer, and which is similar in all respects to the note sued upon, except that it bears the name of no payee, a blank space appearing where the note set out in the complaint has written the name of Herman Fisher.

Second. That at the time and as a part of the transaction wherein said note was executed, an agreement was entered into between the said defendants and one B. R. Parrott; that the note was placed in the custody of the said Parrott by said defendants upon the conditions and for the purposes set forth in said agreement.

Third. That subsequent to the placing of said note with the said Parrott, the said Parrott and defendants Fisher and Fleming, without any authority so to do, inserted or caused to be inserted in said note the name of Herman Fisher as payee; that the said Parrott, Fisher, and Fleming, and each of them, well knew that the defendants Goodrich had never authorized them or any one to insert the name of Fisher as payee in said note, and

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⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes that the name of Herman Fisher was inserted in said note without legal right.

Fourth. That the said Parrott had no authority to negotiate said note or to deliver the same to any one, except in accordance with the provisions of the agreement referred to, and that said note was never delivered by the said Parrott in accordance with the terms and conditions of said agreements, but was negotiated and delivered contrary to the provisions of said agreement; that the said Fisher and Fleming in receiving and negotiating said note knew that the said Parrott had no authority to deliver or negotiate said note.

Fifth. That the said defendants Goodrich received no consideration whatever for said note.

Sixth. That the bank well knew at the time it received said note that the said Parrott had no right to deliver and negotiate said note and well knew of all of the infirmities of said note as alleged in said special defense, and that said bank did not take the note in due course.

[1] It may be also noted that in these special defenses there are sufficient facts alleged to raise the issue of constructive fraud in negotiating and delivery of said note from Parrott on to the plaintiff bank.

For brevity's sake, we have not summarized the provisions of the alleged agreement, as our determination of the appeal makes unnecessary a detailed consideration of the terms of the agreement.

Findings and judgment went for the defendants Dwight P. Goodrich and Jennie E. Goodrich, and in favor of the plaintiff as against the defendants Fisher and Fleming. From this judgment the plaintiff appeals, alleging that the findings in five particular instances are not supported by the evidence, and that therefore the judgment rendered is contrary to law.

The outstanding question of a number raised and discussed in the briefs filed is: "Did the plaintiff bank receive the note in due course and before its maturity?" The court found that it did not, and in our opinion there is sufficient evidence in the record to support this finding.

The note in question, being dated May 18, 1923, and made payable by its terms six months after date, fell due on October 18, 1923. There is no dispute of the fact that the bank received this note from defendant M. A. Fleming as collateral security to a note executed by the defendant Fleming to the bank for moneys loaned to Fleming. The only direct testimony bearing upon the question as to the date of delivery of the note to the bank is that of the defendant Fleming. No officer of the bank appeared as a witness to testify as to when the bank received the note. The record discloses the following as Fleming's testimony on this point:

"Q. When did you turn this note over to the bank? A. Why, I couldn't say exactly when it was. * * *

"Q. Now, how much did you pay for them—did you buy them all at once?" (The pronoun "them" refers to several notes, including the one involved here.) A. No. Now here is the way the purchase was: I was getting money for Mr. Fisher—

"Q. You were getting money from Mr. Fisher? A. *For* Mr. Fisher— The Court: When was this, Mr. Fleming? A. Well, it was, I would say it was along in July or August; I would have to check up some way on that.

"Q. What year? A. 1924; it was about the time that the first notes, the Leichtfuzz notes, was put in the bank there at Los Angeles.

"Q. July or August, 1924? A. Yes. * * *

"Q. And it was after you got this note that you sold it to the plaintiff? A. Yes, sir.

"Q. And you got it in July, 1924? A. Well; as I say, I am not positive.

"Q. How? A. I am not positive about that, about the date.

"Q. Well, when was it? A. Well, approximately, I will say.

"Q. Well, approximately July, 1924; it might have been May or August? A. Oh, no; it was not. That is the best I can say; I think it was July or August. * * *"

Subsequently, upon cross-examination, the witness Fleming was asked, "These notes were transferred to the bank before they were due?" and he replied, "Oh, yes!"

[2, 3] This testimony, respondent asserts, abundantly supports the conclusion of the court that the note was past due when it came into plaintiff's hands. To this assertion, appellant replies that the year 1924, testified to by defendant as the year in which he delivered the note to the bank, "was clearly a misstatement" and was "an inadvertent misstatement, which all parties concerned knew to be such."

Endeavoring to support this conclusion that the witness Fleming inadvertently fixed the year as 1924, appellant makes several assertions of fact, some of which find no basis in the record, from which he urges that his conclusion may be fairly inferred. We have examined the transcript of the evidence, but can find nothing therein to justify appellant's assumption that the witness Fleming "inadvertently" fixed the time of delivery of the note as 1924 instead of 1923, unless it can be said that the fact of conflict in the witness' own testimony on this question is evidence that one of his statements was "inadvertently made."

It was clearly within the province of the trial court sitting as a jury to determine which one of the witness' statements on this point was entitled to credence. The court in its findings has indicated its conclusions and this court on appeal cannot interfere with that determination.

[4] Other points are urged by appellant which relate to issues raised by the respondents in their special defenses and evidence

presented upon these issues. We do not understand that appellant contends that the questions raised in the special defenses would not have been pertinent if the action had been filed by Fisher, the payee appearing in the note. The court finding that the note came into the hands of the bank after maturity, it was subject to all of the defenses that could be raised against the original payee of the note. An examination of the record discloses that, while there is some conflict in the evidence, there is abundant evidence to support the findings of lack of authority to insert the name of Fisher, as payee in the note, and, also, the findings on the question of consideration for the note, delivery of the note, and fraud practiced in the obtaining of the note from Parrott by Fisher.

In view of our conclusion upon the question discussed, we do not deem it necessary to consider in detail the other points raised.

The judgment is therefore affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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90 Cal. App. 634

CORY v. CITY OF STOCKTON et al.

(Civ. 3455.)

District Court of Appeal, Third District, California. April 4, 1928.

1. Eminent domain 🔑2(10)—Flooding of plaintiff's lands with flood waters beyond capacity of canal constructed by federal government in aid of navigation held not compensable.

Occasional flooding of plaintiff's lands with flood waters beyond the carrying capacity of a canal constructed by the United States government in aid of navigation was not compensable, and plaintiff could therefore not recover from city or state.

2. Navigable waters 🔑8—That state and city contributed right of way for canal constructed by United States held not to make them liable for resulting damages.

That state and defendant city contributed the right of way over which the United States government constructed, and is maintaining, a canal and levee in aid of navigation, *held* not to make state or city liable for damages resulting from uses made of such right of way by United States; any remedy being against United States.

3. Courts 🔑489(1)—Issues respecting canal, dam, and levee constructed by United States in aid of navigation are not within state courts' jurisdiction.

Where United States constructed canal, dam, and levee in aid of navigation on right of way granted to it by state and defendant city the control of the properties involved, determination of extent of any rights plaintiff adjoining owner may have therein, duties of grantee thereof toward plaintiff, and question of existence of nuisance are not subjects within the jurisdiction of the state courts to adjudge and determine, but are exclusively for determination of federal courts.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by Carrie E. Cory against the City of Stockton and others. From an adverse judgment, plaintiff appeals. Affirmed.

A. H. Ashley, of Stockton, for appellant.

J. Le Roy Johnson, Clarence A. Grant, R. M. Dunne, Foltz, Rendon & Wallace, and R. C. Pardoe, all of Stockton, and S. B. Hall, for respondents.

BARTLETT, Justice pro tem. By an amended and supplemental complaint filed in the superior court of San Joaquin county, Cal., on June 2, 1925, plaintiff seeks the abatement of an alleged continuing public and private nuisance, incidental damages, declaratory judgment, and general relief. The original complaint was filed on January 28, 1924. Demurrers were interposed by defendants to the amended and supplemental complaint, which demurrers were sustained by the trial court without leave to amend, and judgment was entered in favor of defendants on April 9, 1926. Plaintiff appeals from the whole of said judgment.

The material facts appearing from the amended and supplemental complaint are: The city of Stockton, in San Joaquin county, Cal., lies a short distance east of the San Joaquin river at its junction with what is known as Stockton channel. The San Joaquin river flows in a general northwesterly direction in this vicinity. Stockton channel extends easterly from the San Joaquin river to the center of the city of Stockton. Both of these water courses are navigable streams over which much commerce has passed for many years. At various times in past years, commencing with 1881, the United States government has expended large sums of money for aiding navigation on these streams through deepening and rectifying their channels. Easterly of Stockton in the foothills of the Sierra Nevada Mountains what is known as the Calaveras river has its source. This stream emerges from the foothills onto the San Joaquin Valley plain near a town known as Bellota, about 15 miles east of Stockton. At Bellota the Calaveras river divides into two channels, each flowing generally westerly. The southerly channel is known as Mormon channel and the other is called the Old Calaveras river. The Old Calaveras river empties into the San Joaquin river about 3 to 5 miles northwesterly from the city of Stockton, passing in its course just north of the corporate limits of that city. The southerly course of Mormon channel originally flowed through the corporate limits of Stockton and emptied into Stockton channel at a point just west of the west boundary of the city. Since 1877 Mormon channel carried the bulk of the water of the Calaveras river. This stream has a varying flow of from 29,000-acre feet to over a million-acre feet in a year. In certain seasons this river carried large quantities of sediment towards the San Joaquin river, and the main body of the water of the Calaveras river as it passed through Mormon channel conveyed with such water large amounts of this sediment, portions of which were deposited in Stockton channel and the San Joaquin river, thereby causing detriment to the navigability of the streams. The lands adjacent to these rivers in seasons of rainfall were subject to floods which overflowed portions of the city of Stockton. The matter of the silting of Mormon channel and the San Joaquin river and the possibility of its prevention was made a subject of study by the United States war department. As a result of this study an appropriation by Congress was recommended for the purpose of constructing a canal to carry the water of Mormon channel to the Old Calaveras river. On June 13, 1902, Congress appropriated $50,000 for this purpose. This appropriation act provided as a condition that the city of Stockton or the state of California should furnish the right of way for the proposed diverting canal. The state of California authorized its commissioner of public works to obtain the right of way, appropriated $60,000 with which to secure it, thereafter acquired the same, and conveyed it to the United States. Subsequently the diverting canal was built by the United States and for many years before this action was commenced the waters of Mormon channel flowed through this canal to the Old Calaveras river and thence into the San Joaquin river. On the west side of the canal a high levee was constructed. No levee was constructed on the east side. During flood seasons at various times the diverting canal overflowed its banks, and waters from this overflow were cast upon the lands east of the canal, a portion of these lands being those owned by the plaintiff herein. The first overflow was in 1911. An action was brought in the United States Court of Claims seeking damages resulting from these overflows, plaintiff being a party thereto, and the case on reaching the United States Supreme Court was determined adversely to plaintiff so far as any claim for damages against the United States was concerned. Thereafter this action was instituted, plaintiff by her amended complaint asking that waters overflowing, flooding, or remaining on her land, other than that on the canal right of way, and the dam in Mormon channel, and incidentals thereof, be adjudged a nuisance; that the nuisance be abated; that plaintiff recover damages in the sum of $1,600; that the legal rights and duties of plaintiff and each of the defendants be ascertained and declared; that plaintiff have all other declaratory relief, and general relief and costs. The supplemental complaint alleges acts and claims concerning the lands in the right of way on the part of certain of the defendants occurring and made after the filing of the amended complaint, which acts and claims alleged to be without right or justification are asked to be restrained and prohibited on the determination of the action.

Defendant the city of Stockton filed a demurrer to the amended and supplemental complaint, on the grounds of want of a statement of sufficient facts, laches on the part of plaintiff, and bar of the statute of limitations against any rights plaintiff might have to a recovery against said defendant. This demurrer was sustained in the trial court without leave to amend, and from the judgment in defendants' favor thereupon entered this appeal is prosecuted.

[1] The vital point presented for determination on this appeal is whether or not the amended complaint and supplemental complaint state facts sufficient to constitute a cause of action against the defendant city of Stockton. That the injury complained of is an incidental consequential one resulting from a public work constructed by the United States in aid of navigation is apparent from the facts set forth in the amended complaint and supplemental complaint. That injury resulting from such work is not compensable is declared to be the law applicable in this state by the decision of the Supreme Court in Gray v. Reclamation District No. 1500, 174 Cal. 622, 163 P. 1024. In this case the right of property owners concerning damage from overflows of flood waters caused through public work designed to aid navigation are exhaustively examined and discussed. The facts in that case in many respects are the same as those in the case at bar. There, as in this action, the projected work had in view as one of its primary purposes the improving and protecting of the bed of a navigable river for navigation. The result of the building of a levee on one side of lands embraced in a reclamation district temporarily flooded lands lying outside of the district with flood waters which were beyond the capacity of the navigable river to carry and convey. The court decided that, where a public work is built in aid of navigation, any incidental damage resulting therefrom is not compensable. Occasional flooding of plaintiff's lands with flood waters beyond the carrying capacity of the canal constructed by the United States is the gravamen of this action. In view of the rule laid down in Gray v. Reclamation District No. 1500, supra, the amended complaint and supplemental complaint fail to state sufficient facts to constitute a cause of action against the defendant city of Stockton.

[2] The fact that the state of California and the city of Stockton contributed the right of way over which the United States has constructed and is maintaining its canal and levee cannot be held as making them in any way liable for damages resulting from uses made of such right of way by the United States. If she is entitled to any relief, plaintiff must secure it from the constructor of the canal, the United States of America.

By the decision of the Supreme Court of the United States in the case of Sanguinetti v. United States, reported in 264 U. S. 146, 44 S. Ct. 264, 68 L. Ed. 608, which was an action for damages in tort for damages to plaintiff's lands and others similarly situated, by means of overflow waters, it was held that there is no remedy against the United States for tort in casting water on private property; that the injury was in its nature indirect and consequential and one for which no implied obligation on the part of the government can arise. The case was decided solely upon the point that the Court of Claims had no jurisdiction regarding a liability of the United States sounding in tort. The extent of the jurisdiction of the Court of Claims in a proceeding seeking equitable aid against the United States does not appear to have been raised or presented by the actions instituted by the plaintiff and others in the United States Court of Claims regarding the canal and its operations.

[3] The United States is the only party that has the power to remove the dam and levee which it has constructed upon the right of way granted to it by plaintiff and the state of California. If any nuisance exists because of the maintenance and use of the same, it is not one that lies within the jurisdiction of the courts of the state of California to ascertain and abate. Such proceeding, if at all permissible, is one which must be presented in some court of the United States wherein plaintiff and the United States of America would be the parties plaintiff and defendant.

The control of the properties involved, the determination of the extent of any rights plaintiff may have therein, and the duties of the grantee thereof toward plaintiff are subjects not within the jurisdiction of the state courts of California to adjudge and determine, because of the right of way for the canal in question being the property of the United States, and no power was vested in the trial court to act otherwise than it did in sustaining the demurrers to the amended and supplemental complaint without leave to amend and entering judgment dismissing the action.

The judgment is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

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90 Cal. App. 622

GRANT v. MAIN OIL CO. OF CALIFORNIA.
(Civ. 5295.)

District Court of Appeal, Second District, Division 1, California. April 4, 1928.

1. Appeal and error ⚷843(3)—Error in admitting books in evidence in case based on open account and account stated need not be considered on appeal, where evidence sustained plaintiff's recovery without introduction of books.

In action to recover for services rendered defendant based on cause of action for reasonable value of services on open book account and on account stated and on express promise to pay for services, it was not necessary on appeal to pass on alleged error in admitting books of plaintiff's assignor, where evidence clearly established, without introduction of books, that plaintiff was entitled to judgment.

2. Appeal and error ⚷110, 782—Order denying motion for new trial is not appealable, and appeal must be dismissed.

Order denying motion for new trial is not an appealable order, and appeal therefrom must be dismissed.

3. Costs ⚷262—Testimony indicating defendant failed to pay amount sued for because of financial inability showed appeal for delay only subjecting defendant to pay damages.

Testimony by general manager of defendant company, sued for services rendered by plaintiff's assignor, indicating that amount due was not paid because of company's financial inability to pay bills, showed that appeal was taken for delay only, subjecting defendant to pay damages of $100.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by Pauline Grant against the Main Oil Company of California. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

Jackson Mahon and H. Ray Bailey, both of Bakersfield, for appellant.

Emmons & Aldrich, of Bakersfield, for respondent.

WOOD, Justice pro tem. This action was commenced to recover the sum of $1,925, alleged to be due for services rendered to defendant by plaintiff's assignor by hauling oil. Defendant appeals from a judgment rendered in plaintiff's favor and from an order denying a new trial. The complaint contains three counts; all of them covering the same transaction. In the first of these counts, all of which are in the usual form, a cause of action for the reasonable value of the services is set forth; in the second count plaintiff states causes of action on an open book account and on an account stated; and in the third count an express promise

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

to pay for the hauling is set forth. The trial court found in favor of plaintiff on all of these causes of action.

Defendant now contends that at the commencement of the trial plaintiff elected to stand upon his cause of action based upon an account stated, and that the evidence is insufficient to support the findings that an account was in fact stated. The record does not disclose that plaintiff made such an election. We quote from the reporter's transcript:

> "Mr. Emmons: We don't intend to elect. We have three counts. We are going to put in evidence under the amended complaint.
>
> "Mr. Mahon: You state more than one cause of action, and they are incompatible.
>
> "Mr. Emmons: We refuse to elect. We offer the evidence if relevant and sufficient, the court will render judgment on the cause of action we establish.
>
> "The Court: Well, go ahead. (To Mr. Mahon) You have preserved your rights. Mr. Emmons proceeds at his peril."

The evidence was amply sufficient to establish all of the causes of action with the possible exception of that based upon an account stated. It would therefore be useless to discuss further the cause of action last mentioned.

[1] Counsel for plaintiff states that the "main ground" upon which he seeks a reversal of the judgment is the alleged error of the court in admitting in evidence the books of plaintiff's assignor. He points out that the party who made the book entries had no personal knowledge of the amount hauled, but received data on the subject from the report of the driver, who was a witness at the trial. It is not necessary to pass upon this point for the reason that the evidence clearly established, without the introduction of the books, that plaintiff was entitled to the judgment rendered. All the points necessary to be proved to support the findings on the first and third causes of action were covered by the testimony of plaintiff's witnesses. The defendant presented no evidence whatever in contradiction thereof. The general manager of the defendant company, called as a witness for plaintiff, not only gave testimony which made it clear that plaintiff should recover, but also made statements from which it is apparent that the defense presented in the trial court by the party against whom judgment was rendered and the subsequent appeal were interposed for the purpose of delay. The witness testified:

> "Q. Are you in position to say you don't owe this $1,925? A. No sir.
>
> "Q. What position did you have? A. General manager, that was my title. My duties were more those of a field superintendent.
>
> "Q. As I understand it, I want to get the record clear, it is more of a present inability to pay the bills than a desire not to pay them, isn't that the idea? A. Well, I can't pay.
>
> "Q. When the bills were presented to you, what did you do with them? A. I forwarded them down to the main office.
>
> "Q. That is the situation in regard to all of the bills rendered to you? A. Following our manner of doing business, I forwarded the bills to the office. The financial affairs of the company were arranged down there.
>
> "Q. Do you know any reason why the financial department didn't pay them? A. I presume they were short of money.
>
> "Q. You didn't know whether they were correct bills or not, or did you know? A. I knew the bills correctly represented the oil hauled on the tank account, by tank measure.
>
> "Q. Did you compare, when you received those bills that you received, the amount of the bill with the tag account at that time to see if it was correct? A. Yes, sir."

[2, 3] The appeal being devoid of merit, the judgment is affirmed. As the order denying the motion for a new trial is not an appealable order, the appeal from that order is dismissed. It appearing to the court that this appeal was taken for delay, it is further ordered that the appellant pay to respondent as damages the sum of $100, which amount shall be included in the costs to be allowed respondent on this appeal.

We concur: CONREY, P. J.; HOUSER, J.

90 Cal. App. 654

PEOPLE v. HEELEY. (Cr. 1578.)★

District Court of Appeal, Second District, Division 2, California. April 5, 1928.

Rehearing Denied April 30, 1928. Hearing Denied by Supreme Court May 31, 1928.

Indictment and information 🔑42—Failure to file information within 15 days after defendant's commitment by magistrate held not to result in loss of jurisdiction (Pen. Code, § 1382, subd. 1; § 809, as amended by St. 1927, p. 1045).

District attorney's failure to comply with Pen. Code, § 809, as amended by St. 1927, p. 1045, relative to filing informations within 15 days after examination and commitment of defendant by a justice of the peace, *held* not, because of section 1382, subd. 1, allowing 30 days for filing, to result in loss of jurisdiction to continue the prosecution; the 15-day provision of section 809 being directory.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

J. E. Heeley was convicted of a crime, and he appeals. Affirmed.

C. N. Mozley and John Clarkson, both of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

★Rehearing denied. Hearing denied by Supreme Court.

WORKS, P. J. Defendant was convicted upon a criminal charge, and appeals from the judgment and from an order of the trial court denying his motion for a new trial.

The only point made by appellant is that the trial court erred in denying a motion to dismiss the information under which he was prosecuted, on the ground that it was not filed within 15 days after he was committed by the magistrate who conducted his preliminary examination. This exact question has been decided by us lately in the proceeding entitled Gillis v. Superior Court (Cal. App.) 265 P. 360, the opinion in which has not yet become final. We there said:

> "Section 809 of the Penal Code reads as follows: 'When a defendant has been examined and committed, as provided in section 872 of this Code, it shall be the duty of the district attorney, within fifteen days thereafter, to file in the superior court of the county in which the offense is triable an information charging the defendant with such offenses. * * *'
>
> "The petitioner relies entirely upon the foregoing section, and subdivision 1 of section 1382 of the Penal Code, which reads as follows: 'When a person has been held to answer for a public offense, if an indictment is not found or an information filed against him, within thirty days thereafter,' the court, unless good cause to the contrary is shown, must order the prosecution dismissed. He cites Ex parte Fowler, 5 Cal. App. 549, 555, 90 P. 958, which refers to In re Begerow, 133 Cal. 349, 65 P. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178; and in which former case it was stated that the superior court acquired no jurisdiction by the filing of an information more than thirty days after examination and commitment.
>
> "Although the language in Ex parte Fowler is not free from ambiguity, the net result of what is said is that subdivision 1 of section 1382 of the Penal Code is mandatory, and this holding is based upon the opinion in In re Begerow, where it is held that subdivision 2 of section 1382 is mandatory. Neither case passes upon the question here involved; that is, whether section 809 is to be regarded as mandatory. The latter section was amended in 1927, prior to which time the district attorney was required to file an information within 30 days after the defendant had been committed. Now, reading section 809 and subdivision 1 of section 1382 of the Penal Code together, we have this provision: That it is 'the duty of the district attorney' to file an information within 15 days after the defendant has been committed, and that if such information is not filed within 30 days after such commitment, unless good cause to the contrary is shown, the court must order the prosecution dismissed. As the law thus reads, it can hardly be doubted that the part contained in section 809 is directory; otherwise, section 1382 would also have been amended so as to provide for dismissal within 15 days after commitment if the information should not be filed within that time. It may be that but for an oversight the Legislature would have amended section 1382 so as to make it conform in this particular to section 809; but as to that matter we have no such evidence as would justify the court in digressing from the application of the usual rules of statutory interpretation. The principal reason to surmise that such an error might have occurred is that a clear intention is shown in a number of amendments to the Penal Code enacted concurrently with the amendment of 1927 to section 809 of the Penal Code, to compel more speed in the functioning of criminal procedure. However, it might also well be reasoned that the difference in the provisions of these two sections may have resulted from a deliberate purpose, for the Legislature may have been willing to aid in speeding up trials by making it the duty of the district attorney to file informations within a shorter time after commitment than before, and yet not have believed it wise to go so far in that regard as to compel the dismissal of a prosecution, and thus perhaps release a criminal, because the district attorney might have not proceeded as promptly as directed by section 809 of the Penal Code. However, it is certain that the mandate of the provisions of the Penal Code now under consideration is to be found in section 1382. The teeth of this law have been written into it, and by it 30 days are still permitted for filing an information after commitment and before the courts are commanded to dismiss the prosecution."

Nothing is presented by appellant in his brief which affects the conclusion reached by us in Gillis v. Superior Court.

Judgment and order affirmed.

We concur: CRAIG, J.; THOMPSON, J.

90 Cal. App. 725

OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited, v. INDUSTRIAL ACCIDENT COMMISSION et al. ★

(Civ. 5973.)

District Court of Appeal, Second District, Division 1, California. April 7, 1928.

Hearing Denied by Supreme Court May 31, 1928.

1. Master and servant ⚿398—After insurer's voluntary payment for 244 weeks, time within which injured employee might apply for adjustment of compensation by Industrial Commission was extended for six months from last payment; "voluntary payment" (Workmen's Compensation Act, § 9 (b), (4), (5), and § 11 (c) (h).

Where employer's insurance carrier paid compensation for 244 weeks without application by employee to have claim adjusted by Industrial Accident Commission, time within which application for adjustment might be made was extended for six months from last payment under Workmen's Compensation Act (St. 1917, p. 831), § 11 (c), even though such period extended beyond 245 weeks from date of accident, since under section 11 (h), limitation is affirmative defense which may be waived, and payment after 240 weeks constituted voluntary payment of compensation for permanent dis-

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★Hearing denied by Supreme Court.

ability, for which award may be extended to remainder of employee's life under section 9 (b), (4), (5).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Voluntary Payment.]

2. Master and servant 🔑348—Workmen's Compensation Act should be liberally construed (Workmen's Compensation Act, § 69 (a).

Provisions of Constitution and of Workmen's Compensation Act (St. 1917, p. 831) call for liberal construction of such act for purpose of extending benefits for protection of persons injured in course of employment, under section 69 (a).

3. Master and servant 🔑391¼—Compensation award held annulled in so far as it provided for interest on amounts awarded.

Industrial Accident Commission's award of compensation to injured employee *held* annulled in so far as it provided for interest to be paid on amounts awarded.

4. Master and servant 🔑417(9)—On certiorari to annul Industrial Accident Commission's order, court will annul part of order as stipulated by respondent's counsel without formal issuance of writ.

On application for certiorari to annul order of Industrial Accident Commission, order will be annulled in so far as it provides for interest to be paid on amounts awarded without formal issuance of any writ of review, where respondent admitted that such part of award was not authorized by law and stipulated that court might annul it.

Application by the Ocean Accident & Guarantee Corporation, Limited, for certiorari to annul an order of the Industrial Accident Commission awarding compensation to Frank Pavlovich, in a proceeding under the Workmen's Compensation Act against Bartlett Hayward Company, employer, and petitioner as insurer. Writ denied.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Commission.

CONREY, P. J. Petitioner is the insurance carrier for Bartlett Hayward Company, employer of respondent Pavlovich. Petitioner seeks to obtain annullment of a compensation award to Pavlovich for injuries received by him, which injuries arose out of and in the course of his employment. The accident occurred on the 1st day of September, 1922. Thereafter, and without any application to have the claim adjusted by the Industrial Accident Commission, the insurance carrier paid compensation on an assumed basis of liability, for a period of 244 weeks, and then discontinued further payments. It is the contention of petitioner that Pavlovich was barred from filing any claim after 245 weeks from the date of the injury, that is to say, after the 14th day of May, 1927. His application for adjustment of claim was not filed with the commission until June 7, 1927.

The commission, after finding the facts concerning the accident and injury and the voluntary payments made as above stated, found that "the injury caused permanent disability which is a new and further disability, and this action is not therefore barred within 245 weeks from the date of the injury, compensation having been paid thereon."

[1] It is conceded that a permanent injury is a "new and further disability" within the provision of the Workmen's Compensation Act relating to new and further disability. Hutchinson Lumber Co. v. Industrial Accident Commission, 77 Cal. App. 141, 246 P. 118; General Accident, etc., Corporation v. Industrial Accident Commission, 77 Cal. App. 314, 246 P. 570. The following provisions of the Workmen's Compensation Act of 1917 (St. 1917, p. 831) are pertinent to the question at issue:

> "Section 11 (c): The payment of compensation, or any part thereof, or agreement therefor, shall have the effect of extending the period within which proceedings for its collection may be commenced, six months from the date of the agreement or last payment of such compensation, or any part thereof, or the expiration of the period covered by any such payment; provided, however, that nothing contained in this section shall be construed to bar the right of any injured employee to institute proceedings for the collection of compensation within 245 weeks after the date of the injury upon the grounds that the original injury has caused new and further disability; and the jurisdiction of the commission, in such cases, shall be a continuing jurisdiction at all times within such period. * * *"
>
> "Section 11 (h): The running of the period of limitations prescribed by this section is an affirmative defense and operates to bar the remedy and not to extinguish the right of the employee. It may be waived, and failure to present such defense prior to the submission of the cause for decision shall be a sufficient waiver."

For a temporary disability the maximum period of allowance of an award is limited to 240 weeks from the date of the injury. For a 70 per cent. or greater than 70 per cent. permanent disability the award may be extended to the remainder of life of the injured employee. Workmen's Compensation Act of 1917, § 9 (b), (4), (5). The award made in this case is for the remainder of the life of the employee and on the basis of 100 per cent. disability.

The question to be determined arises on petitioner's contention that under section 11 (c) of the act a claim for new and further disability must in every case and under all circumstances be filed with the Industrial Accident Commission within 245 weeks from the date of the injury; and that the provisions of the statute which extend for six months the time for the filing of the application where the employer or insurance carrier has made voluntary payments do not apply in favor of an employee whose application for adjustment of compensation has not been filed within said period of 245 weeks.

The only direct authority in support of petitioner's contention on this point is Beverly v. Fairmont Hotel et al. (Cal. App.) 259 P. 955, wherein an order of the Industrial Accident Commission denying compensation was affirmed. It appeared in that case that the insurance carrier made voluntary payments of compensation to the employee for less than three months. Thereafter medical treatment was given to the employee at the instance of the paymaster of the employer (Fairmont Hotel), but not by the insurance carrier who was carrying the employer's insurance at the time of the accident. The application for adjustment of compensation was filed with the Industrial Accident Commission within six months after such medical treatment, but not until after the expiration of the period of 245 weeks from the date of the original injury. The decision of the commission, denying compensation, was held to be supported by testimony that the medical treatment which the employee received was not furnished at the instance of the Fairmont Hotel, but had been merely rendered by the physician as a personal favor to the paymaster. The opinion, however, further states that, even if the treatment was furnished by the Fairmont Hotel, the situation would not be altered, because (the applicant not being "totally disabled and bedridden as a result of his injury") the statute could not in any event be tolled beyond the 245 weeks' limitation fixed by section 11 of the Workmen's Compensation Act of 1917 for the continuation of jurisdiction of the commission. Counsel for respondent commission insists that the ruling last above mentioned is to be regarded as dictum and not necessary to the decision of that case. In this we think that counsel is correct. In view of the fact that, as it seems to us, the language of the cited decision was used in the course of its brief discussion of a point not necessarily involved, we feel at liberty to treat the question as open for further consideration and not yet governed by the authority of precedent.

[2] As we have seen by referring to section 11 (h), the running of the period of limitations prescribed by section 11 is an affirmative defense which may be waived. Voluntary compensation was paid to the employee Pavlovich not only for the period of 240 weeks within which compensation might have been awarded as for a temporary disability, but also for an additional period of four weeks for which payment could not have been compelled except on a basis of permanent disability. In other words, the voluntary payment as to those four weeks should be construed as constituting a voluntary payment of compensation as for permanent disability. Under these circumstances there should result and there reasonably does result, under the provisions of section 11 (c), an extension for six months from the last payment of such compensation, of the time within which application for adjustment of compensation might be made, even though said period of six months extended beyond the limit of 245 weeks from the date of the accident. This construction of the statute is in harmony with the provisions of the Constitution and of the statute, both of which seem to call for a liberal construction of the Compensation Act, "with the purpose of extending the benefits of the Act for the protection of persons injured in the course of their employment." Workmen's Compensation Act of 1917, § 69 (a); Bartlett Hayward Co. v. Ind. Acc. Com. (Cal. Sup.) 265 P. 195.

[3, 4] Petitioner further contends that the award is void in this, that it provides for interest to be paid on the amounts awarded as upon a judgment. It is admitted by respondent that this part of the award is not authorized by law (Pacific Indemnity Co. v. Ind. Acc. Com. [Cal. Sup.] 261 P. 987), and counsel stipulates that the court may annul the same.

In accordance with the stipulation of counsel for respondent, that part of the order sought to be reviewed which provides for interest on the compensation awarded is annulled without the formal issuance of any writ of review herein. Subject only to the foregoing order concerning interest, it is further ordered that the petition for a writ of review be and the same hereby is denied.

We concur: HOUSER, J.; YORK, J.

90 Cal. App. 657

PEOPLE v. DUKES. (Cr. 1608.)

District Court of Appeal, Second District, Division 2, California. April 5, 1928.

1. Criminal law 🔑1159(2)—Appellate court cannot weigh evidence on appeal.

An appellate court cannot weigh evidence on appeal.

2. Criminal law 🔑1144(½)—All intendments favor upholding trial court's judgment and action.

All intendments favor upholding judgment and action of trial court.

3. Criminal law 🔑1144(13)—On appeal from conviction, evidence must be viewed in light most favorable to prosecution.

On accused's appeal from conviction, evidence must be viewed in light most favorable to prosecution.

4. Assault and battery 🔑92—Evidence held sufficient to support conviction of deputy sheriff for assault under color of authority (Pen. Code, § 149).

Evidence *held* sufficient to support conviction of deputy sheriff for assaulting motorist under color of authority without lawful necessity in making arrest, in violation of Pen. Code, § 149.

5. Assault and battery 🔑96(1)—In prosecution of officer for assault under color of authority, instruction on authority of officer making arrest for violation of Motor Vehicle Act held not to raise issues not presented by information (Pen. Code, § 149).

In prosecution of deputy sheriff under Pen. Code, § 149, for assaulting person under color of authority while arresting him for speeding, instruction on how officer may proceed in making an arrest for violation of Motor Vehicle Act *held* not subject to complaint that it raised issues not presented by information.

6. Criminal law 🔑753(1)—Because jury following court's instructions and applying them to admitted facts can return but one verdict does not render instruction objectionable as directing verdict.

Merely because, in given case, jury following court's instructions and applying them to admitted facts, but one verdict an be returned this does not render instructions objectionable as directing verdict.

7. Criminal law 🔑763, 764(6)—Instruction in prosecution of officer for assault, that officer making arrest for misdemeanor under Motor Vehicle Act cannot demand that person get out of automobile, held not objectionable as directing verdict (Pen. Code, § 149).

In prosecution of deputy sheriff under Pen. Code, § 149, for assault under color of authority in making arrest of motorist, instruction that, in making an arrest for misdemeanor under Motor Vehicle Act, officer has no right to demand that person arrested get out of his automobile, *held* not objectionable as instructing jury as to what verdict they must return because it was admitted that accused required motorist to get out of his car, and that arrest was for misdemeanor under Motor Vehicle Act.

8. Witnesses 🔑374(1)—In prosecution of officer for assault in arresting motorist, excluding evidence of correspondence between automobile clubs and attorney, offered to show bias on part of motorist, a witness, held not error; it not being shown motorist authorized letters (Pen. Code, § 149).

In prosecution of deputy sheriff for assault in making arrest of motorist, in violation of Pen. Code, § 149, exluding evidence of correspondence between attorney for certain automobile club and manager of another club, and between that attorney and another attorney, offered to show bias on part of motorist, and thus to discredit his testimony, *held* proper, where it was not shown that motorist authorized letters, or knew that they had been written.

Appeal from Superior Court, Riverside County; Wm. H. Ellis, Judge.

J. F. Dukes was convicted of a violation of Pen. Code, § 149, and he appeals. Affirmed.

H. E. Thompson, of San Bernardino, and Geo. F. Lord, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Albert Ford, Dist. Atty., of Riverside, for the State.

CRAIG, J. The defendant, a deputy sheriff of Riverside county, was charged by information with a violation of section 149 of the Penal Code, committed as follows:

> "The said defendant on or about the 27th day of October, 1927, at the said county of Riverside, state of California, and before the filing of this information, did willfully and unlawfully, and under color of authority as deputy sheriff of Riverside county, and without any lawful necessity, assault and beat Walden E. Trimble, said defendant being then and there a duly appointed, qualified, and acting deputy sheriff of Riverside county, Cal."

He was tried, and found guilty as charged in the information.

Three grounds of appeal from the judgment are urged: First, that the court erred in excluding certain evidence; second, that the giving of instruction No. 8 was error; and, third, that the verdict and judgment are against the evidence, and that the verdict was the result of passion and prejudice.

[1-4] The last contention is not sufficiently meritorious to require extended consideration. An appellate court has nothing to do with the weighing of the evidence on appeal. All intendments favor upholding the judgment and the action of the trial court. The evidence is to be viewed in the light most favorable to the prosecution. In the statement of facts contained in appellant's opening brief, much of the testimony of the witnesses Trimble and Roberts is ignored, apparently upon the theory that these witnesses were not worthy of belief. Having found the defendant guilty, it must be assumed that the jury believed such testimony as points to his guilt. That evidence is amply sufficient to sustain the verdict. Accepting it and disregarding that which contradicts it, the transcript shows that on October 27, 1927, Trimble was driving an automobile on the highway at a rate of speed in excess of that allowed by law; that the defendant and another officer followed him, and, when he slowed down back of a truck which interfered with his progress, the officers came alongside of his machine, stopped their own, and approached his car. Dukes then shouted to Trimble: "God damn you, get out of that car. Who do you think you are, that you can come down there like that?" Trimble started to get out, but Dukes took hold of him and dragged him out of the car, struck him in the face, then jerked his glasses off, threw

them on the ground, and struck him in the face again. At this point Roberts, who had witnessed the affair, remonstrated with Dukes, who replied: "Who the hell are you? I have just arrested this man for coming down that hill at an excessive rate of speed." Trimble asked Dukes why he was arresting him, and Dukes responded, "For driving down that hill in the reckless manner you did." In arresting Trimble, Dukes did not give him a citation, as required by section 154 of the Automobile Act (Laws 1923, p. 566). It appears that later Trimble entered a plea of guilty to the charge of reckless driving, and was fined $100.

To be sure, the version of the entire occurrence as given by Dukes and his witnesses was far different from the above, but their testimony simply creates a conflict in the evidence.

[5] The defendant assails instruction No. 8, given by the court, as prejudicial and erroneous. It reads as follows:

> "You are instructed that, whenever a person is arrested for reckless driving or speeding or any other violation of the Motor Vehicle Act which does not amount to a felony, the person arrested has the right to an immediate appearance before a magistrate. If the person arrested does not demand an immediate appearance before a magistrate, the arresting officer must, upon production of the operator's license or other satisfactory evidence of identity, take the name and address of the person arrested and the number of his motor vehicle, and notify him in writing to appear at a time and place to be specified in such notice, before a magistrate of the township in which the offense is committed, or before a magistrate of the township in which is located the county seat of the county in which the offense is committed. The person arrested thereupon has the right to give his written promise to appear at the time and place stated, and it is thereupon the duty of the arresting officer to release him from custody.
>
> "If the person arrested refuses to give his written promise to appear, or demands an immediate appearance before a magistrate, he shall be taken forthwith before the magistrate of the township in which the offense is alleged to have been committed.
>
> "An arrest for a misdemeanor under the Motor Vehicle Act which is made, or attempted to be made, in violation of the above rules, is an illegal arrest, and the person sought to be arrested has the right to resist such unlawful arrest, and to use such force as may be necessary, short of killing the officer or doing him great bodily harm.
>
> "An officer making an arrest for a misdemeanor under the Motor Vehicle Act has no right to demand that the person arrested get out of his automobile and has no right to attempt to remove the person arrested from his automobile. If the officer attempts to forcibly remove the person arrested from his automobile it is an illegal act on the part of the officer, which may be lawfully resisted by the person arrested."

This instruction contained, in addition to other matter, a correct statement of the substance of the provision of the Motor Vehicle Act prescribing the duties of an officer in arresting for misdemeanor committed under it. First, complaint is made that this instruction raises issues not presented by the information in that the only irregularity charged against the defendant is assault in making an arrest. We do not consider that the instruction is susceptible to that criticism. It was necessary that the jury take into consideration all of the circumstances of the transaction to determine whether or not the assault charged had been committed. Even if the defendant used force against Trimble, it might well have been, under the defendant's own theory of the case, that no unlawful act was committed, for Trimble's conduct may have been such as to warrant the officer in using force. However, the decision of the question thus presented necessarily involves a consideration of the conduct of the officer prior to or at the same time that the purported resistance upon the part of Trimble was offered, for, if the officer exceeded his authority in the first instance, both by acts of commission and omission, in attempting to make this arrest, the citizen may have been within his rights in offering resistance, and, if so, the assault by the officer would not have been justified, but would have been unlawful. Hence it was proper to inform the jury as to how the law contemplates that an officer may proceed in making an arrest for the particular misdemeanor charged against Trimble. Appellant concedes that some force was used, and the question then is whether more force was used than was reasonably necessary. To determine that issue, the jury were entitled to know both the extent and nature of the authority of the officer in making such an arrest.

[6, 7] Counsel argue that by all that part of the instruction which tells the jury that in making an arrest for a misdemeanor under the Motor Vehicle Act, the officer has no right to demand that the person arrested get out of his automobile, the court in effect instructed the jury as to what verdict they must return, because, it is said, it was admitted that the defendant did require Trimble to get out of his car, and also that the arrest was for a misdemeanor under the Motor Vehicle Act. Merely because, in a given case, the jury follow the court's instructions, and apply them to the admitted facts, but one verdict can be returned, does not render the instruction objectionable as directing a verdict. It occasionally happens that under the law the defendant's testimony shows him to be guilty, notwithstanding the fact that he has entered a plea of not guilty. If there were no other facts or issues in this case than those above mentioned, to wit, that the arrest was for misdemeanor under the Motor Vehicle Act, and that the officer compelled the person arrested to get out of his car, the officer would undoubtedly have exceeded his au-

thority, and his conduct would have been illegal. However, this would not convict him of the assault with which he is here charged. Again, the evidence presented other issues, for, as appellant elsewhere argues, the officer might have wished to search for, and remove, weapons from the person or from the car of the person being arrested, or to investigate concerning violations of the law prohibiting possession or transportation of liquor. These considerations might have justified the removal of Trimble from his car, even though making an arrest for misdemeanor under the Motor Vehicle Act would not have authorized such procedure. But the fallacy of appellant's argument appears when it is observed that the instruction did not pretend to tell the jury what the officers might or might not do if their purpose was to do any of these things. Doubtless, if appellant had requested an instruction covering such issues, the court would have given one making it plain that, although an officer could not legally make an arrest for the charge here referred to otherwise than as especially prescribed by the law stated by the court, nevertheless, that, if the jury believed that the officers, in compelling the defendant to get out of his car, intended to search for liquor or firearms illegally in his possession, then it would be for the jury to determine as to whether or not such compulsion on the part of the officers was reasonably necessary under the circumstances as they then existed. On the whole, we think the instruction was, in the main, properly phrased and given, and in no sense prejudicial to the defendant.

[8] The other particular in which the action of the trial court is claimed to have been erroneous is that correspondence between the attorney for the Automobile Club of Southern California and the manager of the club at Riverside, and between that attorney and Schwinn, an attorney at Riverside, should have been admitted in evidence. It appears that Trimble complained to the Automobile Club at Pasadena of his treatment by the defendant; that the representative of the club there took Trimble's statement, and said that he would forward it to counsel for the Automobile Club, which was done. Thereafter the last-named attorney took the matter up with the other persons above mentioned. The purpose of the offer of these communications was to show bias upon the part of Trimble, and thus to discredit his testimony. We think the objections were properly sustained, because it was not shown that Trimble authorized them, or knew that they had been written. The mere fact that the action of counsel may have been calculated to be of advantage to the witness does not show bias or motive for the latter to give his testimony, unless it be shown that he expressly authorized, or at least was aware of, what the attorney had written. On this principle, evidence was held properly excluded in People v. Vickroy, 41 Cal. App. 275, 182 P. 764.

The notice of appeal states that the defendant, in addition to appealing from the judgment and sentence, appeals from the order of the court denying the defendant "his constitutional right of bail pending appeal." We find nothing in the record to show that the defendant applied for bail; hence this point need not be given consideration.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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91 Cal. App. 50

PEOPLE v. HAFLINGER. (Cr. 1617.)

District Court of Appeal, Second District, Division 1, California. April 13, 1928.

1. Criminal law 🔑516—Statement of defendant charged with stealing automobile that confederates had advised getting a car to pay traffic fine held admission and not "confession."

In prosecution for theft of automobile, statement by defendant to police officer that defendant's confederates had advised him to get a car so as to make some money to pay fine for traffic violation *held* to be an admission and not a "confession" that he had in fact stolen the automobile and was admissible; a "confession" being a statement by a person to the effect that he is guilty of the crime of which he is accused.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Confession.]

2. Criminal law 🔑753(2)—Motion for instructed verdict for accused is within trial court's discretion, and refusal is not reversible, if evidence sustains verdict of guilty (Pen. Code, § 1118).

Under Pen. Code, § 1118, a motion for what is often termed an "instructed verdict" is one directed to the discretion of the trial court, and, if there is sufficient evidence to sustain the verdict, accused cannot base petition for reversal on action of trial court in refusing to advise jury to acquit.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Wilfred Haflinger was convicted of grand theft, and he appeals. Affirmed.

Hugh Dickson, Ben S. Hunter, and James Farraher, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

WOOD, Justice pro tem. Defendant was accused of the crime of grand theft, and, after trial by jury, was found guilty. On October 30, 1927, J. M. Brouillard left his

Chevrolet touring car parked on Brand boulevard, in the city of Glendale. Later in the same day defendant and two others were arrested while driving the car in the city of Beverly Hills. Chief of Police Blair of Beverly Hills, after laying the foundation customary for the admission of confessions, testified that he had a conversation with Haflinger in which the latter confessed that he had stolen the automobile. The witness testified:

> "He stated that he and Ball had stolen the car and had come out to Beverly Hills with the intention of trying to stick somebody up, and I asked him why they particularly came to Beverly Hills, and he said because there was a lot of rich people lived there. And that was about the amount of the conversation with him. He stated also that this little follow had told him—
>
> "Q. By the small man you mean the defendant Ball? A. Yes. That they had pulled a job like this before somewhere in Pasadena and got a dollar and a half."

The foregoing testimony was received by the court without objection by appellant, and no motion was at any time made to strike it out. The prosecution attempted to introduce in evidence an alleged confession claimed to have been made to F. C. Williams of the Glendale police department after appellant had been removed from Beverly Hills. Upon objection by counsel for appellant, the court permitted testimony to be taken on the question whether the alleged confession was made freely and voluntarily. The court, after hearing such testimony, sustained appellant's objection to the admission of evidence purporting to show a confession by Haflinger. The court did permit, however, the following statement by the witness to remain in the record:

> "I asked him (Haflinger) why—who had proposed the stealing of the car, and he said that he got a ticket—traffic ticket in Glendale, and Russell and Ball told him that it would cost him $15, and they had better go out and get a car that they could make some money out of."

Appellant now contends that the ruling of the trial court refusing to strike this testimony was erroneous.

[1] Respondent concedes that, if the statement of the witness just quoted was a confession, in accordance with the ruling of the trial court to the effect that it was not free and voluntary, the motion to strike should have been granted. It is contended, however, that the statement contained nothing more than an admission which tended toward the proof of the guilt of the accused, and as such was admissible without preliminary proof to show that it was free and voluntary. This contention must be upheld. A confession is a statement by a person to the effect that he is guilty of the crime of which he is accused. While it may be said that the statement tends to prove guilt, it is in effect an admission that he had been told he would have to pay a traffic fine of $15, and had been advised by others to "get a car that they could make some money out of." This falls short of confessing that he had in fact stolen the automobile. In People v. Ferdinand, 194 Cal. 555, 229 P. 341, the court clearly indicated the difference between an admission and a confession in the following language:

> "An admission as applied to criminal law is something less than a confession, and is but an acknowledgment of some fact or circumstance which in itself is insufficient to authorize a conviction, and which tends only toward the proof of the ultimate fact of guilt. On the other hand, a confession by a defendant leaves nothing to be determined, in that it is a declaration of his intentional participation in a criminal act, and must be a statement of such a nature that no other inference than the guilt of the defendant may be drawn therefrom."

[2] Appellant devotes the remaining portion of his brief to an argument which he presents under the heading, "The court should have granted motion for instructed verdict." The evidence was sufficient to sustain the verdict of the jury. The corpus delicti was established by the testimony of the owner of the car, and the confession of appellant made to the witness Blair was properly received without objection. A motion for what is often termed an "instructed verdict" is one directed to the discretion of the trial court, unless the evidence presented is not legally sufficient to sustain a verdict of guilty. Section 1118 of the Penal Code provides that the court *may advise* the jury to acquit, if the court deems the evidence insufficient to warrant a conviction. The section further provides that the jury are not bound by the advice of the court. It follows that, if there is sufficient evidence to sustain the verdict, appellant cannot successfully base his petition for a reversal upon the action of the trial court in refusing to advise the jury to acquit.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

90 Cal. App. 630

DEAKINS v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR LOS ANGELES COUNTY et al. (Civ. 5999.)

District Court of Appeal, Second District, Division 2, California. April 4, 1928.

1. Courts ⚷489(3)—State court held to have jurisdiction of action between owners of unpatented invention, notwithstanding that "questions" might arise under patent laws; "cases" (28 USCA § 371).

State court *held* to have jurisdiction of action between owners of unpatented invention in which accounting was asked, notwithstanding that questions might arise under patent laws, since, under 28 USCA § 371, federal courts have exclusive jurisdiction of "cases" arising under patent laws, and there is distinction between "cases" and "questions."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Case (In Practice); Question.]

2. Removal of causes ⚷17—Defendant filing counterclaim in action involving rights to unpatented invention held to deprive itself of right to remove.

In action in state court between owners of unpatented invention, defendant by filing cross-complaint in which he sought cancellation of contract under which plaintiff claimed *held* to invoke jurisdiction of court and thereby deprive himself of right to remove case to federal court.

Application for writ of mandate by Grover C. Deakins, prayed to be directed to the Superior Court of Los Angeles County, Hugh J. Crawford, Judge. Writ granted.

Leonard Evans, of Anaheim, and Ford W. Harris and Herbert A. Huebner, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondents.

THOMPSON, J. This is an original proceeding to compel the respondent court to proceed to trial in the case of Grover C. Deakins v. Leland S. Hamer. The material facts are: Plaintiff filed a complaint in the superior court wherein he alleged that he and the defendant were the owners of a certain invention and device known as a joint breaker and tong puller; that on November 10, 1921, they entered into a contract with one Wilcox by which Wilcox was to manufacture one complete device and working model for demonstration purposes and to pay for an application for patent thereon which all three of the parties were to jointly make; that by the same contract it was agreed that each of the parties should own a one-third interest in the invention or any improvement which might be made by any of them, and that any net income which might be derived by the parties or any of them, as the result of the manufacture or sale of the invention or any improvement thereon, should inure to the joint benefit of the parties in equal shares, and that each of the three should be entitled to an accounting thereof. It is further alleged that subsequent to the execution of this contract Wilcox surrendered and released to plaintiff all of his interest in the agreement. There also follow allegations that the defendant has engaged in the business of manufacturing the device and has contracted for the manufacture thereof and has earned a considerable profit but has refused to account or pay to the plaintiff any portion thereof. Plaintiff asks for an accounting. The defendant filed his answer, in which in general effect he said that he had first conceived the device and that upon the promises of the plaintiff to furnish a portion of the money to develop the idea and perfect a working model he entered into the contract, but that plaintiff failed and refused to advance any money for that purpose; that on account of plaintiff's failure to provide any funds they had agreed to and did rescind the contract; that the device for the manufacture of which defendant had contracted is a device conceived subsequent to the time the contract was entered into and not the one covered by the agreement. By cross-complaint the defendant also sought to have the contract declared canceled on the ground that it had been abandoned and rescinded by the parties.

[1] When the case was called for trial the respondent judge, without a petition for removal, made an order removing the cause to the District Court of the United States.

Under this situation we are confronted by the question of whether the state courts have jurisdiction to entertain the action. It is provided that the jurisdiction of the United States courts "shall be exclusive of the courts of the several states: * * * Of all cases arising under the patent-right, or copyright laws of the United States." Barnes' Federal Code, § 1021 (28 USCA § 371). The construction and interpretation of this provision, at least so far as general rules thereunder are concerned, is remarkably free of confusion. One of the most exact and most explicit statements with which the great majority of the authorities are in agreement is found in the case of Pratt v. Paris Gaslight & Coke Co., 168 U. S. 255, 18 S. Ct. 62, 42 L. Ed. 458. That action was one in assumpsit to recover the purchase price of a device for the manufacture of water gas. The defendant pleaded a written contract by which plaintiffs agreed to hold defendant harmless from any claims of infringement, and also pleaded that plaintiffs' patents were void and an infringement upon certain other patents. The court says:

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

> "The action under consideration is not one arising under the patent-right laws of the United States in any proper sense of the term. To constitute such a cause the plaintiff must set up some right, title, or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction, of these laws. Starin v. New York, 115 U. S. 248 (6 S. Ct. 28) 29 L. Ed. 388; Germania Ins. Co. v. Wisconsin, 119 U. S. 473 (7 S. Ct. 260) 30 L. Ed. 461.
>
> "The state court had jurisdiction both of the parties and the subject-matter as set forth in the declaration, and it could not be ousted of such jurisdiction by the fact that, incidentally to one of these defenses, the defendant claimed the invalidity of a certain patent. To hold that it has no right to introduce evidence upon this subject is to do it a wrong and deny it a remedy. Section 711 [Rev. St. U. S. (28 USCA § 371)] does not deprive the state courts of the power to determine questions arising under the patent laws, but only of assuming jurisdiction of 'cases' arising under those laws. There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading—be it a bill, complaint, or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals."

Applying the test just quoted the question is framed: Did the plaintiff in this action set "up a right under the patent laws as ground for a recovery?" The answer must be in the negative. He based his right to an accounting in this instance upon a contractual relation which he says the defendant failed to observe. The contract in fact recites that the device was not patented and provides ways and means by which the parties shall proceed to protect it by patent. If the plaintiff is entitled to recover it is by virtue of the contract which he pleads.

Reference should also be had to the case of Lowry v. Hert (C. C. A.) 290 F. 876, which was an action in which the plaintiff alleged that by means of fraud and misrepresentation the defendant had induced the plaintiff to assign his interest in certain patents and also in capital stock of a company interested in exploiting the patents, and sought to have the assignments declared void and a decree establishing that plaintiff was the owner of the patents, and for damages to compensate for the loss of the use of the patents, including "large sums in the form of royalties and license fees," and an accounting of the stock and its dividends. This case was removed by the state court to the United States District Court and there tried. It was determined by the Circuit Court of Appeals that the District Court never acquired jurisdiction of the cause, and the high court remanded it to the District Court, with instructions to remand it to the state court. The general rules are there announced as follows:

> "* * * That, if the case is brought either to enforce or to set aside a contract, federal jurisdiction is not found in the mere fact that the contract relates to patents, while, if the suit is one for infringement of a patent, federal jurisdiction is not necessarily lacking either because the answer sets up, or because the complaint anticipates and avoids, a defense based on contract."

It is clear from these authorities and those therein cited, as well as on principle, that the complaint in this cause was framed so as to give jurisdiction to the state courts and not to the federal courts.

[2] There is an additional reason why at the instance of defendant in this action the suit could not be removed, although it must be noted that defendant did not seek its removal, but rather moved for a dismissal on the ground that the superior court had no jurisdiction. Had the defendant filed a petition for removal a further or other question might have arisen. However, in the recital of facts we mentioned that defendant filed a cross-complaint in which he sought to have canceled the contract which is made the basis of the complaint of plaintiff. It is obvious from the discussion so far had that the United States courts would have no jurisdiction over an action to cancel this character of contract. And as is said in the case of Hansen v. Pacific Coast Asphalt Cement Co., (D. C.) 243 F. 283: "By filing this cross-complaint, the defendant became a plaintiff, and invoked the jurisdiction of the court, and thereby deprived itself of the right to remove." Counsel has argued that there is a conflict of authority upon this point, but we think the conflict arises rather in those cases where the cross-defendant seeks to have the cause removed when for the first time a federal question is raised by the cross-complaint. Many of the authorities which deny the cross-defendant the right to remove, ground their reason in the fact that he, in the first instance, invoked the jurisdiction of the court.

It is apparent from the discussion that the cause was improperly removed.

The peremptory writ will issue.

We concur: WORKS, P. J.; CRAIG, J.

90 Cal. App. 647

MITCHELL v. GOULD. (Civ. 5139.)★

District Court of Appeal, Second District, Division 1, California. April 5, 1928.

Hearing Denied by Supreme Court May 31, 1928.

1. Evidence 🔑413—In action for broker's commissions, evidence showing broker's disregard of instruction to lease for short term held not inadmissible as varying written agreement (Civ. Code, § 1625).

In action on notes representing broker's commission, defendant's evidence showing that broker induced prospective tenant to hold out for long-term lease against defendant's instructions to lease for short term *held* not inadmissible as varying terms of written agreement contrary to Civ. Code, § 1625.

2. Brokers 🔑65(1)—Broker must use best efforts to further principal's interest.

It is duty of broker to act in good faith and put forth best efforts to further principal's interest, and, by failure to do so, he forfeits right to commission.

3. Brokers 🔑86(7)—Evidence showing broker's disregard of principal's instruction to lease for short term held to establish bad faith.

Evidence in action for broker's commission that broker induced prospective tenant to hold out for long-term lease after principal had instructed him to lease for short term *held* to establish bad faith on part of broker.

4. Brokers 🔑34—Broker advising prospective lessee to insist on longer lease after principal's instruction to lease for shortest period obtainable is liable to principal for damages.

Broker, employed to lease property for shortest period obtainable, who in bad faith and in interest of another than principal advises prospective lessee to insist on longer lease and one less advantageous to principal, is liable to principal for damages.

5. Brokers 🔑85(1)—Testimony of rental value at time of trial held inadmissible to support counterclaim against broker for disregard of instruction to lease for short period.

In broker's action for commission, oral testimony as to rental value of leased property at time of trial *held* inadmissible in support of defendant's counterclaim for damages for broker's disregard of instructions to lease for shortest period obtainable.

6. Brokers 🔑38(7)—Measure of damages for broker's disregard of instruction in securing lease is difference between value of lease obtained and value of lease which would have been obtained except for broker's conduct.

Where broker induced prospective lessee to hold out for longer term after principal's instruction to lease for shortest period obtainable, measure of damages due principal is difference between value of lease actually obtained at time of execution and value of lease which would have been obtained had it not been for wrongful conduct of broker.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by R. C. Mitchell against Dave H. Gould, in which Harry E. Mitchell, executor of the estate of R. C. Mitchell, was substituted as plaintiff. Judgment for plaintiff, and defendant appeals. Reversed.

Bearman & Engelhardt, of Los Angeles, for appellant.

Hazlett & Albee, of Los Angeles, for respondent.

WOOD, Justice, pro tem. This action was commenced by R. C. Mitchell to enforce the payment of five prommissory notes executed by the defendant to plaintiff on March 3, 1921, each being in the sum of $500. After the trial of the action, R. C. Mitchell died, and Harry E. Mitchell was appointed executor of his estate and substituted as plaintiff herein. The notes were given as evidence of an indebtedness growing out of a transaction in which it is alleged that R. C. Mitchell earned a commission as broker in procuring a subtenant for defendant for a portion of the ground floor of the Brack Shops building in the City of Los Angeles; the defendant holding a lease upon said premises consisting of an unexpired term of fourteen years and five months. The written authorization under which the broker rendered services to defendant is in the following words:

"For and in consideration of your services, I hereby appoint you my exclusive agent for a period of thirty days from the date hereof, to procure a tenant for the premises known as the California Store, ground floor Brack Shops building, approximately 35x108 feet, with basement and mezzanine, on the following terms and conditions: Lease to cover a period of seven years and ——— months, commencing 30 days (thirty days) after signing of lease. The lease to include the use of the front as is, together with the fixtures as is installed throughout the store, and all other privileges enjoyed by me which are furnished by the owners of the property. The monthly rental shall be a flat rate of $2,500 for the full term of the lease. Should you procure a tenant who accepts the premises herein described, in accordance with the foregoing terms and conditions, or any other terms accepted by me, I hereby agree to pay you a commission at the regular rate authorized by the Los Angeles Realty Board, now in effect, said commission due and payable at time of said acceptance, and authorize you to notify your client of my acceptance upon your receiving a written offer from him in conformity with the above. I agree to place with your firm any insurance carried on these premises during the life of this lease. I have read the aforegoing and fully understand the terms and conditions."

[1] After making certain denials, the defendant interposed what he denominates both a defense and a counterclaim. He alleges, in

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★Hearing denied by Supreme Court.

substance, that at the time he employed Mitchell to lease the premises and before a tenant was otained, he stated to Mitchell that he did not want to make a lease for a longer period than seven years; that Mitchell did obtain a tenant, one Beckman, who was willing to lease the premises for a term of ten years and had actually made a deposit for such a lease, but that Mitchell advised the said Beckman that he could obtain a lease for fourteen years and five months, and thereupon, by reason of such advise from Mitchell, the said Beckman withdrew his offer and insisted upon a lease for the full term of defendant's lease (that is, fourteen years and five months); that defendant, at the time he executed the lease with Beckman, did not know that Beckman had been advised by Mitchell that the longer term lease was available. At the trial, plaintiff offered the notes in evidence and rested. Thereupon the plaintiff objected to the introduction of any evidence in support of the defense above outlined, on the ground that such matter did not constitute a valid defense. Although the court overruled the objection, a motion to strike out all of defendant's evidence was later granted. This ruling was erroneous.

Ben Beckman, the subtenant obtained by Mitchell, testified that he was willing to enter into a lease for ten years, but that he learned in Mitchell's office that the lease could be obtained for approximately fifteen years, whereupon he withdrew his offer to lease for ten years. He had not learned anything about the fifteen years' lease until his visit to Mitchell's office. The defendant testified that he informed Mitchell's representative that he "did not want to lease it for any long time," and that he "told him to rent it for a term of between five and seven years." He further testified:

> "And isn't it true you told Mr. Bridwell, or whoever it was that brought that offer of Beckman's to you, that you would not rent for longer than nine years and five months? A. I told him after he said it would be hard to rent. He said, 'We can't rent it for any five or seven years, but we have got a tenant for around ten years,' and then I told him, 'All right;' that I was willing to go—'if you can't do anything else, I am willing to go for nine years and several months.' * * *
>
> "Q. And then the lease was closed for fifteen years? A. No; not after a long while. I didn't care to go through for any such term. The proposition was made with Mr. Beckman for ten years, changed from seven to ten, and Mr. Beckman had executed a check with a signed letter accepting it for ten years at the rental at that time, when we were supposed to meet the next day to get together on the lease. The next day I had a telephone call from Mr. Mitchell's office that Mr. Beckman would not come through, would not take it for no ten years. He had withdrawn his first offer, and he wanted the full term.
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> "Q. Continue with that conversation you had with Mr. Bridwell over the telephone. A. Mr. Bridwell said he was a desirable tenant, and he said Mr. Beckman would not take it for no ten years, he wanted the full term, which I can't explain just the details of it, however, they got me to it, and I thought the best way out of it was to get rid of it, and I said all right, and I consented. * * *
>
> "Q. And, when the offer was brought to you, you accepted the offer, did you? A. I did, after it was explained there was no way out of it."

The witness stated that he did not learn that Mitchell had informed Beckman of the possibility of obtaining the fifteen years' lease until after the lease had been executed and part of the commission paid. On cross-examination, it was brought out that he was told in Beckman's office "that Mitchell was the one that told him (Beckman) he could have the fifteen years and he had better stand pat on the fifteen years."

In support of the ruling of the trial court striking out the foregoing evidence, counsel for plaintiff argues that defendant was attempting to vary the terms of a written agreement, contrary to the provisions of section 1625, Civil Code. With this contention we cannot agree. Defendant agreed to pay the commission if a tenant should be found for a period of seven years or on "any other terms accepted by me." Both parties agree that a tenant was in fact found, on terms "accepted" by the defendant. The evidence introduced by defendant did not vary or attempt to vary any of the provisions of the agreement. Defendant did not attempt to prove that the contract was other than what it purported to be on its face, nor did he attempt to prove that he had not agreed to pay the regular Los Angeles Realty Board commission if Mitchell obtained a tenant for a term longer than the seven years specified in the written listing.

[2, 3] It was the duty of Mitchell, as broker, to act in good faith and put forth his best efforts to further his principal's interests. If he failed in this regard, he forfeited his right to a commission. His instructions were to find a tenant for a short period, from five to seven years, and, in fact, he did find one for ten years. The principal urged him to secure a short lease, but, according to the evidence stricken out, he informed the prospective tenant that a fifteen years' lease could be obtained, whereupon the tenant refused to enter into a ten years' lease. This testimony stood uncontradicted at the close of defendant's evidence, and, if true, established bad faith on the part of the broker. There is a very good reason for the rule requiring the exercise of good faith on the part of a broker in transactions of this kind. The principal engages a broker to secure a tenant on the best terms obtainable, in this case for a short period. He depends upon the efforts of the broker to secure a tenant. The opportunity might readily be presented to the broker to act in the interests of the tenant

and against those of his principal. In the present case it was largely to the financial interest of the broker to make the longest lease possible, rather than the shortest, since his commission manifestly would be larger in amount in proportion to the length of the lease.

In Harvey v. Lindsay, 117 Mich. 267, 75 N. W. 627, the plaintiff was suing for a commission alleged to have been earned as a real estate broker. The following instruction of the trial court was approved:

> "If Mr. Gamble gave Mr. Leathers such information or made to him such statements as to cause Mr. Leathers to become satisfied that the defendants would not insist upon the price asked, and that he could press them into accepting a substantially less price for the pine, Mr. Gamble was guilty of bad faith towards the defendants and his assignee, and the plaintiff, Mr. Harvey, would not be entitled to recover any compensation for what he may have done in connection with the deal with Mr. Leathers."

In Wiggins v. Wilson, 55 Fla. 346, 45 So. 1011, the court says:

> "If they knew or thought that this alleged customer of theirs had the ability and was ready and willing to purchase the property at the price and on the terms that they were authorized to sell it, it was their duty to promptly notify their principal of such fact. Then, after receiving such notice, if the principal sold to such customer at a less price and on different terms than those given to the plaintiffs, they would be entitled to their commissions. But if the plaintiffs knew of the customer's ability, readiness, and willingness to take the property at the price and on the terms named in their contract of employment, and withheld such knowledge from their principal, it amounted to bad faith with their principal, which forfeits their right to any commissions out of a sale effected by the principal in ignorance of such facts."

In Alford v. Creagh, 7 Ala. App. 358, 62 So. 254, the court lays down these rules:

> 'The law requires that a real estate agent, employed to sell land, must act in entire good faith and in the interest of his employer. Henderson v. Vincent, 84 Ala. 101, 4 So. 180. To this end he must exact from the purchaser the price, the terms, and conditions of sale which his employer has fixed. 23 Am. & Eng. Ency. Law (2d Ed.) p. 902. If he fails to do this, but induces the prospective purchaser to believe that the property can be bought for less, he fails to discharge that duty to his principal that good faith demands. Such conduct on the broker's part is well calculated to lead the purchaser to stand out and thereby either force from the seller a lower price than that fixed or delay the sale, even if he finally buys at the price fixed, both detrimental to the interest of the seller. * * * The real estate agent loses his right to commissions where, in his dealings in reference to the subject-matter of his employment, he is guilty of either fraud or bad faith towards his employer. 23 Am. & Eng. Ency. Law (2d Ed.) p. 921."

[4] In his counterclaim, defendant prayed for damages alleged to have been occasioned by Mitchell in advising Beckman to insist upon the longer lease and by his failure to close the deal for the period of ten years. A broker who is employed to lease property upon the best terms possible, or for the shortest period obtainable, and who in bad faith and in the interest either of himself or any one other than his principal, not only fails to bring about the execution of the lease on the terms which are available and which are most advantageous to his principal, but also advises the prospective lessee to insist upon a longer lease and one less advantageous to his principal, is liable to his principal for damages. In 9 Corpus Jurisprudence, 537, it is said:

> "If a broker employed to sell property understates to the principal the best price obtainable, the principal may recover from him the difference between that obtained and that which might have been obtained."

See Brown v. Carpenter, 142 Ky. 676, 134 S. W. 1150; Holmes v. Cathcart, 88 Minn. 213, 92 N. W. 956, 60 L. R. A. 734, 97 Am. St. Rep. 513; Durand v. Preston, 26 S. D. 222, 128 N. W. 129.

[5, 6] In support of his counterclaim, counsel for defendant sought to establish by oral testimony the rental value of the leased property at the time of the trial. An objection to this testimony was made and sustained by the court. This ruling was correct. In such cases the measure of damages is the difference between the value of the lease actually obtained at the time of its execution and the value of the lease which would have been obtained had it not been for the wrongful conduct of the broker.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

90 Cal. App. 663

REES v. VIEIRA et ux. (Civ. 3463.)

District Court of Appeal, Third District, California. April 5, 1928.

1. Appeal and error ⟹544(2)—On appeal on judgment roll, failure to make finding on plea of limitations held not available as ground for reversal (Code Civ. Proc. § 337, subd. 1).

In suit on note and to foreclose mortgage, on appeal on judgment roll, failure to make finding on plea that cause of action was barred by Code Civ. Proc. § 337, subd. 1, is not available.

2. Mortgages ⟹481—Finding that all allegations in complaint were true held to support judgment on note and foreclosing mortgage.

In suit on note and to foreclose mortgage, general finding that all allegations in complaint were true *held* to support judgment on note and foreclosing mortgage.

3. Appeal and error ⟹907(3)—On appeal on judgment roll from judgment foreclosing mortgage but failing to make finding as to plea of limitations, presumption is that no evidence was introduced on such issue (Code Civ. Proc. § 337, subd. 1).

In suit on note and to foreclose mortgage, where some of parties pleaded limitations under Code Civ. Proc. § 337, subd. 1, on appeal from judgment for plaintiff on judgment roll alone, record is silent as to whether any evidence was offered on defense of limitations, and presumption is that no evidence was introduced on such issue and that no finding thereon was required.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by Edith L. Rees against W. S. Vieira and wife and others. From a judgment for plaintiff, the named defendants appeal. Affirmed.

H. A. Gabriel, of San Jose, and C. W. White, of Hayward, for appellants.

C. B. Sessions and David K. Watkins, both of San Francisco, for respondent.

HART, Acting P. J. Plaintiff brought this suit to enforce the payment of a promissory note for the sum of $7,850, executed jointly by Eugene Joseph Wiegand and his wife, Mary Agnes Wiegand, in favor of Irrigosa Land Company, and, to that end, to obtain a decree foreclosing a mortgage at the same time given by the makers of said note on a tract of land, situate in Madera county, and containing 123½ acres, to secure the satisfaction of said obligation. The case was tried on the complaint and the amended answer thereto. The action was dismissed as to certain of the defendants, some of whom were fictitiously named in the complaint. Upon general findings in favor of the plaintiff, judgment was entered against the remaining defendants, W. S. Vieira, A. Manaschian, Paul C. Manoogian, and K. P. Michaelian, for the principal sum, $7,850, together with accrued interest in the sum of $1,442.50 on the principal sum, the two aggregating, in amount, the sum of $9,292.50, and also foreclosing the said mortgage and ordering the sale of the mortgaged property.

This appeal is by the defendants W. S. Vieira and his wife, Mamie A. Vieira, from the judgment, on the judgment roll alone.

The note in suit and the mortgage given to secure the same were, as is usual in such cases, simultaneously executed in favor of and delivered to Irrigosa Land Company, a corporation, by Eugene Joseph Wiegand and his wife, Mary Agnes Wiegand, for the sum of $7,850. The instruments were dated April 3, 1919, and the note was to mature and become payable on or before the 1st day of October, 1920. The real property upon which the mortgage was given was, at the time of the execution and delivery thereof, as indicated, owned in fee simple by said Wiegand and his said wife. On or about February 10, 1920, said Irrigosa Land Company assigned and transferred said promissory note and said mortgage to the plaintiff herein, and the complaint alleges that "plaintiff ever since has been and is now the lawful owner and holder of said promissory note and said mortgage."

On the 6th day of April, 1920, the defendant W. S. Vieira succeeded by purchase to the title and interest of said Wiegand in and to the mortgaged land, subject to said note and mortgage, and assumed and agreed to pay said note and so satisfy or discharge said mortgage.

In view of the conclusion at which we have been required by the record to arrive relative to this appeal, it is unnecessary to recount herein in detail other transactions relating to said land following that of the acquisition thereof by Vieira and others. It is sufficient to explain generally that the complaint states that Vieira and one Titman and his wife entered into a contract whereby the latter, upon certain specified conditions, and subject to the note and the mortgage in suit, purchased said land; that subsequently said Titman and wife sold and assigned said contract to A. Manaschian and several other Armenians, who became thereby the joint owners of said contract. This transaction was, of course, subject to all the conditions set forth in said contract as it was originally framed and executed by the Titmans and Vieira, one of which conditions was that the sale was to be and was subject to the note and the mortgage which constitute the subject-matter of this action; that said Manaschian and his associates, on purchasing said contract, procured from the plaintiff an extension of time for the payment of said note to October 1, 1922; that, in the month of September, 1922, said Manaschian and associates secured from the plaintiff a further extension of the time for the payment of said note from October 1, 1922, to October 1, 1924.

The defendant Vieira and wife demurred to the complaint on the general ground and also set up as a further ground of demurrer the claim that the cause of action set forth in the complaint was barred by the provisions of subdivision 1 of section 337 of the Code of Civil Procedure. The demurrer was, however, subsequently withdrawn upon the stipulation of the parties, and thereafter the defendants answered, admitting certain and denying other material allegations of the complaint, and also setting up the plea of the statute of limitations as a bar to the cause of action stated in the complaint.

The trial court, as above stated, found generally that the facts pleaded in the complaint were true, but failed to make a finding on the special plea in bar set up by the defendants, the Vieiras. This omission in the decision furnishes the ground for the single point upon which the appealing defendants urge a reversal of the judgment.

[1] It is obvious that, upon the record before us, consisting, as it does, entirely of the judgment roll, the point made by the appealing defendants, as above indicated, is not available as a ground for reversal.

[2] The defendants first contend that the judgment is without validity because the findings are not in form legally sufficient, in that the mere general finding, as in that form of language the court in this case did find, "that all the allegations in plaintiff's complaint contained are true," does not legally measure up to a decision of the questions of fact which will support a judgment. The contention is devoid of merit. The cases of Johnson v. Squires, 55 Cal. 103, and Krug v. F. A. Lux Brewing Company, 129 Cal. 322, 61 P. 1125, cited as in support of the point so urged, involve entirely different situations from that of the case here. The first-named case involved a contest between two conflicting claimants to the right to purchase state land; the contest having been referred as is required in such cases, to the nisi prius court for trial. The case, after decision by the state district court, was appealed to the Supreme Court, and, in its decision reversing the judgment, the latter court said that, since the Constitution (article 17, § 3) declares that "lands belonging to this state, which are suitable for cultivation, shall be granted *only to actual* settlers," the "facts as to the possession of the respective parties must be 'found' in all contested cases like the present." It will be perceived that the very nature of such an action would of necessity require the finding of the facts necessary to determine which of the parties is "the actual settler." In the other case mentioned (Krug v. Brewing Co.), the only findings were:

> "That all the allegations of plaintiffs' complaint in said action are true. That all the allegations of defendant's answer in said action, so far as they are inconsistent with the allegations of said complaint, are not true."

The court, with eminent propriety, held that findings so framed and phrased were insufficient, saying that they "leave entirely undecided what allegations of the answer are inconsistent with the allegations of the complaint," citing a number of other California cases. In that same case, though, the court said that a finding that "all the allegations of the complaint are true and all the averments of the answer are untrue" is sufficient.

[3] To the contention that the effect of the failure to find upon the special plea in bar of the action is to vitiate the force of the judgment, the ready answer is that, this being an appeal upon the judgment roll alone, the record is silent as to whether any evidence was offered and received to support that plea or affirmative defense, and that, in such a situation, the presumption is that no evidence was introduced upon that issue or defense, and that therefore no finding thereon was required.

"A failure to find upon some issue, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal, unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue." Syllabus in Winslow v. Gohransen, 88 Cal. 450, 26 P. 504. To the same effect are Mohr v. North Rawhide Min. & Devel. Co., 177 Cal. 264, 265, 170 P. 600; Roberts v. Hall, 147 Cal. 434, 439, 82 P. 66; Haun v. Rosenmayer, 46 Cal. App. 353, 357, 189 P. 117. There are numerous other cases which likewise hold, but the rule stated is so definitely settled and so familiar to the profession that it would be wholly supererogatory to name them herein.

There is nothing in the cases to which attention is called by counsel for defendants which is at variance with the conclusions above announced upon the record now before us.

The complaint in this action unquestionably (and in effect confessedly) states a cause of action for the relief sought, and, since (as has been shown) the court found that all the allegations of the complaint are true, it of necessity follows that the findings fully support the judgment in all essential particulars.

The judgment is affirmed.

We concur: PLUMMER, J.; BARTLETT, Justice pro tem.

90 Cal. App. 606

TITLE INS. & TRUST CO. et al. v. RITCHARDSON et al. (Civ. 6185.) ★

District Court of Appeal, First District, Division 1, California. April 4, 1928.

Hearing Denied by Supreme Court May 31, 1928.

1. **Covenants ⟹114(2)—Complaint for breach of building restriction held to state cause of action in plaintiff by recital of deed made part of complaint by reference declaring restrictions to be for benefit of all lots of tract.**

Though complaint for breach of building restrictions of deed does not allege restrictions were for benefit of all the lots of the tract, it states a cause of action for plaintiff owner of one of such lots by recital of deed constituting exhibit and made part of complaint by reference deed reciting that the restrictions are for the benefit of each and every lot of the tract.

2. **Appeal and error ⟹877(6)—Giving right of re-entry to both plaintiffs instead of one held harmless to defendant.**

If judgment for breach of building restriction gave right of re-entry to both plaintiffs, instead of the one to whom the property would revert, it would be harmless to defendant.

3. **Covenants ⟹79(3)—Restrictions in deeds of lots in tract held enforceable by one grantee against another grantee of common grantor.**

Where owner of tract makes deeds of different parts of it to different persons, each deed containing the same restrictions as to use of the land, which are imposed as part of a general plan for benefit of the tract and the several lots or portions thereof, the restrictions not only impose a liability on each grantee to the grantor, but give a grantee an equitable right to enforce the restrictions against another grantee.

4. **Injunction ⟹62(1)—Use of property subversive of condition in deed will be enjoined.**

Equity will enjoin the use of property by a grantee or his assigns which is subversive of a condition on which conveyance of the property was made.

5. **Covenants ⟹108(2)—That beneficiary of corporation which was common grantor of all lots with building restrictions gave lease of certain lots free thereof held not to affect right to enforce them against other lots.**

Right of common grantor of the lots in a platted tract, a corporation, or a grantee of one of the lots, to enforce against the grantee of another such lot a building restriction in his deed common to, and imposed for the benefit of, all the lots, is unaffected by a lease of other lots in the tract free from such restrictions, even though the lessor were the beneficiary of the corporation, such fact not making his unauthorized acts or declarations binding on the corporation, and he being unable to bind the purchasers of lots, in the absence of consent or waiver by them of the restrictions.

Appeal from Superior Court, Los Angeles County; Frank H. Dunne, Judge.

Action by the Title Insurance & Trust Company and another against Mabel C. Ritchardson and another. Judgment for plaintiffs, and defendant Gertrude G. Fette appeals. Affirmed.

Schweitzer & Hutton, of Los Angeles (B. R. Ware, of Los Angeles, of counsel), for appellant.

Lewis C. Preston, of Los Angeles, for respondents.

CAMPBELL, Justice pro tem. This is an action for injunction and for forfeiture brought by Title Insurance & Trust Company, a corporation, and Mia Candida Bland against Mabel C. Ritchardson and her lessee, Gertrude G. Fette. The properties owned by plaintiff Mia Candida Bland and the defendant Mabel C. Ritchardson adjoin; the lot owned by Mia Candida Bland being lot 755 and that owned by Mabel C. Ritchardson being lot 756 in that certain tract known as "Chesterfield Square" in Los Angeles county, lot 756 being held under lease by appellant Gertrude G. Fette.

The record shows that the greater portion of the tract known as "Chesterfield Square" was acquired by respondent Title Insurance & Trust Company by deed from R. D. List and Iola R. List; that the lots owned by respondent Bland and defendant Ritchardson were acquired by them from the common grantor, respondent Title Insurance & Trust Company, by grant deeds in which the identical conditions, restrictions, and reservations are contained.

The court entered judgment that defendants Mabel C. Ritchardson and Gertrude G. Fette, their grantees, heirs, successors and assigns be restrained and enjoined from continuing to violate and breach the conditions, restrictions, and covenants of the deed of conveyance from Title Insurance & Trust Company, a corporation, to Mabel C. Ritchardson, conveying lot 756 of Chesterfield Square, and ordered and required defendants to remove the buildings now upon lot 756 forthwith, and further adjudged and decreed if the defendants, or either of them, refuse to discontinue the violation and breach of the covenants and conditions, lot 756 shall be, and is declared to be, forfeited to, and reinvested in, Title Insurance & Trust Company according to the provisions contained in the deed of conveyance.

Defendant Mabel C. Ritchardson has not appealed; the appeal being prosecuted only by defendant Gertrude G. Fette, who urges the following points upon which she relies for a reversal of the judgment: (1) That the judgment is against the law in that, (a) the complaint, as far as the plaintiff Bland is concerned, does not state facts sufficient to constitute a cause of action, (b) the findings of fact do not support either conclusions of law or judgment in favor of the plaintiff Bland, (c) that the findings of fact do not support the judgment; (2) that the denial of the defendant Fette's motion to set aside and vacate the judgment and to amend and correct the conclusions of law and to enter judgment for the said defendant was erroneous and against law; (3) the court below erred in refusing to permit the introduction of the lease of lots 900, 901, of Chesterfield Square tract, executed by R. D. List to W. H. Bissell, and Elmer Deen, and marked Defendants Exhibit 1 for identification.

[1] The point urged that the complaint does not state a cause of action on the part of plaintiff Bland "because there are no averments that the restrictions were intended by all the parties thereto to be for the benefit of all the lots in the tract," is without merit, as the deed which is marked Exhibit A, referred to in, and made a part of, the complaint, contains the following recital:

> "It is understood and agreed that the foregoing conditions, restrictions, and reservations are a part of the general plan for the improvement of said Chesterfield Square, which plan contemplates that certain of the lots therein shall be used for residence purposes only, and that certain others of said lots may be used for residence or apartment house or flat or hotel or church or school or library or business purposes, and are for the benefit of said tract and each and every parcel of land therein, and shall inure to and pass with said tract and each and every parcel of land therein, and are hereby imposed upon the premises conveyed by this conveyance as a servitude in favor of said tract and each and every parcel of land therein, as the dominant tenement or tenements," etc.

The other points urged that the findings do not support the judgment, and the denial of appellant's motion to set aside and vacate the judgment and correct the conclusions of law and enter judgment for defendant Fette was erroneous, may be treated together.

The findings to which appellant takes exception and which pertain to the condition in the deed claimed to have been violated, and which it is contended do not support the judgment, are:

> "II. That the plaintiff Title Insurance & Trust Company is the grantor in the various deeds made by it to the several grantees of lots in that certain tract known as Chesterfield Square, as per map recorded in Book 21, pages 90 and 91, of Maps, in the office of the county recorder of the county of Los Angeles, state of California. * * *
>
> "VII. That each and every of the deeds made by said Title Insurance & Trust Company to the various purchasers of lots in said tract contain the same conditions, restrictions, and reservations as those mentioned in paragraph VI of these findings.
>
> "VI. That the deeds under and by which said plaintiff Mia Candida Bland and the defendant Mabel C. Ritchardson acquired title to and own their respective lots in said tract, contain, among other things, the following express conditions, restrictions, and reservations, to wit: 'That this conveyance is made and accepted upon each of the following express conditions, restrictions, and reservations, which shall apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties: * * * (2) No residence shall be erected upon said premises that shall cost in actual value for labor and material less than $2,500.00, and no building for any apartment house, flat, hotel, church, school, library or business purposes or any combination of said purposes, shall be erected upon said premises that shall cost in actual value for labor and material less than $2,500.00. * * * (3) All buildings placed on said premises shall be erected thereon and from new material, and no building shall be moved upon said premises. * * * (8) The property hereby conveyed shall not be used or occupied by or be permitted to be used or occupied by any person other than a person of the white or Caucasian race. Provided that all and each of said restrictions and conditions herein contained shall continue in full force and effect until January 1, 1930, and then shall terminate and be of no further effect, either legal or equitable, upon said property or on the parties hereto, their heirs, successors, devisees, executors, administrators or assigns. Provided further that a breach of the foregoing conditions shall cause said premises to revert to the grantor, its successors or assigns, each of whom respectively shall have the right of immediate re-entry upon said premises, in the event of any such breach; and as to the owner of any other lot in said tract, the foregoing restrictions and conditions shall operate as covenants running with the land, and the breach of such covenants or the continuance of any such breach may be enjoined, abated, or remedied by appropriate proceedings by such grantor, its successors or assigns, or by any such owners, their heirs, devisees, executors, administrators, successors or assigns, but by no other person. * * *'
>
> "VII. That each and every of the deeds made by said Title Insurance & Trust Company to the various purchasers of lots in said tract contain the same conditions, restrictions, and reservations as those mentioned in paragraph VI of these findings."

[2] Appellant complains that "upon such findings the court bases conclusions of law and judgment to the effect that the plaintiff Bland, to whom, as far as the evidence or findings disclose, there never was transferred the right of re-entry upon breach of said condition, and plaintiff Title Insurance & Trust Company is entitled to an injunction or, in case the defendants refuse to discontinue the violation of said conditions, to a reverter." We are unable to find in the judgment any right of re-entry by plaintiff Bland, but, if it had been so decreed, it may be said that appellant cannot be heard to complain, as she would suffer no injury if the judgment had given respondent Bland the right of re-entry together with respondent Title Insurance & Trust Company, to whom the property would revert, and Title Insurance & Trust Company is not complaining.

Appellant further urges that the following findings are not supported by the evidence:

"XI. That the plaintiff Title Insurance & Trust Company was at all the times mentioned in plaintiff's complaint, and now is the owner of the reversionary rights in and to said lot 756, and in and to each and all of said lots contained in said tract, Chesterfield Square, in said complaint described.

"XII. That the plaintiffs Title Insurance & Trust Company and Mia Candida Bland have not consented to the breach of or waived any of the conditions, restrictions, or covenants in said complaint set forth as and in said conveyance contained, and subject to which said defendant Mabel C. Ritchardson holds title to said lot 756, in which lot the defendant Gertrude G. Fette is interested as lessee thereof, and that said conditions, restrictions, and reservations have not been canceled or withdrawn, and that each and every one thereof are now, and at all the times mentioned in said complaint have been, in full force and effect.

"XIII. That, when it was ascertained that the defendant Gertrude G. Fette contemplated moving said buildings to and upon said lot No. 756, and before said buildings were placed on said lot No. 756, said defendants knew of, and had knowledge of, the said conditions, restrictions, and reservations contained in said deed from Title Insurance & Trust Company to Mabel C. Ritchardson, and were notified that it would be a violation of said restrictions to place said buildings on said lot 756; and that, when it was ascertained that said defendant Gertrude G. Fette was determined to and had placed said buildings on said lot 756, timely demand for the discontinuance of such violation of said restrictions was made upon said defendants; but that said defendants failed and refused to discontinue such violation, and still fail and refuse so to do.

"XIV. That by reason of the violation, by the defendants, of the conditions, restrictions, and reservations contained in said deeds from Title Insurance & Trust Company to the plaintiff Mia Candida Bland and to the defendant Mabel C. Ritchardson, and to the various other purchasers of lots in said tract, Chesterfield Square, said plaintiff Mia Candida Bland has been, and is, irreparably damaged."

If the findings here quoted and concerning which appellant contends the evidence does not support are in fact supported by sufficient evidence, and the refusal of the court to permit the introduction in evidence of the lease of lots 900 and 901 of Chesterfield Square tract, executed by R. D. List to W. H. Bissell and Elmer Deen, is not reversible error, the judgment must be affirmed.

We think the evidence justifies the findings of the trial court, and such findings support the judgment. P. L. Bishop, an employee of Title Insurance & Trust Company, and who stated that he was acquainted with the conditions and restrictions contained in the deeds issued to persons who bought lots in Chesterfield Square tract, testified as follows:

"Q. Do you know of your own knowledge whether the general plan or scheme of the subdivision, in the sale of lots, was to retain and make effective the various restrictions and conditions of the deeds as issued to Mrs. Bland? A. Yes.

"Q. Were they so carried out?

"Mr. Hutton: I object to that as indefinite and uncertain, calling for the conclusion of the witness, and, furthermore, that I do not understand— A. Meaning, were the restrictions lived up to?

"Q. (by Mr. Preston): No. Did they show in all the deeds? A. Yes, sir.

"Cross-examination by Mr. Ware: Q. Now, you say the general plan and scheme of this tract was uniform; is it not true that there are two distinct and separate forms of deeds used on the tract, one business and one for residence? A. Certain business and certain residence, yes.

"Q. Or combination of business and residence purposes? A. Yes, sir.

"Q. So that, when you say it was uniform, each deed in the tract was not the same as each other deed in the tract? A. I was referring to those deeds—this business deed that Mr. —the attorney had in front of me.

"Q. However, in the tract as a whole, there were two separate and distinct forms of deeds? A. Yes, sir.

"Q. You say in certain of these deeds paragraph 4 has been eliminated; is that correct? A. Yes, sir.

"Q. Entirely eliminated? A. Yes, sir.

"Q. And how many, approximately, do you know? A. Our records are that there are lots 1 to 12, with the exception of one lot that was not in the trust; I don't know whether it was lot 5 or 6; one of those lots.

"Q. 5 or 6? A. Yes.

"Q. Who owns that lot? A. I don't know, sir.

"Q. Do your records disclose the owner? A. No; it was not in the trust."

Paragraph 4, which was eliminated from the deeds to lots 1 to 12, requires any residence built upon the premises to front on Slauson avenue, and permits the residence or building to be erected on the front property line, excepting that, if the premises are on a street corner and front north or south, the residence or building shall be located not less than 20 feet from the side street line, etc.

Respondent Bland testified that she never at any time consented to the buildings being placed on the lot of defendant Ritchardson adjoining her lot, and never consented to small buildings being moved onto such lot. Defendant Mabel C. Ritchardson testified that at the time she leased her lot to appellant the restrictions in her deed were called to the attention of appellant, and appellant read the deed. Appellant Gertrude G. Fette testified that before she moved the buildings onto the lot she received written notice concerning the conditions contained in the deeds:

"Q. At the time you received this notice, had you made any arrangements to make improvements under your lease from you by—? A. Yes sir.

"Q. What arrangements had you made? A. The buildings were moved up that night; they were all on timbers, and had to leave the lot.

"Q. At the time you received this notice they had not been moved, is that correct? A. They were not off the lot, but they were on timbers ready for moving, yes, sir.

"Q. They had not yet been placed on lot 756 on Slauson avenue? A. No, sir."

The evidence shows the general plan for the improvement of the tract, Chesterfield Square; that, at the time of purchasing their respective lots, both the plaintiff Bland and the defendant Ritchardson understood and agreed with Title Insurance & Trust Company, their common grantor, that the conditions, restrictions, and reservations set forth in the deeds accepted by them were and are a part of the general plan for the improvement of Chesterfield Square, which plan contemplates that certain of the lots therein shall be used for residence purposes only, and that certain others of the lots may be used for residence or apartment house or flat or hotel or church or school or library or business purposes, or any combination of such purposes, and are for the benefit of the tract, and are, by such understanding and agreement imposed upon the premises covered, by their respective deeds as a servitude in favor of Chesterfield Square tract and each and every parcel of land therein, as the dominant tenement or tenements; that, at the time of entering into and making the lease of lot 756 by the defendant Ritchardson to appellant Fette, appellant had notice of all such conditions, restrictions, and reservations, and took her lease with knowledge thereof; that both before and at the time of moving the buildings complained of both defendants Ritchardson and appellant Fette had notice of objections to the moving of the buildings onto such lot.

[3, 4] It is well settled that, when one makes deeds for different parties to a tract of land, each deed containing the same restrictions as to the use of the land to be conveyed, which restrictions are imposed as part of a general plan for the benefit of the tract and the several lots or portions thereof, the restrictions not only impose a liability upon each grantee to the grantor, but give the grantee an equitable right to enforce the restrictions against another grantee. Allen v. Barrett, 213 Mass. 36, 99 N. E. 575, Ann. Cas. 1913E, 820. Equity will enjoin the use of property by a grantee or his assigns when such use is subversive of a condition upon which conveyance of property was made. Pavkovich v. Southern Pacific R. R. Co., 150 Cal. 39, 87 P. 1097. In Alderson v. Cutting, 163 Cal. 503, 126 P. 157, Ann. Cas. 1914A, 1, the court says:

> "The validity of restrictions like those here involved is not open to question (Firth v. Marovich, 160 Cal. 257 [116 P. 729, Ann. Cas. 1912D, 1190]). In case of a violation relief may be sought by the owner of any lot in the tract for the benefit of which the restrictions were imposed;"

—and in Los Angeles, etc., Land Co. v. Marr, 178 Cal. 243, 173 P. 83, this language is used:

> "The validity of restrictions of this kind, when imposed, as was the covenant in this case, for the benefit of other lands owned by the grantor, is not questioned. Quatman v. McCray, 128 Cal. 285 [60 P. 855]; Firth v. Marovich, 160 Cal. 257 [116 P. 729, Ann. Cas. 1912D, 1190]."

In Miles v. Clark, 44 Cal. App. 539, 187 P. 167, the court says:

> "The principle that covenants of the character here involved operate as a covenant running with the land for the benefit of other lots in the tract is well * * * recognized in this state. Los Angeles, etc., Co. v. Southern Pacific R. R. Co., 136 Cal. 48, 68 P. 308; Hunt v. Jones, 149 Cal. 301, 86 P. 686; Firth v. Marovich, 160 Cal. 260, 116 P. 729, Ann. Cas. 1912D, 1190; Alderson v. Cutting, 163 Cal. 504, 126 P. 151 [157], Ann. Cas. 1914A, 1; Parker v. Kenworthy, 181 Cal. 783, 183 P. 950."

The case of Werner v. Graham, 181 Cal. 174, 183 P. 945, on which appellant principally relies, is distinguished from the present case, for the reason that the restriction ran personally to the grantor of plaintiff's predecessor in interest, and was not imposed upon the premises covered by the deed there construed as a servitude in favor of each parcel of land as the dominant tenement or tenements. Nor is McBride v. Freeman, 191 Cal. 152, 215 P. 678, inconsistent with the doctrine announced in the cases quoted from.

[5] The refusal of the trial court to permit the introduction in evidence of the lease covering lots 900 and 901 of Chesterfield Square, made by R. D. List to W. H. Bissell and Elmer E. Deen, was not error. Neither of the plaintiffs was shown to have consented to such lease nor to the erection of the buildings placed on such lots. Even if R. D. List were the beneficiary of Title Insurance & Trust Company, such fact would not make his unauthorized acts or declarations binding on such company in contravention of the terms or purposes of the trust, and surely could not bind the purchasers of lots, in the absence of consent or waiver by them of the conditions contained in the deeds.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

90 Cal. App. 653

CALLAWAY et al. v. WOLCOTT et al.
(Civ. 4888.)

District Court of Appeal, Second District, Division 2, California. April 10, 1928.

1. Appeal and error 🔑635(1)—Appellate court would be justified in affirming order appealed from, where appellants did not print in briefs or supplement any part of record disclosing error (Code Civ. Proc. §§ 953a–953c).

Where appeal was taken pursuant to alternative method provided for in Code Civ. Proc. §§ 953a–953c, from an order under section 473, relieving defendant from failure to file with clerk his notice pursuant to section 953a, within time therein limited, to require preparation for certification of transcript of record in prior appeal, and appellants did not print in their brief or supplement thereto any part of record except portion of affidavit made by defendant, which failed to disclose error on part of trial court, *held* appellate court would be justified in affirming order appealed from.

2. Appeal and error 🔑607(1)—Granting relief from failure to file timely notice to require preparation of transcript held not abuse of discretion, where, because of death of attorney, defendant was unaware that notice had not been filed (Code Civ. Proc. §§ 473, 953a).

Where attorney who represented defendant at trial died shortly after he filed notice of motion for new trial and defendant was informed that there was filed with clerk in connection with his appeal notice under Code Civ. Proc. § 953a, requiring preparation and presentation for certification of transcript of record, and succeeding counsel, being informed that necessary notice had been filed, did not discover failure to file it until a few days before defendant applied for relief from failure to file, *held* that, under section 473, trial court did not abuse its discretion in granting relief from failure of attorneys to file notice within time provided in section 953a; no prejudice to plaintiff appearing.

3. Appeal and error 🔑607(1)—Trial court may relieve party from excusable failure to file statutory notice for preparation of transcript in time (Code Civ. Proc. §§ 473, 953a).

Trial courts have right under provisions of Code Civ. Proc. § 473, authorizing court to relieve party against whom judgment has been taken through his surprise, etc., to relieve party from his excusable failure to file notice provided in section 953a for preparation and certification of transcript of record on appeal within time therein limited.

4. Judgment 🔑364—Trial court may relieve party from legal effects of mistakes and oversights of his attorney (Code Civ. Proc. § 473).

Under provisions of Code Civ. Proc. § 473, authorizing court to relieve party from judgment, order, etc., taken against him through his mistake, surprise, etc., trial court may relieve party from legal effect of mistakes and oversights of his attorney.

5. Appeal and error 🔑982(1)—Relief from judgment being addressed to court's discretion, order granting same will not be disturbed unless abuse clearly appears (Code Civ. Proc. § 473).

Relief under Code Civ. Proc. § 473, authorizing court to relieve party from judgment, order, etc., taken against him through his mistake, surprise, etc., being addressed to sound discretion of trial court, order granting same will not be set aside on appeal unless an abuse of discretion clearly appears.

6. Judgment 🔑392—Any doubt as to granting application for relief from judgment should be resolved in favor of application (Code Civ. Proc. § 473).

Any doubt that may exist as to granting application under Code Civ. Proc. § 473, to be relieved from judgment, order, etc., taken against party through his mistake, surprise, etc., should be resolved in favor of application, to end of securing trial upon merits.

7. Appeal and error 🔑948—All presumptions will be indulged in favor of order granting relief from judgment; burden being upon appellant to show discretion was abused (Code Civ. Proc. § 473).

On appeal from an order granting relief under Code Civ. Proc. § 473, authorizing court to relieve party against whom judgment has been taken through his surprise, neglect, all presumptions will be indulged in favor of correctness of court's action, and burden in all cases is upon appellant to make it appear that court's discretion was abused in making order.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by Emma A. Callaway and husband against N. A. Wolcott and others. From an order relieving the named defendant of his failure to file notice to require preparation of transcript, the plaintiffs appeal. Affirmed.

J. M. Fursee and Dan V. Noland, both of Los Angeles, for appellants.

Stutsman & Stutsman, of Los Angeles, for respondent.

HAZLETT, Justice pro tem. Plaintiffs appeal in this action pursuant to the alternative method provided for in sections 953a, 953b, and 953c of the Code of Civil Procedure, from an order of the trial court relieving defendant (respondent) N. A. Wolcott, under the provisions of section 473 of the Code of Civil Procedure, from his failure to file with the clerk his notice pursuant to the provisions of section 953a, within the time therein limited, to require the preparation for certification of a transcript of the record in the prior appeal which he made from the judgment entered against him in the action.

[1] However, the appellants in this appeal did not print in their briefs or in a supplement thereto any part of the record except a portion of an affidavit made by defendant

Wolcott in support of his application for the relief, which printed portion in itself is insufficient to show error on the part of the trial court in granting the relief. Respondent Wolcott's brief does not aid appellants in their appeal, for he printed no portion of the record. Therefore the record properly before us fails to show error on the part of the trial court in permitting the notice to be filed with the clerk requiring the preparation of the transcript after the time limited by section 953a.

The Supreme Court definitely announced in a very recent decision, in a case where the appeal was made pursuant to the alternative method and the appellant failed to print in his brief on appeal or in a supplement thereto any part of the record sufficient to justify a reversal, that it devolves upon the appellant to affirmatively show the existence of error upon which he asks for a review. "We are unable to say, therefore, that any error was committed by the trial court. * * * All presumptions indulged in are in favor of the regularity of the judgment and proceedings upon which it is based; hence it devolves upon an appellant to affirmatively show the existence of the error upon which he asks for a reversal. * * * It has been reiterated approximately one hundred times in the decisions of this court and of the District Courts of Appeal that it is incumbent upon an appellant who relies upon a typewritten transcript to print in his brief or in a printed supplement thereto sufficient of the record to justify a reversal of the judgment or order appealed from." Dahlberg v. Dahlberg (Cal. Sup.) 260 P. 290, and cases therein cited.

[2-7] In this appeal we would be justified in affirming the order appealed from without going further, but, in order to determine whether the adherence by this court to the strict rule of procedure would work any hardship upon appellants or deprive them of any substantial rights, we have examined the typewritten transcript of the record, and it appears therefrom that the attorney who represented defendant Wolcott at the trial and who filed a notice of motion for a new trial on his behalf, died shortly after he filed the notice of motion; that defendant Wolcott was informed that there had been filed with the clerk on his behalf in connection with his appeal from the judgment, a notice under the provisions of section 953a requiring the preparation and presentation for certification of a transcript of the record; that the motion for a new trial was denied, and defendant Wolcott was not informed until after the moton was denied that the notice to the clerk had not been filed, whereupon he requested the attorney he employed to succeed the deceased attorney to file such notice. This succeeding counsel was given a typewritten transcript of the reporter's notes taken at the trial, by one of the former attorneys of defendant Wolcott, and was informed that the necessary notice had been filed, and did not discover the failure to file it until a few days before defendant Wolcott applied to the court for relief from the failure to file the notice, which application was made about two months after notice of the order denying the motion for a new trial was given. Plaintiffs did not show that the delay of less than two months to file the notice caused them any loss or injury.

Appellants contend that the provisions of section 473 do not apply to a motion for such relief, that, as the notice under section 953a was not filed within the time therein provided, the trial court lost the power to grant the relief sought, and that the record fails to show circumstances that would constitute excusable neglect or inadvertence on the part of defendant's attorneys.

None of these contentions have merit. As to the first and second contentions, our courts have definitely held that trial courts have the right, under the provisions of section 473, to relieve a party from his excusable failure to file the notice provided for in section 953a, within the time therein limited. Stenzel v. Kronick (Cal. Sup.) 255 P. 199; Vicino v. Amador, 71 Cal. App. 604, 236 P. 369; Revert v. Hesse, 184 Cal. 295, 193 P. 943; Kammerer v. Marino, 66 Cal. App. 720, 226 P. 980.

The answer to the last contention is likewise simple. Under the provisions of section 473, the trial court may relieve a party from the legal effect of the mistakes and oversights of his attorney. Broderick v. Cochran, 18 Cal. App. 202, 122 P. 972; Mitchell v. California S. S. Co., 156 Cal. 576, 105 P. 590, and the cases above cited. An application for relief under section 473 " 'is addressed to the sound discretion of the trial court, and (the order of the court) will not be set aside on appeal unless an abuse of discretion clearly appears. Any doubt that may exist should be resolved in favor of the application, to the end of securing a trial upon the merits' [citing cases]. * * * 'All presumptions will be indulged in favor of the correctness of the court's action, and the burden in all cases is upon the appellant to make it appear that its discretion was abused in making the order.' " Hecq v. Conner (Cal Sup.) 265 P. 180.

It does not appear that the trial court abused its discretion in granting defendant Wolcott the relief from the failure of his attorneys to file the notice within the time provided in section 953a. This is particularly true, as he had a right to believe that his attorney had filed the required notice, plaintiffs showed no injury because of the short delay, and "all presumptions will be indulged in favor of the court's action."

The order is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

91 Cal. App. 64

MIRAMONTE & LOUEDESTEL CO. v. NATIONAL SURETY CO. (Civ. 6186.)

District Court of Appeal, First District, Division 1, California. April 16, 1928.

Attachment 🔑351—Attorney's fees, expended in defending attachment suit on merits, held not proper element of recovery in suit on bond.

Attorney's fees, expended in defending the original attachment suit on its merits, *held* not a proper element of recovery in suit on the attachment bond.

Appeal from Superior Court, Inyo County; William D. Dehy, Judge.

Action by the Miramonte & Louedestel Company, against the National Surety Company. From the judgment, defendant appeals. Modified, and, as modified, affirmed.

Henry E. Carter, of Los Angeles, for appellant.

A. H. Swallow and Robert Richards, both of Bishop, for respondent.

KNIGHT, J. This is an action for damages against appellant as surety on an attachment undertaking. Judgment was awarded in respondent's favor for the sum of $633.30, from which judgment the appeal is taken.

The action in which the attachment was issued and levied was brought by one O. N. Scott against respondent in Los Angeles county, and subsequently transferred to Inyo county. It was tried upon the merits in the latter county, and judgment given for respondent. No proceedings were ever taken to dissolve or vacate the attachment, and it was discharged only by virtue of the judgment rendered in respondent's favor after trial upon the merits. In the present action, the principal element of damages for which allowance was made consisted of an item of $500 for attorney's fees expended in defending the attachment suit on the merits; and the sole question presented for determination is whether under the circumstances stated the item of attorney's fees constituted a proper element of damage. This identical question was raised in the recent case of Soule v. United States Fidelity & Guaranty Co. (Cal. App.) 255 P. 886, and the authorities cited and relied upon by respondent herein as sustaining the trial court's action were therein reviewed. In deciding the point it was said:

"We are of the opinion that in actions of the character of the instant case, as in analogous cases of suits on injunction bonds, the rule established by the weight of authority limits the recovery of attorneys' fees to those paid for procuring a dissolution of the attachment; and that, as said in Mitchell v. Hawley, 79 Cal. 301, supra, the allowance of such fees is exceptional, and the rule should not be extended to include counsel fees paid in defense of the principal suit."

Therefore, upon the authority of that case, and for the reasons therein stated, the judgment in the present case is modified by deducting therefrom the sum of $500 representing the expenditure for attorney's fees, and, as thus modified, the judgment will stand affirmed, appellant to recover its costs on appeal.

We concur: TYLER, P. J.; CASHIN, J.

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91 Cal. App. 16

GENERAL SECURITIES CORPORATION v. REO MOTOR CAR CO. OF CALIFORNIA. (Civ. 5800.)★

District Court of Appeal, Second District, Division 1, California. April 12, 1928.

Hearing Denied by Supreme Court June 11, 1928.

1. Sales 🔑473(1)—Defendant conditionally selling automobile to dealer, and allowing him to resell under conditional sales contract bought by plaintiff, cannot assert title against plaintiff (Civ. Code, §§ 2317, 3543).

Where defendant, after selling automobile under conditional sales contract to dealer, allowed dealer with apparent title to resell under conditional sales contract, which was bought by plaintiff, defendant cannot assert title against plaintiff, notwithstanding that investigation by plaintiff would have disclosed that automobile was not registered in dealer's name, since dealer had ostensible authority within Civ. Code, § 2317, and under section 3543 innocent person whose negligence caused loss must suffer, notwithstanding general rule that buyer under conditional sales contract in which title is expressly reserved cannot, in subsequent sale, grant any better title than he himself has.

2. Sales 🔑473(1)—Conditional seller of automobile authorizing resale cannot complain, as against innocent third person, that dealer did not advise him of resale (Civ. Code, § 1142).

Where defendant selling automobile under conditional sales contract to dealer gave dealer express authorization to resell, he cannot, under Civ. Code, § 1142, complain, as against innocent purchaser of dealer's conditional sale contract, that dealer did not keep good faith by advising him before resales were actually made.

3. Sales 🔑473(1)—Buyer of conditional sales contract covering automobile held not put on notice of seller's defective title, where in assignment seller warranted title.

Plaintiff purchasing conditional sales contract from seller of automobile *held* not put on notice as to defect in seller's title by language of assignment in which dealer assigned his "right, title, and interest" in contract and automobile, where in such assignment dealer also guaranteed, warranted, and defended title of the property conveyed, and that he was owner of full and complete title.

★Hearing denied by Supreme Court.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action of claim and delivery of an automobile by the General Securities Corporation against the Reo Motor Car Company of California. Judgment for plaintiff, and defendant appeals. Affirmed.

Loyd Wright and Charles E. Millikan, both of Los Angeles, for appellant.

W. W. Hindman, of Los Angeles, for respondent.

WOOD, Justice pro tem. Defendant was at the time of the transaction which gave rise to this litigation, engaged in the business of selling automobiles to dealers, and plaintiff was engaged in the business of buying conditional sale contracts on automobiles from dealers who were selling automobiles to purchasers on such contracts. The car handled by defendant was known as the "Reo," and one F. S. Stewart was the Reo dealer in the city of Santa Barbara. Stewart conducted a business establishment in that city in which he was engaged in the business of buying and selling automobiles, and in which he displayed automobiles for sale to the general public. On January 23, 1922, defendant sold to F. S. Stewart the automobile described in the complaint by conditional sale contract. This automobile was delivered to Stewart and by him displayed for sale in his place of business at Santa Barbara. On February 8, 1922, Stewart drew up a conditional sale contract purporting to sell the car to one L. C. Simmons, the contract reciting a valuable consideration. Thereafter Stewart, in the ordinary course of business and for a valuable consideration, sold the Simmons conditional sale contract to plaintiff. At that time plaintiff did not know that Stewart did not own the automobile or that it had been purchased under conditional sale contract by Stewart, but believed that Stewart was the owner of the automobile and entitled to sell it. Most of the facts are stipulated by the parties. The court found, upon evidence which fully sustains the findings:

> "That during said period of time said F. S. Stewart bought from the defendant herein many Reo automobiles on conditional sales contract, and that defendant during all of said times knew of, permitted, allowed, and directed the said F. S. Stewart to resell in his own name on conditional sales contract to the general public cars which it, the said defendant, had sold to him, the said F. S. Stewart, on conditional sales contract before he, the said F. S. Stewart, had paid it, the said defendant herein, the balance due on said conditional sales contract, and permitted and allowed the said F. S. Stewart during all of said times to hold himself out to the general public as being owner of and also as being entitled to sell said cars in his own name, and convey clear title thereto. That the said F. S. Stewart, with the knowledge of the defendant, did not have sufficient money or means to finance or carry on his business or to pay the defendant for cars purchased by him on conditional sales contract or otherwise, without reselling such cars so purchased and selling all conditional sales contracts taken by him, the said F. S. Stewart, on the resale of said cars to the general public. That this defendant knew at all of said times that the said F. S. Stewart was in his own name reselling all of the cars sold to him by it on conditional sales contract to the general public on conditional sales contract, and in order to obtain money to pay the balance due it, the said defendant, he, the said F. S. Stewart, was selling said conditional sales contracts so taken by him in his own name on such resales to some finance company, who was in the business of purchasing paper of that kind, and that during said period of time he did sell to the plaintiff herein many of said conditional sales contracts and turned over the money received therefrom to the defendant herein to be applied upon his said indebtedness to it."

Both the contract by which Stewart purchased from defendant and the contract by which Stewart purported to sell to Simmons provided that the title to the car should be retained by the respective sellers until the purchase price thereof should be paid. On March 1, 1922, Stewart was in default in the payment of the balance of the purchase price due on his contract, and the defendant took possession of the automobile which it thereafter sold to one Weise. No payments were made on the contract sold to the plaintiff, and at the time of the commencement of the action many payments were due and unpaid. The trial court gave plaintiff judgment for the value of the car, and from this judgment defendant appeals.

[1] Defendant rests upon the general rule that "a vendee of personal property, under conditional sales contract in which title is expressly reserved and remains in the vendor, cannot, in a subsequent sale, grant or sell any better title than he himself has." Ample authority can be found for this rule. Authorities are equally numerous, however, in holding that, "where the owner of the property clothes another with the apparent title to or power of disposition over it, and an innocent third party has thereby been induced to deal with the apparent owner in reference thereto," the true owner in such case is estopped from afterward asserting his title. Chase v. Whitmore, 68 Cal. 545, 9 P. 942. Section 2317 of the Civil Code provides:

> "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess."

In Shirey v. All Night and Day Bank, 166 Cal. 50, 134 P. 1001, the court said:

> "Where the true owner holds out another, or allows him to appear as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they

will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power, which through negligence, or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."

See Schultz v. McLean, 93 Cal. 329, 28 P. 1053; Gardiner v. McDonogh, 147 Cal. 313, 81 P. 964; Chucovich v. S. F. Securities Corp., 60 Cal. App. 700, 214 P. 263.

It was held in Carter v. Rowley, 59 Cal. App. 486, 211 P. 267, that, where the owner of an automobile, knowing that a certain dealer is engaged in the business of selling secondhand cars, delivers his car to said dealer for the purpose of finding a purchaser, he thereby clothes said dealer with such indicia of authority to sell the car as usually accompanies such authority according to the custom of trade and the general understanding of business men, and he cannot recover the machine from an innocent purchaser from said dealer on the latter's premises, even though said dealer exceeded his authority in making the sale. The court said:

> "As between two innocent persons, one of whom must suffer, the loss should fall on the principal who has armed the agent with apparent authority and thus has enabled him to obtain the advantage of the person with whom he trades, rather than on the purchaser, where the agent acts within the apparent scope of his authority and there is nothing in the transaction to put the purchaser on notice that the agent is exceeding his authority."

Section 3543 of the Civil Code provides:

> "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer."

In the case at bar the owner of the automobile placed it in the hands of a dealer who was engaged in the business of buying and selling automobiles and authorized him to place it on sale to the general public. Defendant undoubtedly allowed Stewart to appear as the owner of the car, or at least as having "full power of disposition" over it. Plaintiff had no notice whatever of any claim of ownership by any one other than Stewart. Plaintiff was undoubtedly an innocent party in the transaction and its rights should be protected. If Stewart failed in his duty toward defendant, the responsibility does not rest with plaintiff, who was dealing with Stewart at arms' length. Defendant cannot escape liability by showing that an investigation on the part of plaintiff would have disclosed that the automobile was not registered in Stewart's name. We know of no rule which, in the absence of circumstances putting him on guard, requires the purchaser of personal property from a dealer at a regularly established place of business to commence an investigation to determine the status of the title of the dealer having possession of the article offered for sale.

[2] Under the findings of the trial court and the facts as proved at the trial, defendant not only vested Stewart with ostensible authority to sell the automobile, together with the conditional sale contract thereon, but gave him absolute authority to do so. The treasurer of defendant company testified that for a long period of time Stewart was buying cars from defendant on conditional sale contracts, and was in turn reselling them on conditional sale contracts with the knowledge and consent of the officials of defendant company. The witness knew that it was necessary for Stewart to conduct his business in this way for financial reasons. The plan was agreed to by the defendant, but with the promise on the part of Stewart, so the witness testified, that defendant would be advised before the resales were made by Stewart. It thus appears that express authorization was given Stewart by defendant to resell the cars by the method followed in the instant case. Defendant is not now in position to complain if Stewart did not keep good faith by advising defendant before the resales were actually made. Section 1142, Civil Code, provides:

> "Where the possession of personal property, together with a power to dispose thereof, is transferred by its owner to another person, an executed sale by the latter, while in possession, to a buyer in good faith and in the ordinary course of business, for value, transfers to such buyer the title of the former owner, though he may be entitled to rescind, and does rescind, the transfer made by him."

[3] Defendant contends that plaintiff was put upon notice by the language of the assignment of the Simmons contract in which Stewart assigned to plaintiff his "right, title and interest" in and to the contract and to the automobile. It is a complete answer to this contention to point out that in the assignment Stewart further says:

> "I further guarantee, warrant, and defend the title of said property hereby conveyed * * * and that the undersigned, party of the first part, is the owner of the full and complete title to said property."

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

91 Cal. App. 22

GENERAL SECURITIES CORPORATION v. REO MOTOR CAR CO. OF CALIFORNIA. (Civ. 4679.)

District Court of Appeal, Second District, Division 1, California. April 12, 1928.

1. Sales 🔑473(1)—Seller of automobile under conditional sales contract, authorizing buyer to represent himself as owner for purpose of resale, cannot assert title as against innocent third person dealing with buyer.

Seller of automobile under conditional sales contract, who authorized buyer to resell and to represent himself as owner for such purpose, cannot assert his title as against innocent third person dealing with buyer.

2. Replevin 🔑8(3)—Right to possession determines right to relief in claim and delivery action.

Where pleadings show that action is one of claim and delivery, right to possession determines right to demand relief asked.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action of claim and delivery of an automobile by the General Securities Corporation against the Reo Motor Car Company of California. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

W. W. Hindman, of Los Angeles, for appellant.

Dave F. Smith, of Los Angeles, for respondent.

WOOD, Justice pro tem. Plaintiff and defendant presented to the trial court a stipulation of facts upon which the court rendered judgment for defendant. In its findings the court adopted the language of the stipulation, omitting certain exhibits referred to therein. The findings are as follows:

"First. That the plaintiff herein is a corporation, organized under the laws of the state of California; that it is now, and has been for some years last past, engaged in the buying of conditional sales contracts on automobiles from dealers, who sell automobiles on conditional sales contracts and dispose of said paper.

"Second. That defendant has been for some years last past engaged in the selling in the state of California and elsewhere of automobiles known as the Reo, and that it maintains an office in the city of Los Angeles, state of California, for that purpose.

"Third. That F. S. Stewart was, during the year 1921 and a part of the year 1922, in the city of Santa Maria, state of California, engaged in the business of buying and selling automobiles, and during said time he had a place of business in said city, where he displayed such automobiles to the general public for sale, and during said period of time he bought many automobiles and sold the same to the general public in the ordinary course of business; all of which facts both the plaintiff and defendant knew.

"Fourth. That during said period of time the said F. S. Stewart bought from the defendant herein several Reo automobiles, for cash and on conditional sales contracts, and sold them to the general public, with the knowledge of defendant.

"Fifth. That on the 8th day of November, 1921, the defendant herein delivered to said F. S. Stewart the car in litigation herein, on a conditional sales contract.

"Sixth. That said automobile was taken by the said F. S. Stewart of Santa Maria, displayed in his place of business for sale, and was on the 30th day of December, 1921, in the ordinary course of business, sold to one L. W. Clark, for valuable consideration, and on a conditional sales contract.

"Seventh. That on the said 30th day of December, 1921, and in the ordinary course of business, said conditional sales contract last above mentioned was for a valuable consideration sold to plaintiff herein by the said F. S. Stewart.

"Eighth. That prior to the purchasing of said contract plaintiff had its agent at Santa Maria ascertain that the said F. S. Stewart was in possession of said automobile on the said 30th day of December, 1921, and that he had sold the same to the said L. W. Clark on said date under said conditional sales contract.

"Ninth. That neither the said L. W. Clark or this plaintiff knew on the said 30th day of December, 1921, or for some time thereafter, that the said F. S. Stewart did not own the said automobile, or that it had been purchased under said conditional sales contract from defendant, but believed that the said F. S. Stewart was the owner thereof, and entitled to sell the same.

"Tenth. That thereupon, and on said 30th day of December, 1921, the plaintiff and the said L. W. Clark had said automobile registered with the motor vehicle department of the state of California.

"Eleventh. That the said L. W. Clark was in possession and use of said automobile for about three months, when it was taken to a garage, (connected with the place of business of the said F. S. Stewart, but not owned or operated by him), for repairs; that defendant prior to the commencement of this action, found the said automobile at said place and took possession of the same.

"Twelfth. That all damages caused by the detention of said automobile are hereby waived.

"Thirteenth. That defendant, before taking said automobile, demanded the balance due on the conditional sales contract from F. S. Stewart.

"Fourteenth. That said defendant has never been paid by any one the balance due on said conditional sales contract."

[1] On these findings the court erred in concluding that defendant was entitled to the possession of the property referred to therein. We have this day filed our decision in General Securities Corporation v. Reo Motor Car Co., civil No. 5800, 266 P. 576, in which it is held, on facts quite similar to the facts in the present case, that the defendant was not en-

titled to the possession of the automobile. In that case the same dealer, F. S. Stewart, had sold a car under circumstances showing that he had been given at least ostensible authority to make the sale as the owner. From the stipulation in the case now before us, it is manifest that the defendant impliedly, if not expressly, authorized Stewart to sell the car to the public and to represent himself as its owner for this purpose. In the case above referred to, our civil No. 5800, the law applicable to these facts is discussed at some length. It is not necessary to repeat the discussion here other than to point out that there is ample authority to support the rule that "where the owner of the property clothes another with the apparent title to or power of disposition over it, and an innocent third party has thereby been induced to deal with the apparent owner in reference thereto," the true owner in such case is estopped from afterward asserting his title. Chase v. Whitmore, 68 Cal. 545, 9 P. 942; Shirey v. All Night and Day Bank, 166 Cal. 50, 134 P. 1001; Schultz v. McLean, 93 Cal. 329, 28 P. 1053; Gardiner v. McDonogh, 147 Cal. 313, 81 P. 964; Carter v. Rowley, 59 Cal. App. 486, 211 P. 267; Chucovich v. F. S. Securities Corp., 60 Cal. App. 700, 214 P. 263; Civ. Code, § 2317.

[2] Judgment cannot be rendered for the plaintiff on the findings of the trial court and upon the record as it comes from the lower court, for the reason that it is not disclosed whether Clark, the purchaser of the car, was in default in his payments at the time of the commencement of the action. This point is not mentioned in the briefs, and was doubtless inadvertently omitted by counsel. If Clark had made all his payments, he would have been the proper party to sue; otherwise the plaintiff had a right of action. The pleadings show that the action is one of claim and delivery. Therefore the right to possession determines the right to demand the relief asked. The record is incomplete in other particulars. It cannot be determined therefrom in whose possession the car was left upon the rendition of the judgment and pending appeal. The record is silent as to the value of the property. We have only the allegation in the complaint that the car at the time of the commencement of the action was of the value of $2,000, and the allegation in the cross-complaint that its value was only $1,650.

By a stipulation recently filed in this court, the information necessary to a termination of the litigation has been furnished. It appears therefrom that the car in question was on March 17, 1922, of the value of $1,650; that L. W. Clark was in default in his payments on said contract on March 17, 1922; and that the car has been sold under stipulation and the proceeds of the sale deposited in a bank pending the outcome of the litigation.

It is therefore ordered that the judgment be, and it is hereby reversed, with directions to the superior court to render judgment in favor of the plaintiff for $1,650, with interest thereon from March 17, 1922.

We concur: HOUSER, Acting P. J.; YORK, J.

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91 Cal. App. 796

PALATINE INSURANCE COMPANY, Plaintiff and Respondent, v. REO MOTOR CAR COMPANY OF CALIFORNIA, Defendant and Appellant. (Civ. 5799.)★

District Court of Appeal, Second District, Division 1, California. April 12, 1928.

Hearing Denied by Supreme Court June 11, 1928.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Loyd Wright and Charles E. Millikan, both of Los Angeles, for appellant.

W. W. Hindman, of Los Angeles, for respondent.

WOOD, Justice pro tem. This action was tried in the superior court at the same time as the case of General Securities Corporation v. Reo Motor Car Co. of California, Civil No. 5800, in which our opinion is this day filed, 266 P. 576. The facts are the same in the two cases except that in the instant case F. S. Stewart, the Reo dealer at Santa Barbara, executed a conditional sale contract for the automobile in question in favor of R. B. Stewart, reserving title in himself until the purchase price should be paid. Defendant sold and delivered to F. S. Stewart the automobile in question on January 24, 1922, by conditional sale contract in which title was reserved in defendant. F. S. Stewart displayed the automobile for sale in his place of business at Santa Barbara until February 1, 1922, when he sold to the General Securities Corporation the said conditional sale contract in which R. B. Stewart was the purchaser. R. B. Stewart was the wife of F. S. Stewart, but this fact did not appear in the document. The plaintiff in the present action carried insurance on the automobile at the instance and request of the General Securities Corporation, and has paid the General Securities Corporation a loss pursuant to the contract of insurance. Prior to the commencement of the action the General Securities Corporation assigned to plaintiff its rights under the contract. On February 12, 1922, F. S. Stewart was in default in his payment to defendant, and upon demand he delivered the automobile to defendant on February 27, 1922, by storing it in a garage in Los Angeles and sending the ticket to the defendant. Thereafter, defendant received the automobile from the garage where it had been stored. R. B. Stewart defaulted in the payments due under the contract sold to General Securities Corporation. The trial court rendered judgment in favor of plaintiff for the possession of the automobile or the sum of $1,500, the value thereof, in case delivery could not be had, and from this judgment defendant appeals. Other facts necessary to the consideration and decision of this appeal are the same as the facts in the case of General Securities Co. v. Reo Motor Car Co., supra. The same rules of law govern both cases.

For the reasons therein stated, the judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

★Hearing denied by Supreme Court.

91 Cal. App. 44

PEOPLE v. EGAN. (Cr. 1440.)

District Court of Appeal, First District, Division 1, California. April 13, 1928.

1. Assault and battery 🔑74—Charge by information held substantially to conform to definition of assault so as to be sufficient to charge such crime (Pen. Code, § 240).

In prosecution for assault with intent to rape, wherein defense was that allegations of information were insufficient to charge an assault, *held* that since it could easily be gathered from such allegations that defendant was charged with having willfully and unlawfully attempted, coupled with then present ability, to commit a violent injury upon the person of another, the charge substantially conformed to definition of an assault as given in Pen. Code, § 240, so as to be sufficient to charge such crime.

2. Assault and battery 🔑96(1)—Restricting issue to "simple assault" held not error on ground no such crime existed; "simple assault" being "an assault."

Where the information charged assault with intent to commit rape, court's restricting issue to "simple assault" *held* not error on ground no such crime existed; "simple assault" meaning, because of common usage, "an assault."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Simple Assault.]

3. Criminal law 🔑543(2)—Court held not to have abused discretion in permitting deposition of absent prosecuting witness, taken at preliminary examination, to be read at trial (Pen. Code, § 686, subd. 3).

In prosecution for assault with intent to commit rape, court *held* not to have abused discretion in finding that prosecuting witness could not, with due diligence, be found within state, and consequently permitting, under Pen. Code, § 686, subd. 3, deposition of such prosecuting witness, taken at the preliminary examination, to be read at trial.

4. Criminal law 🔑1169(2)—Judgment of conviction held not reversible even if admission of deposition was improper where evidence was ample to support verdict.

In prosecution for assault with intent to commit rape, wherein admission of deposition of prosecuting witness, taken at preliminary trial, was objected to, *held* on review that even if the admission of such deposition was error because of sufficient grounds not having been laid for its admission, judgment should not be reversed on that ground alone, where evidence was ample to prove assault.

5. Assault and battery 🔑83—Excluding testimony offered by defendant as to previous relations with prosecuting witness held not error, where charge of assault with intent to commit rape was treated as simple assault.

Where, in prosecution under information charging defendant with having committed an assault with intent to commit rape, the charge of an assault with intent to commit rape was eventually eliminated and prosecution proceeded on ground of simple assault, there was no error in court's excluding testimony sought to be given by defendant as to his previous relations with prosecuting witness.

6. Criminal law 🔑768(1)—Defendant calling witnesses dirty liars and vile names held not entitled to instruction that jury should not be prejudiced against him because of outbursts.

Sane defendant calling witnesses dirty liars and calling one witness a vile name during trial *held* not entitled to instruction that jury should not be prejudiced against him because of outbursts.

7. Criminal law 🔑808½—Instruction on impeachment of witnesses held not erroneus where in statutory language (Code Civ. Proc. § 2051).

Instruction relative to impeachment of witnesses, containing no indication that it was directed toward any particular witness, *held* not erroneous, where given in identical language of Code Civ. Proc. § 2051.

8. Criminal law 🔑808½—Court's reading to jury Penal Code provision held not error. since provision merely codified pre-existing legal principles on which juries have been instructed (Pen. Code, § 1096, as amended by St. 1927, p. 1039).

In prosecution for assault with intent to commit rape, court's reading to jury section 1096 of the Penal Code as amended by St. 1927, p. 1039, *held* not error, for the reason that the section as amended merely codified the legal principles upon which juries have been instructed for years.

9. Criminal law 🔑750—Where criminal charge included lesser offense, court could confine issue to lesser offense included in greater.

Since the charge in prosecution of assault with intent to commit rape included the lesser offense of an assault, trial court had power to confine the issue to such lesser offense.

10. Criminal law 🔑1168(6)—If court erred in confining issue of defendant's guilt to lesser offense included within greater, defendant, being benefited thereby, could not complain.

If the court erred in confining issue of defendant's guilt to a lesser offense included within the greater, defendant, being benefited thereby, could not complain.

Appeal from Superior Court, City and County of San Francisco; Raglan Tuttle, Judge.

Peter George Egan was convicted of simple assault, and he appeals. Affirmed.

Ernest Spagnoli, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the State.

KNIGHT, J. Appellant was charged by information with having committed an assault with intent to commit rape. At the conclusion of the evidence the court withdrew from the consideration of the jury the higher grade of crime charged and restricted the issue to "simple" assault by submitting to the jury but two forms of verdict, one reading, "Guilty of misdemeanor, to wit, simple assault;" and the other, "Not guilty." The jury agreed upon and returned the former, and appellant was sentenced to imprisonment in the county jail, and thereafter took this appeal from the judgment of conviction.

Briefly stated, the facts established at the trial by the prosecution were as follows: The appellant and the prosecutrix, a Mrs. Ethel Schmilk, occupied different living apartments in the same building. Appellant had entertained some friends at a party held in his apartment during the night, and the next morning about 9:30 o'clock, while still intoxicated, went to the apartment occupied by the prosecutrix, dressed only in his underclothes, knocked at the door, and when the prosecutrix, who was fully dressed, having just come in from shopping, opened the door appellant seized her and started to force her down the hallway toward his room. She screamed and during the struggle which followed she was either knocked or fell to the floor. Appellant tried to muffle her screams, but finally released her and she ran into the street. Some of the neighbors heard her screams and came to her assistance. They summoned two police officers, and upon the arrival of the latter appellant was found in his room partially disrobed, and in conversation with the officers admitted having acted in the manner described by the prosecutrix and stated the purpose he had in mind in attempting to force her into his room. He was placed under arrest and later formally charged with an assault with intent to commit rape.

[1, 2] The first contention made is that the allegations of the information are insufficient to charge an assault and that there is no such crime as "simple" assault of which appellant was convicted. We find no merit in either point. It may be easily gathered from the allegations of the information that appellant was charged with having willfully and unlawfully attempted, coupled with a present ability, to commit a violent injury upon the person of another, and consequently the charge substantially conformed to the definition of an assault as given in section 240 of the Penal Code. As to the second point, although the Penal Code does not employ the appellation "simple" assault in denouncing as a crime the acts mentioned in said section 240, still, ever since the rendition of the decision in the early case of People v. Apgar, 35 Cal. 389, in the year 1868, the term "simple assault" has been repeatedly used synonymously with the term "assault" in the administration of the criminal laws, particularly by trial courts in charging juries and by the reviewing courts on appeals in differentiating between assaults which amount only to misdemeanors and those committed with felonious intent; so that by common usage the term "simple assault" has long since been understood to mean the same thing as "an assault." The case of People v. St. Clair, 56 Cal. 406, cited and relied upon by appellant, does not touch the point. There the defendant was charged with the burglarious entry into a building with intent to commit "larcey" instead of "larceny"; and it was held in substance that since there was no such crime as "larcey" (nor in fact any such word), the charge against the accused was meaningless. Moreover, the record in the present case shows that after the jury had been deliberating a short time, it returned into court and requested an instruction defining simple assault; and, in response, appellant consenting, the court read to the jury section 240 of the Penal Code defining "an assault," and amplified it with other instructions; consequently there could have been no misunderstanding on the part of the jury as to the nature of the charge.

[3, 4] On account of the absence of the prosecutrix from the trial, the prosecution was allowed, over appellant's objection, to read in evidence her deposition taken at the preliminary examination (subdivision 3, § 686, Penal Code), at which time her testimony was taken down by question and answer, appellant being present and represented by counsel, who cross-examined said witness. The substance of the proof adduced as the foundation for the introduction in evidence of said deposition was as follows: Rachel Katz, a close friend of the prosecutrix for 20 years, testified that during the month preceding the trial, which took place on October 26, 1927, Mrs. Schmilk stayed at her apartment, and upon departing went to New York; that later, and on September 23d, she received a letter from Mrs. Schmilk which she knew was in the latter's handwriting, purporting to come from and the same was postmarked "New York"; that she knew Mrs. Schmilk well enough to know that if the latter had returned to California she would have let her know. Further testimony was given by a police officer to the effect that about two weeks prior to the trial he had been given a subpœna to serve upon Mrs. Schmilk, but after a search had been unable to find her; that, although he had not visited any hotels or rooming houses in the city, he had searched for her at her former address and had made inquiries as to her whereabouts from her friends and former neighbors; that he had possession of the subpœna for about a week, and during the week preceding the trial had continued his search by going around the neighborhood where she formerly lived. From the foregoing evidence we are not prepared to hold that the trial court abused

its discretion in permitting the deposition to be read in evidence (People v. Lewandowski, 143 Cal. 574, 77 P. 467; People v. Buckley, 143 Cal. 375, 77 P. 169; People v. Caballero, 41 Cal. App. 146, 182 P. 321); and in any event, even though the deposition should have been excluded, the judgment should not be reversed upon that ground alone for the reason that, aside from the testimony of Mrs. Schmilk, the evidence is ample to prove an assault (People v. Hayes, 72 Cal. App. 292, 237 P. 390).

[5] In view of the fact that the charge of an assault with intent to commit rape was eventually eliminated from the case, there was no error in the court's ruling excluding the testimony sought to be given by appellant as to his previous relations with Mrs. Schmilk.

[6] Nor do we find any merit in appellant's contentions regarding the instructions. While one of the police officers was testifying, appellant loudly shouted at him, "You're a dirty liar," and called him a vile name; and while one of the women witnesses for the prosecution was testifying, appellant likewise shouted at her that she was a "dirty liar." At the conclusion of the evidence appellant requested the court to give the jury the following instruction: "You are not to be prejudiced against the defendant or his defense because of any outbursts made by him during the course of the trial." We think the instruction was properly refused, for if a defendant on trial, who does not claim to be insane, conducts himself at the trial in the presence of the jury in such a disorderly manner as to lessen the respect the jury would otherwise have for him, he must not expect and much less is he entitled to have the court in its instructions apologize for him.

[7-10] There was nothing contained in the instruction given upon the subject of impeachment of witnesses indicating that it was directed toward any particular witness. It was given in the identical language of section 2051 of the Code of Civil Procedure, and was therefore proper. Nor was it error for the court to read to the jury section 1096 of the Penal Code, as amended in 1927 (St. 1927, p. 1039), for the reason that the section as amended merely codified the legal principles upon which juries have been instructed for years. The charge made in the information included the lesser offense of an assault, and therefore it was within the power of the trial court to confine the issue of appellant's guilt to the lesser offense. If in doing so a mistake was made, appellant was benefited by it and consequently he is not in a position to complain.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

90 Cal. App. 792

MOORE GROCERY CO. v. LOS ANGELES NUT HOUSE et al. (Civ. 5083.)

District Court of Appeal, Second District, Division 2, California. April 11, 1928.

1. Appeal and error 🔑939—Mere appearance of respondent's attorneys at time judge other than one trying case certified transcript held not to authorize assumption that respondent acquiesced therein (Code Civ. Proc. § 953a).

Court of Appeal cannot presume that respondent consented and acquiesced in certification of transcript by judge other than one who tried case contrary to Code Civ. Proc. § 953a, by its appearance in court at the time, and apply rules of Civ. Code, §§ 3515 and 3516, where only record is extract from clerk's minutes merely showing fact of appearance of respondent's attorneys.

2. Appeal and error 🔑612(1)—Requiring judge who tried case to certify record does not require an "idle act" (Code Civ. Proc. § 953a; Civ. Code, § 3532).

To require trial judge who tried case while sitting temporarily to certify transcript, as required by Code Civ. Proc. § 953a, cannot be said to require an "idle act" within Civ. Code, § 3532, which the law does not require.

3. Appeal and error 🔑612(1)—Evidence is not presented for review, where transcript was not certified by judge trying case (Code Civ. Proc. § 953a).

Where transcript was not properly certified by judge who tried case, as required by Code Civ. Proc. § 953a, there is nothing presented from which a review of the evidence can be made.

Appeal from Superior Court, Los Angeles County; George F. Buck, Judge.

Action for damages for breach of contract by the Moore Grocery Company against the Los Angeles Nut House, a copartnership, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

E. F. Gerecht and C. W. Hall, both of Los Angeles, for appellants.

Hunsaker, Britt & Cosgrove and Robert B. Murphey, all of Los Angeles, for respondent.

VALENTINE, Justice pro tem. This was an action for damages for breach of contract. Judgment was rendered for plaintiff for $1,500 and costs, and from this judgment defendants appeal.

Respondent contends that, upon the record presented, none of the appellants' contentions can be considered because the reporter's transcript on file is not properly authenticated, in that it was not certified by the trial judge, as required by section 953a of the Code of Civil Procedure.

The case at bar was tried and decided, and the findings and judgment signed by Hon.

George F. Buck, a judge of the superior court of San Joaquin county, sitting temporarily in department 24 of the superior court in Los Angeles county, who then returned to San Joaquin county. A motion for a new trial was made in said department 24 and heard by Hon. Walter Guerin, whose regular department it was. Subsequently, defendants appealed and noticed the settlement of the reporter's transcript before the said Judge Guerin in said department 24, whereupon the following entry was made in the clerk's minutes:

> "Moore Grocery Co. v. L. A. Nut House et al. Case Called. Hunsaker, Britt & Cosgrove by A. L. Keister appearing for pltff. and E. F. Gerecht by phone consenting the reporter's transcript is settled, allowed and filed as record in this case,"

—and the said reporter's transcript was signed and certified to by said Judge Guerin.

In Bell v. Brigance, 194 Cal. 445, 229 P. 27, the court, after remarking that section 953a of the Code of Civil Procedure does not require that the judge who tried the case shall certify to the truth and correctness of the transcript, says:

> "But we may assume, for reasons at once apparent without stating them, that such was the intention of the Legislature."

In the case at bar the record contains an affidavit of Judge Buck, who tried the case, as follows:

> (Title and venue.)
>
> "George F. Buck, being first duly sworn, deposes and says: That on December 2, 1924, and for some time prior thereto and at all times since, he has been, and is now, a duly elected, qualified, and acting judge of the superior court of the county of San Joaquin, state of California; that he presided at the trial of the above-entitled action in department 24 of the superior court of Los Angeles county, on December 2, 1924, and as such presiding judge signed the findings of fact and conclusions of law and judgment in said action, which were filed with the clerk of the superior court for the county of Los Angeles, state of California, on or about December 9, 1924.
>
> "That no request has ever been made upon him, nor has he ever refused, to certify to the truth and/or correctness of any reporter's transcript of the evidence introduced and proceedings had at the trial of said action or of any reporter's transcript prepared or attempted to be prepared in accordance with section 953a of the Code of Civil Procedure; that he has not been removed from office, and has not resigned his office as judge of the superior court of said San Joaquin county, nor was he absent from the state of California at any time between December 2, 1924, and the date of the making of this affidavit. That at no time has he become disqualified to certify to any reporter's transcript prepared or attempted to be prepared under section 953a, C. C. P., in connection with the above-entitled case. That he is not a party to the above-entitled case, nor is he, nor has he ever been, interested therein in any way, directly or indirectly. That he is not, nor has he ever been, related to any of the parties to said action, or to any attorney, counsel or agent of any of the parties to said action by consanguinity or affinity within the third degree, or otherwise or at all. That he has never been attorney or counsel for any of the parties to said action either in the above-entitled case or proceedings or in any other previous action or proceeding involving any of the same issues, or otherwise, or at all. That he has never given advice to any of the parties in said action upon any matter involved in the said action or proceeding. That he has never had any bias or prejudice against any of the parties to said action.
>
> "[Signed] George F. Buck."
>
> (Verification.)

[1] Appellants argue that respondent consented to, and acquiesced in, the act of Judge Guerin in certifying the transcript by their appearance in court at that time. The only record as to this before us is the extract from the clerk's minutes quoted above from which nothing appears except the fact of the appearance of respondent's attorneys, and there is nothing upon which to base even a presumption that they consented or acquiesced, and to apply the rules laid down by sections 3515 and 3516 of the Civil Code, cited by appellants.

[2] Appellants finally argue that to have required Judge Buck to have returned to Los Angeles for the purpose of certifying the record would have been "an idle act," and that section 3532 of the Civil Code provides that "the law * * * does not require idle acts." But it can scarcely be successfully contended that to require compliance with a Code provision and a rule of the Supreme Court is an idle act and non constat, but that Judge Buck, who was familiar with the evidence, rulings, acts, or statements of the court during the trial, might have refused to certify to the correctness of the transcript. These Code provisions and the rule of the Supreme Court are based upon substantial and real reasons, and are not merely technical, and to require compliance with them cannot correctly be called an idle act.

[3] There is therefore nothing presented from which a review of the evidence can be made. We find no assignment of error by appellants that the findings do not support the judgment. Examining the judgment roll, we find no error which will warrant a reversal being ordered. The findings of the court seem to support the judgment and to have been within the issues made by the pleadings. Yount v. Arakalian Bros. Co., 26 Cal. App. 472, 147 P. 467.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

90 Cal. App. 700

Ex parte HECKMAN. (Cr. 1025.)★

District Court of Appeal, Third District, California. April 6, 1928.

Hearing Denied by Supreme Court May 31, 1928.

1. Prisons 🔑9—Technical rules of pleading do not apply to proceeding before prison directors.

Technical rules of pleading, to be enforced when prisoner is charged with offense and brought to trial before a jury, do not apply to proceeding before board of prison directors.

2. Prisons 🔑9—Prison directors act under authority of state laws as interpreted by state courts.

The board of prison directors acts under authority of the laws of California as interpreted by the courts thereof.

3. Prisons 🔑15—Prison directors may forfeit credits of paroled prisoner arrested on charge of violating Harrison Narcotic Act, though acquitted by federal court because of officers' search of his room without warrant (St. 1913, p. 1048, § 1½, as added by St. 1915, p. 981; Pen. Code, § 1588).

Under Pen. Code, § 1588, board of prison directors, irrespective of parole law, St. 1913, p. 1048, § 1½, as added by St. 1915, p. 981, may forfeit credits of prisoner arrested on charge of violating Harrison Narcotic Act (26 USCA §§ 211, 691–707; U. S. Comp. St. §§ 6287g–6287q) while on parol, though acquitted in federal court because of federal officers' search of his room without warrant; commission of crime not being disproved by searching officers' want of authority.

4. Habeas corpus 🔑92(1)—Sufficiency of testimony to justify prison directors' forfeiture of credits for violating parole cannot be considered on habeas corpus (St. 1913, p. 1048, § 1½, as added by St. 1915, p. 981; Pen. Code, § 1588).

Whether testimony before board of prison directors was sufficient to justify forfeiture of prisoner's credits for violating terms of parole under St. 1913, p. 1048, § 1½, as added by St. 1915, p. 981, Pen. Code, § 1588, cannot be considered by Court of Appeal on habeas corpus proceeding for discharge from prison warden's custody.

5. Prisons 🔑15—Evidence that paroled prisoner was violating federal or state narcotic acts authorizes forfeiture of credits by prison directors, though parole officer's charge is technically insufficient (St. 1913, p. 1048, § 1½, as added by St. 1915, p. 981; Pen. Code, § 1588).

Evidence that prisoner on parole was violating Harrison Narcotic Act (26 USCA §§ 211, 691–707; U. S. Comp. St. §§ 6287g–6287q), or any state narcotic or drug acts, is sufficient foundation for forfeiture of his credits by board of prison directors, under St. 1913, p. 1048, § 1½, as added by St. 1915, p. 981, or Pen. Code, § 1588, though charge filed by parole officer is technically insufficient.

6. Pardon 🔑9—Prisoner on parole is under prison directors' jurisdiction and constructively a prisoner of state.

While outside prison walls on parole, prisoner is under jurisdiction of board of prison directors, and constructively a prisoner of the state.

7. Holidays 🔑6—Statutes do not require closing of public offices, nor prohibit exercise of quasi judicial functions by boards or commissioners, such as prison directors, on Saturday afternoon (Pol. Code, § 10, as amended by St. 1923, p. 838; Code Civ. Proc. § 134).

Pol. Code, § 10, as amended by St. 1923, p. 838, declaring every Saturday afternoon a holiday as regards transaction of business in public offices of state, and Code Civ. Proc. § 134, providing that no court except Supreme Court shall be open for transaction of judicial business on holidays, do not require that public offices be closed on Saturday afternoons, nor prohibit exercise of quasi judicial functions by boards or commissioners, such as board of prison directors, acting as state agencies.

8. Holidays 🔑6—Prison directors' forfeiture of prisoner's credits on Saturday afternoon held not invalid (Pol. Code, § 10, as amended by St. 1923, p. 838; Code Civ. Proc. § 134).

Board of prison directors' forfeiture of prisoner's credits on a Saturday afternoon for violating terms of parole *held* not invalid, under Pol. Code, § 10, as amended by St. 1923, p. 838, declaring every Saturday afternoon a holiday as regards transaction of business in public offices of state; neither such act, nor Code Civ. Proc. § 134, prohibiting actions by such board on Saturday afternoon.

Original application by Albert Heckman for a writ of habeas corpus. Writ denied.

Joseph A. Brown, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and J. Charles, Deputy Atty. Gen., for respondent.

PLUMMER, J. This is an original application by Albert Heckman for a writ of habeas corpus, praying that he may be discharged from the custody of the warden of the state prison at Folsom. The application is made on the ground that the petitioner is now illegally confined in said state prison; that the illegality consists in keeping him in confinement after the expiration of the term for which he was sentenced.

The record shows that the petitioner was committed to the state prison at San Quentin on the 9th day of August, 1924; that on or about the 28th day of August, 1925, the term of imprisonment of said prisoner was fixed at the period of four years, beginning with his reception at San Quentin on the said 9th day of August, 1924. On the 27th day of February, 1926, petitioner's application for a parole was granted, and on the 14th day of August, 1926, said petitioner was released from the state prison on parole. On the 25th day of

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★Hearing denied by Supreme Court.

June, 1927, the parole granted as aforesaid to said petitioner was revoked, and on the 12th day of September, 1927, the petitioner was received at Folsom prison to complete his term of imprisonment as a parole violator. On the 10th day of December, 1927, all the credits earned and to be earned by the petitioner were declared forfeited on account of the alleged violation by the petitioner of his parole. If the proceedings referred to were properly taken and are valid, the effective discharge date of the petitioner would be October 26, 1928. The petitioner alleges that his credits were illegally revoked: First, for insufficient grounds; and, second, that the action of the board of revoking his credits took place on Saturday afternoon, December 10, 1927, at a time when the board had no jurisdiction to act thereon. The record is silent as to the hour on which the board of prison directors took the action revoking the applicant's credits, but the oral testimony of the petitioner taken upon the hearing hereof was to the effect that it did not take place until after 12 o'clock of that day.

The minutes of the board of prison directors, made a part of the return to the petitioner's application herein, set forth the following:

"Office of the Clerk, State Prison at Folsom,
Represa, California, December 10th, 1927.

"S. Q. No. 39766, Albert Heckman, now Fol. No. 14905, Forfeiture of Credits:

"Excerpt of the minutes of the board meeting held on the above date:

"Ed H. Whyte, state parole officer, having charged the above named prisoner with having willfully and with evil intent violated the terms and conditions of his parole and ticket of leave on or about the 15th day of April, 1927, by being arrested in San Francisco, by federal agents, on the charge of violating the Harrison Narcotic Act, and by being held to answer to the United States District Court on this charge:

"This complaint came on for trial at the session of the state board of prison directors held in their meeting room at said prison on the 10th day of December, 1927. The prisoner being in attendance before the board answered the complaint by saying that he was not guilty of the offense thereby charged.

"Proof was made that a copy of the complaint had been personally delivered to the prisoner on the 3d day of October, 1927, together with a written notification of the time and place when and where the complaint would be tried and the prisoner brought before the board to be heard in answer to the complaint.

"Oral and documentary evidence to show the particulars involved in said matter was introduced and considered by the board. Thereupon the board, having duly considered all the evidence, determined that due proof had been made that the prisoner had with evil intent violated the rules and regulations of the prison, was guilty of the offense specified in the complaint, and should be punished therefor by a forfeiture of such time credits as hereinafter specified; whereupon the board resolved that the said prisoner, for the said offense, should be punished by a forfeiture of such time credits as he has heretofore earned, or may hereafter earn, under S. Q. No. 39766, and the clerk was directed to make the necessary entries upon the prison records to carry said determination and resolution into effect.

"Attest: Henry Crowle,
"[Seal.] Assistant Clerk, State Prison at Folsom."

[1-3] Neither the petition for a writ herein nor the return thereto set forth what conditions, if any, were printed upon the ticket of leave given to the petitioner at the time he was allowed to go on parole on the 14th day of August, 1926, and the petitioner calls our attention to section 1½ of the act approved June 16, 1913, Statutes 1913, p. 1048, as amended in 1915, Statutes of that year, p. 981, which section, among other things, provides that the board may, upon granting parole to a prisoner, impose any condition or any term or terms that it may deem proper, etc., and may impose, as a condition, that all or a portion of his credits earned or to be earned may be forfeited, etc.; and, further, that no parole shall be revoked and no credits forfeited without cause, which cause must be stated in the order revoking the parole or forfeiting the credits. The section also provides for a hearing, and that the prisoner shall be given an opportunity to present witnesses, etc. No question is presented as to the sufficiency of notice being given the petitioner of the hearing had by the board of prison directors relative to canceling the credits or forfeiting the credits which the applicant had theretofore earned or might thereafter otherwise be entitled to. The contention in this particular is that the complaint of the state parole officer, upon which the petitioner was arrested and returned to the state prison, following which a hearing was had, was not sufficient in form or substance to give the board of prison directors jurisdiction to act thereon, in that the complaint did not charge the petitioner with the commission of a crime but only with having been willfully and with evil intent violating the terms and conditions of his parole by being arrested on a charge of violating the Harrison Narcotic Act (26 USCA §§ 211, 691–707; U. S. Comp. St. §§ 6287g–6287q). It is true the complaint of the parole officer would not be sufficient, as an information or an indictment, upon which a prisoner might be prosecuted, and would, of course, be subject to demurrer. But we do not think that the technical rules of pleading which the courts are called upon to enforce when a prisoner is charged with some offense and brought to trial before a jury apply to proceedings before boards of prison directors. The minutes of the board of directors which we have set forth show that oral and documentary evidence was introduced to show the particulars concerning the offense charged against the petitioner.

[4-6] We may here state that upon a hear-

ing had before this court testimony was introduced tending to show that the petitioner was acquitted in the United States District Court of the offense charged against him, but that such acquittal was brought about by reason of the fact that the room occupied by the petitioner, in which a narcotic substance was found, had been entered, and the narcotic substance found and taken possession of by federal officers, without first having obtained a search warrant authorizing a search of the room occupied by the petitioner and the seizure of any narcotics found therein. The board of prison directors act under the authority of the laws of the state of California, and as those laws are interpreted by the courts of this state. Under the laws of this state, and the interpretation given by the courts thereof, no such result could be had. Whether a crime has been committed is neither proven nor disproved by the want of authority of an officer who makes a search, and the board of prison directors, in determining whether the credits earned by the petitioner, or to be earned thereafter by him, were not bound by the technical limitations imposed upon federal officers in making searches and seizures. Irrespective of the parole law, the board of prison directors are authorized by section 1588 of the Penal Code to forfeit the credits of any prisoner who shall have violated any of the rules and regulations of the prison or any of the laws of the state, and the action of the board of prison directors is not made to depend upon proceedings which may be taken and had against the prisoner in jurisdictions having no control over the determination of whether a prisoner's credits should or should not be forfeited. The minutes show that the board inquired into the circumstances concerning the alleged offense. Whether the testimony before the board of prison directors was sufficient to justify their determination is a matter into which we cannot inquire upon this proceeding. In the Matter of the Application of Stanton, 169 Cal. 607, 147 P. 264, the Supreme Court held as follows:

> "The courts will not, on habeas corpus, consider the sufficiency of the evidence of a convict's misconduct, on which the board acted in declaring a forfeiture of his credits, or hold their proceedings invalid, if the offense charged is one which can fairly be considered as embraced within the provisions of the statute applying to the forfeiture of credits."

The mere fact of being arrested does not constitute a violation of any law of this state, but an inquiry into all the circumstances pertaining thereto may disclose sufficient evidence to justify the board of prison directors in declaring a forfeiture on account of the misconduct of the prisoner involved, and if the testimony in this case established that the petitioner was violating the Harrison Narcotic Act, or any of the narcotic or drug acts of this state, sufficient foundation would be laid for the action of the board of prison directors, even though the charge filed by the parole officer was technically insufficient. The minutes show that the board made inquiry, that is, they received oral and documentary evidence as to the particulars of the matter, and if we had the power to inquire into the sufficiency of such testimony, there is nothing before us upon which we could act, as the testimony taken before the board is not in the record. During the time petitioner was outside the prison walls upon parole, and at the time he is alleged to have violated his parole, the petitioner was under the jurisdiction of the board of prison directors and was constructively a prisoner of the state. Matter of Stanton, 169 Cal. 607, 147 P. 264; In re Sanders, 47 Cal. App. 368, 190 P. 647.

[7] It is further contended on the part of the petitioner that even though the board of prison directors had cause for forfeiting his credits, the order of the board was made upon a Saturday afternoon, and therefore that such order is invalid, as having been made upon a holiday. In this particular the petitioner relies strongly upon the case of In re Dal Porte, 198 Cal. 216, 244 P. 355. That case had to do with a judgment pronounced in a police court in the city of Santa Cruz, on a Saturday afternoon. Having been pronounced on a holiday the judgment was set aside.

The appellant also cites the note to Moss v. State, Ann. Cas. 1916B, 16. These cases and others might be cited holding that courts cannot perform any judicial functions upon a holiday, and basing his arguments upon the decisions so holding, the petitioner contends that the board of prison directors, in revoking his credits, was acting in a judicial capacity and, therefore, any such action taken on a Saturday afternoon is void.

Section 10 of the Political Code, as amended in 1923 (St. 1923, p. 838), reads: "Every Saturday from 12 o'clock noon until 12 o'clock midnight is a holiday as regards a transaction of business in the public offices of this state," etc. The concluding paragraph of that section also specifies: "All public offices of the state and all state institutions, including the state university and all public schools in the state shall be closed on the 9th day of September of each year, known as 'Admission Day.'" Section 10 of the Political Code does not provide that public offices shall be closed on Saturday afternoon. It simply provides that it is a holiday as regards the transaction of business in the public offices of this state. Outside of what we have stated, there is no prohibition contained in the codes of this state against keeping a public office open. Section 134 of the Code of Civil Procedure provides that no court except the Supreme Court shall be open for the transaction of judicial business on holidays, the language being: "No court, other than the Supreme Court, must be open for the transaction of judicial business on * * * holidays * * * except for" specified purposes. The prohibition which we have just set forth refers only to courts. It does not refer to boards or commissioners which may at times be exercising quasi judicial functions. It has been frequently decided that boards of supervisors, commissioners and others which simply act as state agencies are not courts. In the case of Suckow v. Alderson, 182 Cal. 247, 187 P. 965, the Supreme Court took occasion to pass upon this question, and after stating that such boards exercise quasi judicial functions, used the following language:

> "Nevertheless it is now well established in this state that tribunals such as the board of medical examiners or other boards empowered to revoke licenses which they have previously granted, for cause defined by the law, are not courts in the strict sense; they are not exercising 'the judicial power of the state' as that phrase is used in the Constitution conferring judicial power upon courts, and that statutes creating such boards and conferring upon them such powers are constitutional."

A number of cases relating to different boards are there cited. See, also, Chinn v. Superior Court, 156 Cal. 478, 105 P. 580, where it was held that a board of supervisors was not a court from which an appeal could be taken, and was not a court within the meaning of that word as used in the Constitution.

It has been frequently decided that as a general rule a quasi judicial act performed on Sunday is valid in the absence of a prohibitory statute. See cases cited and Ann. Cas. 1916B, 16, where a long list of cases so holding are quoted. Following this rule the Supreme Court of this state, in the case of People v. Town of Loyalton, 147 Cal. 774, 82 P. 620, held that an election in that town which took place on the 9th day of September was valid, even though such date was a holiday; that there was nothing within the statutes prohibiting elections on such days. The court there said, with reference to the contention that the holding of an election on the 9th day of September was void:

> "That day being a holiday under the provisions of our statute (Political Code, § 10), it is claimed that no valid election could be held thereon. Appellant has pointed out no statute prohibiting the holding of such an election on a holiday, and we know of none. There is a statutory prohibition as to the transaction of certain judicial business on certain holidays. * * * But the holding of an election does not come within that term. * * * The rule appears to be that on all such days all transactions not within the statutory prohibitions may be carried on as on any other day."

That all acts not prohibited by the statutes may be performed upon a holiday, see, also, note to St. Paul v. Robinson, Ann. Cas. 1916E, 847. See, also, note to Ex parte Seward, 31 A. L. R. 676, where acts of the Legislature on holidays are upheld. Even many acts pertaining to courts may be performed on holidays, such as are purely ministerial. 23 Cal. Jur. p. 970, § 8. In the case of State (Mueller) v. Egg Harbor City, 55 N. J. Law, 245, 26 A. 89, the Supreme Court of New Jersey held that an act which made Saturday afternoon a legal holiday did not apply to proceedings taken before a common council. The act there involved provided that certain days should be considered as holidays so far as transacting business in the public offices of the state was involved.

[8] As we have stated, the record in this case is silent as to the hour of the day on which the board of prison directors took action in the matter of forfeiting the petitioner's credits, but if petitioner's oral testimony taken upon the hearing of his petition be accepted, it shows that the order was made upon a Saturday afternoon, but under the authorities which we have cited, and the fact that the statutes contained no words prohibiting action by the board of prison directors upon a Saturday afternoon, we think that its action, if so taken, was not invalid by any of the provisions of section 10 of the Political Code.

The writ is denied.

We concur: BUCK, Presiding Justice pro tem.; HART, J.

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90 Cal. App. 730

RIGNELL v. FONT et al. (Civ. 6078.)★

District Court of Appeal, First District, Division 2, California. April 9, 1928.

Hearing Denied by Supreme Court June 6, 1928.

1. Automobiles 🔑160(1)—Vehicles and pedestrians must each exercise right to use street with due regard to rights of other.

Neither vehicles nor pedestrians ordinarily have superior right to use of public street, but each must exercise privilege with due regard to the rights of the other.

2. Automobiles 🔑217(1)—Pedestrian must exercise constant vigilance for his own safety while crossing busy street.

Pedestrian is required to exercise constant vigilance for his own safety while crossing busy city street.

3. Automobiles 🔑217(1)—Pedestrian crossing street may rely on expectation that automobiles will conform to customary traffic rules.

In exercise of ordinary care in crossing city street, pedestrian may rely on expectation that automobiles will conform to customary rules of traffic and travel only on proper side of street.

★Hearing denied by Supreme Court.

4. Automobiles 🔑245(67)—Contributory negligence is ordinarily fact question.

In action for injuries to pedestrian struck by automobile while crossing street, question as to existence of contributory negligence is ordinarily one of fact, to be determined by court or jury.

5. Appeal and error 🔑1011(1)—Finding on conflicting evidence as to contributory negligence will not be disturbed on appeal.

Where testimony is conflicting as to contributory negligence of pedestrian struck by automobile while crossing street, and finding of court is supported by substantial evidence, it will not be disturbed on appeal.

6. Automobiles 🔑244(36, 50)—Evidence held to support finding that accident was result of automobilist's negligence, and that pedestrian was not contributorily negligent when struck by car traveling on wrong side of street.

In pedestrian's personal injury action, evidence *held* to support finding that accident was proximate result of defendant's negligence and that plaintiff was not contributorily negligent, where plaintiff was truck after crossing half of street by defendant's automobile, which was traveling on wrong side of street.

7. Witnesses 🔑388(4)—Witness' signed statement of circumstances of accident, not mentioned on chief examination, held properly rejected, notwithstanding reference to it in cross-examination.

Where, in pedestrian's action for injuries when struck by automobile while crossing street, witness of accident was called by defendants and testified, refusal to admit written statement of circumstances of accident previously signed by witness, but not mentioned in chief examination, *held* not error, notwithstanding that plaintiff's counsel had referred to it in cross-examination.

8. Witnesses 🔑388(2)—Witness must be given opportunity to explain alleged discrepancy before being impeached by evidence of inconsistent statements (Code Civ. Proc. § 2052).

Witness cannot, under Code Civ. Proc. § 2052, be impeached by evidence that he has made at other times statements inconsistent with present testimony, without calling his attention to specific statements and giving him opportunity to explain or correct alleged discrepancy.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Personal injury action by Carl Rignell against Anthony Font and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Wm. M. Abbott, K. W. Cannon, and J. E. Reardon, all of San Francisco, and Enid Childs, of Berkeley, for appellants.

Edmund J. Holl, of San Francisco, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment of $3,500 which was awarded the respondent as compensation for injuries sustained as a result of having been struck by appellants' automobile while he was engaged in attempting to cross the Embarcadero at San Francisco.

The appellants urge a reversal of the judgment on the grounds that (1) the evidence affirmatively discloses the presence of contributory negligence on the part of respondent; and that (2) the trial judge erred in sustaining an objection to appellants reading in evidence a written statement of the circumstances of the accident made by one of their own witnesses prior to the trial. It is claimed this statement was competent for the purpose of impeachment.

At the time of the accident, the respondent was engaged as a stevedore at pier 29 on the water front at San Francisco. For ten years the appellant Anthony Font had been the manager of the harbor car service for the appellant California Stevedore & Ballast Company, and was thoroughly familiar with the traffic in that vicinity. At the time of the accident, Font was engaged in driving his employer's Chevrolet car northerly among the Embarcadero, which is a broad paved street parallel with and adjacent to the water front north of the Ferry building in San Francisco. Car tracks traverse the westerly side of the Embarcadero, which street, at the time of the accident, was undergoing repairs, in the process of which an excavation had been dug and a mound of dirt was piled in the center of the street leaving an open space of some 25 or 30 feet in width for the use of vehicles on the easterly side. The street was not congested with traffic. At 11 o'clock a. m. on January 24, 1924, the respondent, who was a man in the full vigor of life, possessing good eyesight and hearing, walked southerly from the place of his employment at pier 29 along the sidewalk to a point opposite pier 25, where he paused at the curbing facing the street, and looked both to his right and left for approaching vehicles. Upon the opposite side of the easterly portion of the Embarcadero he observed a truck some 300 feet to the north, traveling southerly at the rate of 8 or 10 miles an hour. Toward his left he saw a car, near at hand, which was being driven northerly close to the curbing upon which he stood. Beyond this car was a Fordson tractor coming slowly along the street in his direction. Behind this tractor, nearly a block away, was the appellants' Chevrolet car approaching in a course near the easterly curbing at a rate of 30 or 35 miles an hour. The respondent waited until the first car had passed the point where he stood, and then proceeded to cross the Embarcadero in a westerly direction for the purpose of obtaining his lunch at a restaurant. He passed ahead of the tractor, and reached a point about 18 feet westerly from the curbing, where he stopped to permit the truck, which was approaching from the north, to pass ahead of him. Here he stood facing southwesterly so as to keep an eye on the truck and at the same time to watch the northbound vehicles which were approaching along the easterly portion of the street. The appellants' Chevrolet had overtaken the Fordson, and, as it passed the tractor, suddenly without warning or the sounding of a horn respondent saw the Chevrolet at a distance of about 25 feet swerve toward him. It was then traveling at the rate of 25 or 30 miles an hour, and apparently its course was changed in order to pass the tractor. Mr. Lawson, the driver of the tractor, testified that the Chevrolet passed upon his left, and that the accident occurred when it reached a point about 25 feet ahead of him. Observing the sudden change in the course of the Chevrolet, the respondent jumped to avoid the collision, but was struck and sustained a compound fracture of the left leg, together with other bruises and contusions. The testimony of Mr. Miller indicates that the Chevrolet ran 25 or 30 feet beyond the point of contact before it was brought to a stop, and skid marks were found upon the surface of the pavement. The respondent's version of the accident was substantially corroborated by two other witnesses. The appellant Font testified that at the time of the accident he was driving northerly at the rate of only 15 to 20 miles an hour, along a course 3 or 4 feet from the easterly curbing of the Embarcadero, when suddenly, without warning and without looking in his direction, the respondent sprang from the curbing directly in front of his machine, and that, in spite of prompt application of his brakes, he was unable to avoid the collision.

[1-6] It is apparent that, if appellants' version of the circumstances were true, the respondent would clearly be guilty of contributory negligence. Upon the contrary, if respondent's version is correct, it follows that this court could not find as a matter of law that he was guilty of contributory negligence, for, after looking both ways before leaving a point of safety at the easterly curbing, he succeeded in crossing nearly two-thirds of the traveled portion of the street to a point where a prudent person would ordinarily have a right to assume he would be safe from north-bound vehicles traveling along the easterly portion of the street. It cannot reasonably be said that, before one may lawfully attempt to cross a busy thoroughfare, in the absence of an ordinance to the contrary, he must wait upon the curbing until he can cross the entire street ahead of all vehicles which may be in sight. If this were true, a pedestrian might wait all day long in vain for an opportunity to venture across a city street congested with traffic. Neither vehicles nor pedestrians ordinarily have a superior right to the use of a public street, but, upon the contrary, each must exercise the privilege with due regard to the rights of the other. Mayer v. Anderson, 36 Cal. App. 740, 173 P. 174; Kinnear v. Martinelli (Cal. App.) 258 P. 686. A pedestrian is required to exercise constant vigilance for his own safety while crossing a busy city street, but this duty will not ordinarily charge him with contributory negligence merely because he fails to anticipate danger from an automobile which is traveling upon the wrong side of the street. Wright v. Foreman (Cal. App.) 261 P. 481. In the exercise of ordinary care, a pedestrian may rely upon the expectation that automobiles will conform to the customary rules of traffic and travel only upon the proper side of a street. Harris v. Johnson, 174 Cal. 55, 161 P. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560; Averdieck v. Barris, 63 Cal. App. 495, 218 P. 786; Gornstein v. Priver, 64 Cal. App. 249, 221 P. 396. Evidently the trial court accepted the respondent's version of the circumstances of the accident as true. The question of the existence of contributory negligence is ordinarily one of fact to be determined by the court or jury. 1 Thompson on Negligence, 408, § 425; 29 Cyc. 631; Kelly v. Santa Barbara, etc., R. R. Co., 171 Cal. 415, 423, 153 P. 903, Ann. Cas. 1917C, 67; Phillips v. Pacific Electric Ry. Co. (Cal. App.) 264 P. 538. Where the testimony is conflicting as to contributory negligence and the finding of the court is supported by substantial evidence, it will not be disturbed on appeal. 19 Cal. Jur. 783, § 168. The evidence in the present case is ample to support the court's findings that the accident was the proximate result of appellants' negligence and that respondent was not guilty of contributory negligence.

[7] In the course of the trial, appellants called and examined at length Mr. Lawson, the driver of the Fordson tractor. At the request of appellants, this witness had previously signed a written statement of the circumstances of the accident which conflicted in certain respects with his testimony given at the trial. The appellants, however, failed to suggest either to the witness or to the court that this conflict existed, or that appellants were taken by surprise by the testimony which he gave at the trial. The former written statement was not mentioned on the chief examination of the witness. At the close of a lengthy cross-examination by respondent, the following proceedings occurred:

> Mr. Holl, examining the witness for respondent, asked: "Q. When you were 25 feet from the place where you first saw Mr. Rignell, this Chevrolet passed you? * * * A. Yes. Q. Now Mr. Lawson before coming here to-day, I take it (for granted) you discussed your testimony? A. I gave a statement the first day when Mr. Curtaz came around. Q. Who is Mr. Curtaz?"

Mr. Reardon, attorney for appellants, replied: "He is right down there. * * *"

Mr. Holl continuing: "Q. The only person you spoke to since the date of the accident * * * was Mr. Curtaz? A. Yes. Q. That was the written report you gave him at the time? A. Yes."

Mr. Reardon, speaking to counsel for respondent: "I show you the statement. Ask him if this is the statement, as long as you have asked him about it."

Mr. Holl continuing: "Q. Is that the statement? A. Yes."

Mr. Reardon speaking: "Are you going to introduce it in evidence?"

Mr. Holl replying: "No."

Then resuming the examination of the witness: "Q. Mr. Font was there, and you had a blackboard and measurements, and locations were fixed where the accident occurred? A. I didn't see any measurements on it. I told them (it was) between 23 and 25 feet (from me) where the accident occurred. Q. Did you tell Mr. Reardon * * * that this Chevrolet passed your machine * * * 25 feet from the place of the accident?"

Mr. Reardon addressing the court: "I think the statement is the best evidence."

Mr. Holl replying: "I will not press the question."

Thereupon Mr. Reardon took the witness upon redirect examination, and, merely exhibiting the document, asked: "Q. That is your signature? A. Yes. Q. It is dated December 17, 1924, and witnessed by Benjamin Curtaz? A. Yes sir."

Addressing the court, Mr. Reardon then said: "I would like to read it (in evidence)."

Mr. Holl: "I object to that as not proper redirect examination."

The Court: "I will sustain the objection."

Mr. Reardon: "Counsel has gone into it. * * * I would like to make a formal offer of the statement of Harry O. Lawson, dated December 17, 1924, on behalf of the defendants in this case."

The Court: "He has not read any part (of it). * * * He did not say anything about the statement, or its contents. * * * The objection is considered to have been made on the grounds stated by counsel, and it is sustained."

[8] It is contended by appellants for the first time on appeal that they were entitled to read this contradictory statement of their own witness to impeach him. It will be observed, however, that the former written statement was not offered by appellants on the ground that they were taken by surprise at the evidence which was given at the trial; nor did they suggest either to the witness or to the court that this written statement contained assertions in conflict with the testimony given at the trial. No conflicting statements were called to the attention of the witness, nor was his written statement offered to him for his examination. He was not aware of the fact that appellants even contended that he had made conflicting statements, and he was given no opportunity to explain or correct any such variance in the statements which the document may have contained. Upon the contrary, it is evident that the appellants did not offer the former written statement in evidence for impeachment purposes, but rather assumed that, because counsel for respondent had referred to it, therefore they were entitled to have the entire document received in evidence. However, the moment appellants suggested that the document was the best evidence of its contents, the subject was abandoned, and it was not again referred to. No part of the contents of this statement was read or offered by respondent. No foundation was laid for impeachment. There was therefore no error in refusing to receive the document in evidence. Under the circumstances, it was incompetent for any purpose, and the objection was properly sustained. Section 2052 of the Code of Civil Procedure provides:

> "A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them."

It would be eminently unfair to a witness to seek to impeach him without calling his attention to the specific statements which it is claimed he has fabricated, and giving him an opportunity to explain or correct the alleged discrepancy. This is absolutely necessary before one may impeach either his own or an adverse witness. 6 Jones Com. on Ev. 4810, § 2431; 7 Enc. of Ev. 109, § 6b; People v. Lambert, 120 Cal. 170, 52 P. 307; People v. Orosco, 73 Cal. App. 580, 592, 239 P. 82; Hyde v. Buckner, 108 Cal. 522, 41 P. 416.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

90 Cal. App. 640

EARL FRUIT CO. v. HERMAN et al.★
(Civ. 6227.)

District Court of Appeal, First District, Division 1, California. April 5, 1928.

Hearing Denied by Supreme Court May 31, 1928.

1. Principal and surety 🔑59—Generally surety may stand upon express terms of contract.

Generally surety is entitled to stand upon express terms of his contract.

2. Principal and agent 🔑143(2), 144—Both agent and principal may sue on contract made by agent on behalf of undisclosed principal.

Where agent enters into contract in his own name on behalf of an undisclosed principal, not only may principal sue in connection with such contract in his own name, but also agent himself may in like manner sue thereon.

3. Principal and agent 🔑144—Agent, procuring surety bond for benefit of undisclosed principals to secure payment for fruit shipped and sold, held entitled to maintain action on bond in his own right.

Where agent selling fruit through one who had guaranteed price, giving bond signed by surety to secure payment, acted for undisclosed principals, *held* that agent was entitled to sue surety in own right.

4. Principal and surety 🔑151—Agent held entitled to sue on surety bond, which he had procured to secure payment of fruit shipped for principal, as trustee of express trust; "real party in interest" (Code Civ. Proc. §§ 367, 369).

Where agent shipping principal's fruit procured surety bond to secure payment therefor sued on bond, held that agent was real party in interest within Code of Civ. Proc. § 367, by reason of section 369, making one in whose name contract is made for benefit of another trustee of an express trust.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Real Party in Interest.]

5. Principal and surety 🔑151—That surety bond was specialty would not change situation in agent's action on bond, since distinction between sealed and unsealed instruments was abolished by statute (Code Civ. Proc. § 1932; Civ. Code, § 1629).

In agent's action on surety bond, fact that obligation was in nature of specialty *held* not to change situation, since Code of Civ. Proc. § 1932, and Civ. Code, § 1629, abolished distinctions between sealed and unsealed instruments.

6. Principal and surety 🔑104(1)—Surety bond, given as security for payment of shipments of fruit, held not affected by shipper's taking of trade acceptances which matured date of payment for fruit.

In action on surety bond given to secure payment of shipments of fruit, where one of shippers took trade acceptances from principal on bond which did not extend time of payment but fixed date of maturity, *held* that terms of bond were not changed by trade acceptances, which consequently did not operate to release surety as by an extension of time.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by the Earl Fruit Company against Samuel Herman and another. Judgment for plaintiff, and the Globe Indemnity Company appeals. Affirmed.

Hartley F. Peart and Gus L. Baraty, both of San Francisco (Sylvester J. McAtee, of San Francisco, of counsel), for appellant.

Devlin & Devlin, of Sacramento, for respondent.

TYLER, P. J. Action upon a bond executed by defendant Globe Indemnity Company, as surety, in favor of plaintiff corporation. The complaint, in substance, alleges that on or about the 13th day of September, 1923, the plaintiff, Earl Fruit Company, entered into an agreement with defendant Samuel Herman, whereby said company agreed to make daily shipments of grapes during the season of 1923 to said Herman on consignment, the grapes to be sold by Herman as agent for plaintiff; that Herman agreed to remit to plaintiff the amount received from the proceeds of the sales less any charge for commission to which he might be entitled; that, in consideration of entering into the contract, Herman, as principal, and defendant Globe Indemnity Company, as surety, made and delivered to plaintiff a surety bond in writing conditioned upon Herman faithfully accounting for and properly remitting to plaintiff such moneys as might be due to it from the sale of the grapes. The bond, which is made part of the complaint, is in the sum of $7,500, and it recites that it is to remain in full force and effect until the 31st day of December, 1923. Proceeding, the complaint alleges that, in pursuance of the agreement, plaintiff made shipments of grapes to Herman on consignment, and that Herman, as agent, sold the same, and, on or about December 1, 1923, received the proceeds of such sale, but that he failed to remit to plaintiff a portion of such proceeds amounting to the sum of $3,954.25, which sum it is alleged is now due and owing to plaintiff, and judgment is prayed for in this amount. Defendant Globe Indemnity Company by its answer, among other things, denied ownership in plaintiff of the grapes referred to in the complaint and alleged ownership in one Henry Martin, who, it is claimed, delivered the same to plaintiff, as agent, for shipment to defendant Herman; that thereafter said grapes were shipped to said defendant by plaintiff for and on behalf of Martin, and said Martin thereupon entered into a new agreement in writing directly with defendant Herman without the knowledge or consent of defendant Globe Indemnity Com-

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★Hearing denied by Supreme Court.

pany, whereupon Herman issued to Martin four certain trade acceptances under which the time of payment was extended. It is then alleged that at this time Herman was solvent but thereafter became insolvent and unable to pay for the grapes.

The facts adduced at the trial are without substantial conflict. It appears therefrom that plaintiff, Earl Fruit Company, is a corporation, engaged in the business of buying and selling fruits, including grapes for its own account, and that it handled grapes for others. The grapes concerning which suit was brought were owned by one Henry Martin and some seven others. Prior to September 13, 1923, Earl Fruit Company agreed to ship said grapes to defendant Herman on consignment and under a guaranteed price; said Herman agreeing to remit to Earl Fruit Company the amount guaranteed or received from the proceeds of the sale thereof, less any charge for commission to which he might be entitled. The identity of the various owners of the grapes was disclosed to Herman, together with an estimate of the tonnage to be produced by each owner. It was further agreed that Herman should have the right to sell the grapes to his trade upon credit and was to have a certain period of time in which to make his payments in order to enable him to collect the proceeds of his sales, provided he would furnish to plaintiff a surety bond as security, that he would account for and properly remit to plaintiff such moneys as might be derived from the sale or guaranteed price of the grapes, less his commission, and that the term or duration of said bond would be such as to fully protect plaintiff in securing such proceeds of sale by reason of the credit to be extended to him. Pursuant to such understanding, the bond in question was executed by Globe Indemnity Company in favor of plaintiff upon its own stationery, and was so issued for a compensation. Thereafter plaintiff shipped grapes to Herman to the amount of $8,285.80, and advanced the additional sum of $168.45 for freight charges upon boxes forwarded by Herman to plaintiff for use in shipment. Defendant paid $5,500 on account of this amount, leaving a balance due in the sum of $3,954.25, which is the amount of the demand of plaintiff against defendants. The period for the shipment of grapes having ended about November 1, 1923, plaintiff demanded a statement of account from Herman and payment for the amount due for the grapes shipped to him. Thereafter on or about November 15th following, this statement was furnished, but payment was not made, Herman requesting plaintiff to receive certain trade acceptances, representing the same would mature prior to the expiration of the bond furnished by Globe Indemnity Company, and that the taking of said trade acceptances would not prejudice any right that plaintiff might have against such company upon its bond. Plaintiff refused to take the offered trade acceptances, whereupon Herman interviewed one Sam Martin, son of Henry Martin, one of the owners of the grapes, making like representations to him respecting the offered acceptances. Martin agreed to the proposal and thereupon four trade acceptances, each dated November 15, 1923, were made to the order of Henry Martin for the sum of $998.56 each, payable respectively December 1, December 10, December 15, and December 20, 1923, and were accepted by Sam Martin on behalf of his father, Henry Martin, with the knowledge of plaintiff and in the presence of its representative, but against his consent and without the knowledge or consent of defendant Globe Indemnity Company. Each of the acceptances were presented by Henry Martin for payment and dishonored. Subsequent to the dishonor of the one due December 1, 1923, plaintiff advised Globe Indemnity Company of the execution and delivery of said trade acceptances, the dishonor of the first, and that plaintiff would look to it for payment by reason of the bond. On March 4, 1925, defendant Herman was declared a bankrupt by voluntary bankruptcy proceedings, and the balance due by reason of the transaction was reduced by the sum of $205.62, paid to plaintiff by the assignee, leaving a net balance of $3,748.63. Under these facts judgment was rendered against Herman for this sum and for the sum of $3,580.18 against defendant Globe Indemnity Company, the court holding that the amount of $168.45 advanced by plaintiff in connection with freight charges was not covered by the bond and that such amount should, therefore, be deducted so far as it was concerned.

Appellant Globe Indemnity Company here contends: (1) That the plaintiff, having suffered no loss, it cannot recover from the surety, and, as a corollary, that the plaintiff cannot recover from the surety on behalf of the real owners of the grapes; (2) that even if plaintiff had suffered a loss, nevertheless, due to a material alteration of the contract and of the obligation for the payment of which the bond was given, the surety has been released.

[1-5] In support of the first point, it is argued that plaintiff is not the real party in interest; it never having owned the grapes, and that as to the true owners the surety has incurred no obligation, the bond running to plaintiff as sole obligee and to which alone the surety is liable. In this connection it is claimed that there is no privity of contract between the owners and the surety, and such surety has the right to stand strictly upon the terms of its obligation and to answer solely to the obligee named therein for any loss it may have suffered. While it is generally true that a surety is entitled to stand upon the express terms of his contract, it is equally true, that, where an agent enters into a contract in his own name on behalf of

an undisclosed principal, not only may the principal sue in connection with said contract in his own name, but also the agent himself may in like manner sue thereon. The right of an agent to sue on a contract which has been entered into in his own name has met with universal recognition. Whenever the agent contracts directly with a third person, the law allows the agent, treated as a principal, to sue on the contract in his own name, whether the fact of the agency was or was not known to the other contracting party. Tustin Fruit Ass'n v. Earl Fruit Co., 6 Cal Unrep. 37, 53 P. 693; Parker v. Otis, 130 Cal. 322, 62 P. 571, 927, 92 Am. St. Rep. 56; Kelley Clarke Co. v. Leslie, 61 Cal. App. 559, 215 P. 699. The fact, therefore, that plaintiff is not the real party in interest is of no consequence. The contract with Herman, and the bond given by the Globe Indemnity Company were negotiated by plaintiff and entered into by it in its own name. Plaintiff received the grapes as agent of the owners for the purposes of sale, and it sold the same under its agency. Having directly contracted with appellant as a principal, the law allows the agent to sue in his own name, though not the real party in interest, and, as above indicated, the fact that the agency was or was not known to appellant is of no consequence. The rule that every action must be prosecuted in the name of the real party in interest (section 367, Code. Civ. Proc.) is subject to the further rule that a person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust which permits him to sue with like effect as though he were the principal in fact. (Section 369, Code Civ. Proc.) Nor does the fact, as claimed, that the obligation is in the nature of a specialty alter or change the situation. Whatever the rule may be in other jurisdictions, our Code provisions abolish all distinctions between sealed and unsealed instruments. Section 1629, Civ. Code; section 1932, Code Civ. Proc. Here plaintiff was an agent in whose name the instrument sued on has been executed and he may sue thereon for the purpose of enforcing the obligations thereof. There is no merit in this objection.

[6] The remaining contention that, even assuming plaintiff to have suffered a loss, and therefore entitled to sue in his own name, nevertheless due to a material alteration of the contract and of the obligation for the payment of which the bond was given, appellant has been released, is, in our opinion, equally without merit. The contention is based upon the act of Sam Martin in agreeing to receive the trade acceptances offered by Herman. The trial court found that Sam Martin acted solely on behalf of his father and was not authorized by any of the other growers to take the same. Irrespective of any question of authority in Sam Martin in the premises, it seems clear to us that his act in no manner prejudiced appellant. The bond involved provides that it shall remain in full force and effect until the 31st day of December, 1923. None of the trade acceptances extended the time of payment beyond that period. The bond was given to insure payment of the grapes received by Herman and which he sold on credit. The agreement between the parties with reference to payments to be made by Herman was silent as to any particular due date. At most, the trade acceptances definitely fixed such date. There never was an extension of the time of payment, for without a due date a subsequent agreement fixing such date is not an extension. Such an agreement merely establishes the maturity of the obligation which theretofore had been indefinite. The term of the bond was up to December 31, 1923, and the only meaning this limitation can have is that plaintiff had the right to extend credit to Herman up to this time within which to make payments of the grapes shipped to him. Up to the time of the execution of the bond no term of credit had been definitely agreed upon, and the bond fixed the period so far as the surety was concerned, and the trade acceptances were within the limitation agreed upon. Under these circumstances the terms of the bond were not changed, as the trade acceptances merely marked the period of credit within which the payments were to be made. In other words, they fixed a due date which was still within the period limited in the bond. Tyson v. Reinecke, 25 Cal. App. 696, 145 P. 153.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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90 Cal. App. 776

CHARLES R. McCORMICK LUMBER CO. v. O'BRIEN et al. (Civ. 5262.)

District Court of Appeal, Second District, Division 1, California. April 11, 1928.

1. Appeal and error ⟹931(1)—On appeal from judgment on findings for plaintiff, evidence must be considered in light most favorable to plaintiff.

On appeal from judgment on findings in favor of plaintiff, evidence must be considered in light most favorable to plaintiff's contentions.

2. Mechanics' liens ⟹281(3)—Evidence held to sustain finding that one making alterations in which materials were furnished was house owner's agent, not independent contractor.

In action on materialman's lien, evidence *held* sufficient to sustain trial court's finding that defendant, engaged by codefendant owner of house to make alterations in which materials were used, was owner's agent rather than independent contractor.

3. Master and servant 🔑5—One without right to control means by which he renders services is "employee," not "independent contractor."

One performing services for another is an employee, not an independent contractor, if he does not have the right to control the means by which the services are rendered; right to control, rather than actual exercise of control, being the test.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé; Independent Contractor.]

4. Master and servant 🔑5—"Independent contractor" is one exercising independent occupation and representing employer only as to results of work.

An "independent contractor" is one who exercises an independent employment or occupation in rendering services, and represents his employer only as to results of work, not as to means whereby it is to be accomplished.

5. Master and servant 🔑5—Whether one rendering services for percentage of cost of labor and materials is independent contractor depends on particular circumstances.

One rendering services for another for a certain percentage of the cost of labor and materials used may or may not be an independent contractor, depending on circumstances of individual case.

6. Master and servant 🔑5—In absence of written contract expressly affirming or negating power of control and direction, court must draw reasonable inferences from surrounding circumstances in ascertaining whether person doing work was employee or independent contractor.

In absence of written contract expressly affirming or negating power of control and direction of one engaged to perform services, it is trial court's duty to draw reasonable inferences from surrounding circumstances in ascertaining whether he was employee or independent contractor.

7. Master and servant 🔑5—Right to discharge and exercise thereof is strong circumstance tending to show that person doing work was employee.

That owner of house had right to discharge one engaged to make alterations when he pleased, and exercised such right, is strong circumstance tending to show that latter was employee rather than independent contractor.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by the Charles R. McCormick Lumber Company against M. J. O'Brien and another. From a judgment against named defendant, he appeals. Affirmed.

W. C. Wilde, of San Diego, for appellant.

G. F. Hoff and E. S. Torrance, both of San Diego, for respondent Charles R. McCormick Lumber Co.

Dwight D. Bell, of San Diego, for respondent M. R. Essery.

WOOD, Justice pro tem. Plaintiff alleges in the complaint that it sold and delivered certain building materials to defendants O'Brien and Essery at their instance and request, and seeks to recover the sum of $530.32, the balance due on the purchase price. O'Brien was the owner of a house on which certain alterations were being made, and Essery was engaged to make the alterations under an agreement by which his compensation was to be calculated on the basis of 10 per cent. of the cost of labor and materials used in the work. The defendants answered separately, O'Brien claiming that Essery was an independent contractor, and therefore solely liable, and Essery claiming that he was merely the agent of O'Brien. The trial court found in favor of the contentions of Essery and rendered judgment against O'Brien, who prosecutes this appeal.

[1, 2] Determination of the appeal depends upon the question whether the findings are supported by the evidence. Since the findings are in favor of plaintiff, the evidence must be considered in the light most favorable to its contentions. Hoppin v. Munsey, 185 Cal. 678, 198 P. 398. Nearly all the evidence on the subject is found in the testimony of Essery and certain exhibits received by the court. Concerning the making of the contract, Essery testified:

> "I told him (O'Brien) the only way I would car to handle a job of that kind in the country, and an alteration job, would be on a percentage basis, which would be—I would act as his agent as superintendent, on the basis of 10 per cent. plus cost of the job, and settlement would have to be made every week, at any time he was dissatisfied with me, he could fire me. * * *
>
> "Q. Then what did Mr. O'Brien say? A. All right. * * *
>
> "Q. As to the general method of the doing of this construction work by you for Mr. O'Brien, the employment of all labor and the purchase of all necessary material was left with you to attend to, was it not? A. Practically—with his suggestions, of course. He made suggestions, and I advised him. Always advised with him.
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> "Q. That is, he directed generally as to what he wanted done and what should be done; but as to the duties of procuring the necessary material and the duties of the necessary labor to carry it out, that was left with you? A. Yes, sir. * * * I drew a sketch of the plan that he wanted, and he kept changing it from time to time, adding to it and enlarging it. * * * I told him that I would handle the work, that the only way I could handle a job like that would be on what we call percentage plan, he to pay all bills, and make a settlement each week, and give me 10 per cent. of the cost for that week, each weekly settlement; that I would handle the job on that basis. And he said that he did not want to bother writing out

all these checks, and asked me if I would do it. I told him, if he would give me the money to pay the bills, I wouldn't mind using my checks. I had a voucher check, and showed it to him. And he seemed to think it was a very good arrangement. He said it would please him better because he was very busy; give me one check a week instead of a number of checks. So that was arranged that way. * * * He said he * * * would pay all the bills and give me 10 per cent. for my trouble in looking after it and drawing the plans and furnishing carpenters, and so forth. * * * Mr. O'Brien bought some of the material himself personally."

Concerning the ordering of the material from plaintiff, Essery testified:

> "I told Pearsall it was another percentage job; and just then Mr. Richardson, the bookkeeper, stepped up, he says, 'Who is O'Brien?' I told Mr. Richardson that he was a Canadian gentleman who had been spending his winter here for a number of years, and had rented a house from me once and paid the rent in advance, and had shown me his pass over a Canadian railroad issued to 'Senator M. J. O'Brien,' and admitted to me that was who he was. And Richardson said, 'All right, we'll send that out.' * * * Q. Just one moment. I desire particularly to call your attention to any conversation you had with him as to who you were representing in the matter; whether yourself individually or some other person. A. I don't think I told Mr. McDermott, but I told Mr. Richardson and Mr. Pearsall over the counter.
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> "Q. What did you say to them? A. I handed the order in, and told them I had another percentage job here at Grossmont for M. J. O'Brien, and that I had spoken to McDermott about it, and that I had brought this order in for him. They said he was not in, but they would see he got it. Then Mr. Richardson come up and took the order and said, 'Who is O'Brien?' and then I told him, as previously stated, who O'Brien was. And Richardson said he would send it up. Yes, sir. 'All right, we'll send it up,' he said. I told him, of course, he understood that O'Brien was to pay the bills, and he nodded and went back to his desk. That is all there was to it."

Essery further testified that he was discharged by O'Brien before the work was finished. There was received in evidence a letter from O'Brien to Essery, in which the writer states:

> "I have in mind that you complained about not having been able to get labor to do the excavation up there, and I sent you some laborers that applied for work and that were not engaged. These men are now working at Grossmont in the quarry there. They are good men, and all think they should have been employed. I would like to know what was the reason they were not so employed when they were sent. Please be good enough to send me these details as asked for before Saturday. * * *"

Mr. O'Brien, being ill, did not testify.

[3, 4] Sufficient evidence appears in the foregoing to sustain the finding of the trial court that Essery was the agent of O'Brien rather than an independent contractor. It is well settled that one performing services for another is an employee if he does not have the *right to control the means* by which the services are rendered. 13 Cal. Jur. 1019. In Luckie v. Diamond Coal Co., 41 Cal. App. 468, 183 P. 178, it is stated:

> "The accepted doctrine is that, where the essential object of the employment is the performance of work, the relation of master and servant does not exist unless the employer retains the right to direct the mode and manner in which the job shall be done; or, in other words, not only what shall be done, but how it shall be done."

The *right to control* is the test rather than the actual exercise of control. Press Pub. Co. v. Industrial Acc. Com., 190 Cal. 114, 210 P. 820; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491, Ann. Cas. 1917E, 390. "An independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished. * * * The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for." Green v. Soule, 145 Cal. 96, 78 P. 337. In Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491, Ann. Cas. 1917E, 390, it is said:

> "The real test by which to determine whether a person is acting as the servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control and was liable to be discharged by him for disobedience of orders or misconduct."

In Press Pub. Co. v. Industrial Acc. Com., 190 Cal. 120, 210 P. 823, the court said:

> "In the absence of any express terms affirming or negating the power of control and direction, its existence must be determined from the reasonable inferences to be drawn from all of the circumstances surrounding and attending the making and execution of the contract considered in conjunction with the nature of the contract and the duties ordinarily to be performed thereunder."

[5, 7] One rendering services for another under the so-called percentage plan might or might not be an independent contractor, depending upon the circumstances of the individual case. In the case now before us there was no written contract, and there is an "absence of any express terms affirming or negating the power of control and direction." It was therefore the duty of the trial court to draw reasonable inferences from the surrounding circumstances to determine who had the right to control the means of doing the work. Press Pub. Co. v. Industrial Acc. Com.,

supra. We find that O'Brien had the right to discharge Essery when he pleased, and did in fact exercise this right. This is a "strong circumstance tending to show the subserviency of the employee." 13 Cal. Jur. 1034. We also find that O'Brien personally bought some of the material used in the work, an act entirely inconsistent with the claim that Essery was an independent contractor. From his letter to Essery it appears that O'Brien sent laborers to be employed on the job, and demanded an explanation why they had not been put to work. A finding that Essery was an independent contractor would necessarily involve holding that O'Brien had no right to purchase any of the material, and that Essery had the absolute right to determine where each article of the material used should be purchased. In view of all the circumstances, it cannot be said that the trial court was not justified in holding that Essery was the agent of O'Brien rather than an independent contractor.

Counsel have not called to our attention any California decision in which a percentage building contract is construed with reference to the liability of the owner for bills incurred by the builder. Decisions from several other states have been cited, but these do not conflict with the views herein expressed. The statements of facts in the decisions cited are either incomplete as to the terms of the contract or definitely show that the builders had the right to control the details of the work. The case of Carleton v. Foundry & Machine Products Co., 199 Mich. 148, 165 N. W. 816, 19 A. L. R. 1141, relied upon by appellant does not assist him, for the reason that Carleton, who did the work on a percentage basis, had complete control of the details of the work. The court, quoting from an earlier Michigan decision, states:

> "We are of the opinion that the test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent."

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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91 Cal. App. 76

JOHNSON v. SCHIMPF. (Civ. 3467.)★

District Court of Appeal, Third District, California. April 12, 1928.

Hearing Denied by Supreme Court June 11, 1928.

1. New trial 🔑72—Verdict for plaintiff for damages for breach of contract to convey real property held against weight of evidence justifying granting new trial.

In action for damages for breach of contract to convey real property, evidence *held* to sustain trial court's finding that verdict of jury for plaintiff was against the evidence, justifying setting aside verdict and granting new trial.

2. Appeal and error 🔑977(3)—New trial 🔑6—Granting new trial is within trial court's discretion, whose action will not be disturbed, absent abuse of discretion.

A motion for new trial for insufficiency of evidence to justify verdict of jury is addressed to sound legal discretion of trial court, and its action in granting new trial will not be disturbed on appeal unless it appears that there was a clear abuse of such discretion.

3. New trial 🔑39—Trial 🔑253(5)—Instructions in action for breach of contract to convey real property held erroneous in failing to submit questions, justifying new trial; "properly" (Civ. Code, § 3306).

In action for damages for breach of contract to convey real property, in which damages for bad faith were claimed under Civ. Code, § 3306, which limits amount recoverable to expenses "properly" incurred by plaintiff in preparing to enter upon land, instructions omitting question of reasonable value of structures which plaintiff alleged he paid for and which payment constituted amount of damages sought and which set forth certain facts to be found, but did not require finding that acts of defendant were in bad faith, *held* erroneous, justifying trial court in granting new trial; the word "properly" ordinarily meaning in a proper manner; suitably; fitly; strictly; rightly.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Properly.]

4. Costs 🔑264—Neither trial court nor clerk could allow items of cost bill for costs in Supreme Court not filed within statutory time (Code Civ. Proc. § 1034).

Where plaintiff's cost bill for costs in Supreme Court was not filed within time required by Code Civ. Proc. § 1034, plaintiff's objection to hearing of motion to strike out certain items on ground of defective notice of motion to strike is without merit, since neither trial court nor clerk had jurisdiction either to allow or to enter up such items.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by J. W. Johnson against Marie Schimpf. From order setting aside a verdict for plaintiff and granting a new trial and from an order striking out items of plaintiff's cost bill on a former appeal, plaintiff appeals. Affirmed.

Charles A. Wetmore, Jr., of San Francisco, and George F. Jones, of Orovile, for appellant.

W. E. Davies and Warren Steel, both of Marysville (Warren Olney, Jr., of San Francisco, of counsel), for respondent.

BARTLETT, Justice pro tem. This is an appeal from an order setting aside the verdict of the jury in favor of appellant and

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★Hearing denied by Supreme Court.

granting defendant a new trial. Plaintiff also appeals from an order of the trial court striking out his costs on appeal awarded on a previous appeal.

The action was brought to recover the sum of $4,000 damages for an alleged breach of contract to convey certain real properties situated in the city of Marysville, Cal. A demurrer to plaintiff's amended complaint was sustained by the trial court without leave to amend, plaintiff appealed from the judgment entered, and the District Court of Appeal affirmed the judgment of the lower court, but on a hearing in the Supreme Court the judgment of the superior court was reversed. Defendant then answered the amended complaint, and the case was tried before the superior court of Yuba county and a jury. The verdict rendered was for the sum of $3,250.

The following is the order of the trial court made in granting defendant's motion for a new trial:

(Title of court and cause.)

"In the above-entitled matter, the defendant, Marie Schimpf, moves for a new trial upon practically all the statutory grounds, which said motion has been argued by respective counsel and submitted to the court for its decision. The grounds relied upon are specified in the notice of motion, and are: The damages appear to have been excessive; insufficiency of the evidence to justify the verdict; the verdict is against law; errors of law occurring at the trial.

"The action was brought by plaintiff to recover damages alleged to have been sustained by plaintiff because of the breach by defendant of a contract to convey real property. It will be unnecessary to set out the facts alleged in plaintiff's complaint in detail.

"The court has carefully reviewed the testimony given by the plaintiff and his principal witness, E. E. Venters, upon the trial, and is satisfied that error was committed in the giving to the jury, at the request of plaintiff, of certain instructions, bearing upon the measure of damages found in section 3306, C. C., within the provisions of which section the Supreme Court, on appeal, held that the complaint herein alleged facts constituting a cause of action. The court held on said appeal that plaintiff's recovery should be limited by the concluding clause of said section 3306, C. C., viz.: 'In case of bad faith, * * * the expenses properly incurred in preparing to enter upon the land.'

"Plaintiff claims that he purchased of and from Venters, upon defendant's promise and agreement to sell plaintiff certain land, with the full knowledge, consent, and approval of defendant, the slaughterhouse, shed, corrals and appurtenances on said land of defendant, and paid said Venters therefor the sum of $4,000, in lawful money of the United States of America, the reasonable value thereof, and entered into possession of the premises with the knowledge and consent of defendant and pursuant to said agreement for the purchase of the land, which plaintiff claims defendant promised to sell for $800 per acre.

"His whole testimony shows that Mrs. Schimpf never at any time represented Venters to be the owner of all the slaughterhouses, sheds, corrals and other structures upon the land, but pointed out to him a portion only thereof as the property of Venters. His testimony shows he entered into possession of said property on or about March 10, 1923, and remained in possession thereof until on or about the 1st day of September, 1923, during which time he conducted the business of wholesale meat dealer.

"The case was tried upon the theory that all material averments of the complaint were denied and were in issue, for the defendant denied the alleged oral or verbal agreement with plaintiff in toto, and denied that Venters, her tenant under a lease in evidence, had any ownership in any of the structures upon said land, which were all a part of the realty. In support of her denials, she introduced the lease, subsisting at the time of the alleged transaction with plaintiff, between herself and her tenant Venters.

"A careful scrutiny of the evidence will show that Venters, prior to and at the time plaintiff began his negotiations to acquire the property, was carrying on a wholesale butcher and slaughterhouse business; and although plaintiff himself declared that the sum of $4,000 was paid by him solely for the structures claimed by Venters, Venters, by whose testimony plaintiff is bound, testified as follows: 'Q. By Mr. Carlin. Now, you say you told Mr. Johnson you would take $4,000; did you have a business there? A. Had my slaughterhouse there; yes. Q. You had your slaughterhouse there, didn't you? A. Yes. Q. You were selling the business too? A. Selling what I had there. Q. All the improvements and your business, didn't you, that went with it? A. *Well, yes; he took that over.*' (Testimony of Venters, pages 4 and 5.)

"This conclusively shows that the sum of $4,000 paid included not only an amount paid for certain structures and improvements, but for the business of Venters as well, and throughout the testimony there is not a scintilla of testimony which would enable the jury to ascertain the value of that business, which, according to Johnson's own testimony, was the principal thing he wished to buy. Of the total sum of $8,389, paid by Johnson to Venters, the excess over $4,000 was paid for live stock upon an inventory of the same, and was not in any sense a payment for the business.

"The instructions of plaintiff do not call attention to this important element of value of the business purchased by Johnson, and, as stated, there is no evidence to throw light upon that matter. Johnson took that business with him when he left the premises and established it on another piece of land about a mile north of the old location.

"There is no testimony at all in the case upon the reasonable value of the structures owned or claimed to have been owned by Venters, and there was nothing before the jury to show whether the price paid by Johnson was *the reasonable value thereof, as alleged in the complaint, or not.* But, conceding, for argument's sake, that $4,000, the price paid was the reasonable value of all of the slaughterhouses and other structures on the premises, some of them concededly belonged to defendant, as, for instance, the slaughterhouse which was there before Venters ever entered upon the premises, there was no testimony pointing out to the jury the particular structures covered by the alleged transaction between Johnson and Venters, and no testimony to indicate whether $4,000 was a reasonable price for the structures claimed to be owned by Venters, or not.

"Under the averments of the complaint, Johnson entered into possession of the premises on or about the 10th of March, 1925, remained in possession until the following September, during which interval he was in possession of all of the property, including all the structures upon the land—those concededly Mrs. Schimpf's, as well as those claimed by Venters—conducting his wholesale butcher business, for all of which use and occupancy no allowance was made by him in the reduction of his damages, if any, occasioned by her alleged breach of contract to sell the land. Such use and occupancy must have had a very considerable value, and evidence upon that matter should have been offered, not only by the defendant, who denied the existence of any executory contract of sale and also denied any and all damage to plaintiff, but by plaintiff also, and the burden was upon him to establish his actual damage.

"Testimony was offered as to the value of certain structures not definitely described, but consisting of some corral-fencing removed from the premises by plaintiff. Plaintiff declared in one part of his testimony that what he took away was of no value, but subsequently corrected that statement by saying it amounted to not more than $50. The jury evidently rejected his testimony, and made an allowance apparently of $750 from the amount of damage claimed, and there is no possible way to determine how the jury found the credit of $750, because except for Johnson's own testimony there was none at all as to the value of the removed property. It is argued that because the jury placed the credit for the removed property at a much larger figure than named by plaintiff in his testimony, defendant has no right to complain. That argument, however, seems unsound, for perhaps the credit should have been a much larger sum than $750, particularly in view of Johnson's statement that upon his removal he endeavored to tear down fences and corrals so that the premises could not again be used for the conduct of a slaughterhouse and wholesale butcher business. This points to the fact that the verdict was not based upon any evidence adduced upon the trial. It also illustrates that if credit in reduction of damages should have been given, and perhaps was given by guess, for structures and property removed from the premises, further credit should have been given also for the use and occupancy from March to September. It seems apparent also that if the structures were reasonably valued at $4,000, as they stood on the premises for the purposes of the business there carried on, one wrongfully deprived of their use, in destroying or removing some of them, should allow in reduction of his own claimed damage their proper value as they stood prior to the destruction or removal. If, by tearing down and removing parts of them, he could claim such parts had only a nominal value under $50, when, as they stood he claimed they were very much more valuable, perhaps to the value of $4,000, he could not enhance his own damage by their removal or destruction, without giving due credit to the amount of their value when in place on the land.

"The foregoing considerations lead me to conclude that instructions numbered 13, 14, 15, and 16, given at plaintiff's request, were erroneous and misleading.

"Instruction No. 10, also given at the request of plaintiff, in theory drawn in an attempt to conform to the doctrine of estoppel mentioned in Johnson v. Schimpf, 197 Cal. 43, 239 P. 401, in conclusion therein, after the hypothetical statement of facts, that 'it makes no difference whether Venters was, in fact, the owner of the buildings or not,' may perhaps be a correct statement of law, but seems to me to impinge upon the constitutional inhibition against instructing jurors upon questions of fact. It is apparent that the statement, 'it makes no difference whether Venters was, in fact, the owner of the buildings or not,' may have misled the jury into disregarding all the evidence as to the ownership for all purposes. The jury had the duty and the right to consider that question of ownership in weighing the probabilities and the truth as to the alleged oral agreement between plaintiff and defendant. Plaintiff testified flatly that defendant verbally promised, in the event of his buying Venters' improvements on the land, that she would sell the land to him. Defendant flatly denied any such agreement. There were no other persons immediately present except plaintiff and defendant at the conversation.

"The evidence in the case, including the lease between Venters and the defendant, and the testimony that the slaughterhouse was on the premises when Venters first entered under his lease, established without contradiction that Mrs. Schimpf in fact owned all the buildings and structures as a part of the realty, excepting perhaps a few panels of fencing not attached to the soil. It seems improbable that the actual owner, without any apparent, rational motive, would have misrepresented and falsely stated that some one else owned her property, when an ostensible purchaser was trying to buy that same property, and when she admittedly, according to plaintiff's own testimony, was trying to obtain the largest possible price for her premises. There is no evidence of any agreement, either verbal or written, whereby Mrs. Schimpf had ever given or granted any rights to Venters in and to the property other than he had by virtue of his lease. It therefore was very important for the jury to consider the fact as to the real ownership of the improvements in determining whether or not the main agreement for the sale of the land was in fact as claimed by plaintiff, verbally consummated.

"In the opinion of the court, the plaintiff would only be entitled to recover damages in this case at all under the last clause of section 3306, C. C., after establishing by a preponderance of the evidence the existence of the executory oral agreement claimed by him. The preponderance does not appear in that respect to be with the plaintiff, unless the jury considered that foolish and unreasonable statements and promises against her own interest were made by Mrs. Schimpf at the time of the alleged transaction. If the jury rejected, under instruction 10 above cited and under the theory of estoppel, for all purposes, the testimony as to ownership, the contrary conclusion as to the main agreement, which plaintiff is not seeking to enforce in this proceeding, might well have been reached.

"Now, therefore, in consideration of the premises, it is hereby ordered, adjudged, and decreed that the defendant's motion for new trial be and it hereby is granted.

"Dated July 15, 1926.

"Eugene P. McDaniel, Judge."

[1, 2] It is apparent from the foregoing order that the trial court came to the conclusion that the verdict was against the weight of the evidence and that certain erroneous instructions were given. The order should be affirmed if the court's action can be sustained on either of those grounds. An inspection of the record discloses two main issues of fact in the case arising under the pleadings, both of which had to be determined in plaintiff's favor to justify a verdict in his favor.

The damages sought are for breach of an alleged contract of the defendant to sell certain land to plaintiff. Whether the contract was oral or written does not appear from the complaint, but the evidence at the trial discloses that the contract, if any, was an oral one. Its making is positively denied by the answer of defendant. Whether or not there was a contract of defendant to sell any land to plaintiff was therefore a most vital issue in the case.

The damages sought were not the damages ordinarily arising through breach of a contract to convey or sell real property but depend entirely upon determining that the refusal to convey the lands was in bad faith on the part of defendant, and the measure of the damages recoverable, even if defendant's bad faith was shown, was the expenses properly incurred by plaintiff in preparing to enter upon the land, in accordance with the rule prescribed in section 3306 of the Civil Code.

Plaintiff claimed that he was misled by statements of defendant into paying one Venters $4,000 for buildings on the property, which, plaintiff alleged, Venters, a lessee of defendant and in possession of the property, represented he owned, which statement he alleges defendant confirmed by her oral declarations made to him when he negotiated with her for a sale of the lands on which the buildings were situated. The reasonable value of the buildings is alleged in the amended complaint to be the sum of $4,000. Outside of the statement of plaintiff that he paid Venters $4,000 for the buildings there is nothing in the evidence offered to show what was the reasonable value of the buildings on the property. Part of the structures were removed from the land after defendant refused to make and execute a deed and the evidence is not at all clear or satisfying as to the reasonable value of the property so removed. There is a flat conflict in the evidence on all the material issues in the case and it does not disclose or suggest a motive or reason for defendant representing that her lessee and not herself owned the buildings or structures placed on her premises. Her lease to Venters introduced in evidence is silent as to the disposition of improvements on its termination and the improvements made as disclosed by the evidence were of the character which would ordinarily be deemed affixed to the land in the absence of an agreement providing for their removal by a lessee at the termination of his leasehold.

A consideration of all the evidence offered amply supports the conclusion of the trial court that the verdict of the jury was against the weight of the evidence. The rule laid down by the Supreme Court in Wendling, etc., Co. v. Glenwood, etc., Co., 153 Cal. 411, 95 P. 1029; Warner v. Thomas, etc., Works, 105 Cal. 409, 38 P. 960; Gordon v. Roberts, 162 Cal. 509, 123 P. 288; Empire Investment Co. v. Mort, 169 Cal. 732, 147 P. 960; and Tweedale v. Barnett, 172 Cal. 271, 156 P. 483; Bjorman v. Fort Bragg Redwood Co., 92 Cal. 500, 28 P. 591; Domico v. Casassa, 101 Cal. 411, 35 P. 1024, that a motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict of a jury is addressed to the sound legal discretion of the trial court and that its action in granting a new trial will not be disturbed on appeal, unless it appears that there was a clear abuse of such discretion, should be applied in this case.

[3] An examination of the instructions given which the trial court refers to and discusses in its order granting the new trial satisfies this court that the conclusion reached by the lower court that these instructions were erroneous must be sustained. The damages recoverable in this action are limited to the expenses which plaintiff properly incurred in preparing to enter upon the lands. Plaintiff is in a position resembling that of a buyer of property who is deprived of its possession. The general rule measuring damages in such cases is deemed to be the price for which plaintiff might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession. The general rule regarding the extent of damages in all classes of actions is set forth in section 3359 of the Civil Code, which provides that damages in all cases must be reasonable. Section 3306 of the Civil Code does not provide that any and all expenses incurred by plaintiff in preparing to enter upon the lands are recoverable, but limits the amount recoverable to those properly incurred. The ordinary meaning of the word "properly" is: "In a proper manner; suitably; fitly;

strictly; rightly." The view of the trial court as to the meaning of the word "properly," as used in section 3306 of the Civil Code, when making its order granting the new trial, apparently was that it meant such sum of money as the Venters structures were reasonably worth when he sold them to plaintiff. That such was the belief of the plaintiff when he instituted this action seems manifest from the allegation in his complaint that these structures were of the reasonable value of $4,000. In the instructions given to the jury there was no direction that the reasonable value of the Venters structures was a material fact for consideration and determination. That the jury desired instructions on this question is evident from a request made by it to the court during its deliberations as to whether or not it had the authority to appraise the value of the buildings. In answer to this, the court simply reread its previous instructions, all of which are silent in this regard.

Instruction numbered 13 given the jury reads as follows:

> "The amount of money, if any, which plaintiff paid to Venters for the buildings and appurtenances situated upon the land in question, is an expense properly incurred in preparing to enter upon the land within the meaning of the law, if you find that any amount was so paid by plaintiff in reliance upon defendant's promise to sell and convey to him the land in question, and if you further find from the evidence, that plaintiff is entitled to damages for the breach by defendant of the alleged agreement to sell and convey the land in question, then the amount of money, if any, so paid to Venters by plaintiff, less such amount as you may find to be the reasonable value of any of said buildings and appurtenances, if any, which you may find plaintiff did remove from the land, should be allowed to plaintiff as damages, and your verdict should be for the plaintiff and against the defendant for such amount of money."

This instruction not only omits to instruct on the question of reasonable value of the venters structures, but also instructs as to the facts upon which if the jury finds them to exist its verdict should be for plaintiff. The instruction sets forth certain facts which must be found, but fails to specify that before any damages can be awarded, the jury must find that the acts of defendant were in bad faith. That in this class of damage actions the bad faith of a vendor is a principal question for determination and that it is a fact for the jury to find and determine is clearly decided by the Supreme Court in the case of Hamaker v. Bryan, 178 Cal. 128, 172 P. 391.

Instructions numbered 14, 15, and 16, given at plaintiff's request, are erroneous for the same reason as is instruction No. 13, in failing to specify as matters to be considered and found upon by the jury in arriving at the amount of damage allowable, the reasonable value of the Venters structures and the bad faith of the defendant.

[4] Plaintiff filed a cost bill after judgment in which certain costs on the former appeal of this case amounting to the sum of $110.75 were included, which items on motion were stricken out and disallowed by the trial court. It is not disputed that the remittitur from the Supreme Court was filed with the clerk of the trial court on October 15, 1925, and that the cost bill in question was not filed until May 24, 1926. Under section 1034, Code of Civil Procedure, plaintiff's costs in the Supreme Court should have been filed within 30 days after the remittitur was filed with the clerk of the trial court. As the statutory time for filing the cost bill had expired when it was filed, so far as costs on appeal are concerned, there is no merit in plaintiff's objection interposed to the hearing of the motion to strike out these costs on the ground of defective notice of motion to strike, as there was no jurisdiction in the trial court, or its clerk, to either allow or enter up these items. Emeric v. Alvarado, 64 Cal. 529, 2 P. 418; Riddell v. Harrell, 71 Cal. 254, 12 P. 67; People v. Davis, 143 Cal. 673, 77 P. 651; Griffith v. Welbanks & Co., 26 Cal. App. 477, 147 P. 986.

The order granting a new trial is affirmed, and the order striking out the items of plaintiff's costs on the former appeal is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

91 Cal. App. 11

BURTON v. CURTIS. (Civ. 5100.)

District Court of Appeal, Second District, Division 1, California. April 12, 1928.

1. Reformation of instruments 🔑45(15)—Evidence sustained finding of mistake in sale contract by plaintiff, which defendant knew or suspected, authorizing its reformation (Civ. Code, § 3399).

On plaintiff's prayer for reformation of contract for sale of certain personal property, evidence *held* to sustain trial court's finding, that insertion of certain word had its origin in the mistake of plaintiff, which defendant at the time knew or suspected, by reason of which alleged mistake, contract failed to express truly the intention of the parties, within Civ. Code, § 3399, authorizing court to reform contract.

2. Appeal and error 🔑1033(8)—Defendant cannot complain of allowance of brokerage commission as offset to defendant because not raised by issues, since defendant was benefited thereby.

In action for breach of contract, whereby defendant was to resell the property and credit plaintiff with excess over certain amount, defendant cannot complain of an allowance to her as an offset of reasonable brokerage commission for sale of property because no issue as to it was raised, since defendant was benefited thereby.

3. **Sales ⟹384(1)—Defendant, in action for breach of contract, held not entitled to credit for sum paid for assignment of lease other than one provided for in contract.**

Where contract for sale of certain personal property by plaintiff to defendant and its resale by latter provided for allowance to defendant of certain sum as payment to landlord for assignment of lease from plaintiff to defendant, in action for breach of such contract, defendant was not entitled to allowance for sum paid for an assignment of lease other than from plaintiff to defendant.

Appeal from Superior Court, Los Angeles County; Frank H. Dunne, Judge.

Action by Martha A. Burton against Emma F. Curtis for damages for breach of contract. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. M. Harker and Harry Hirsh, both of Los Angeles, for appellant.

Charles E. Williams, of Los Angeles, for respondent.

HOUSER, J. The main purpose of the action in controversy was to recover damages for an alleged breach of contract. In order to establish that a breach of the contract had occurred, it was first necessary that the contract as signed by the parties there be reformed. It appears that the plaintiff, who was the owner of certain personal property consisting of the furniture and furnishings of an apartment house, sold the same to defendant, and that, according to the final written agreement between the parties, whatever sum in excess of $16,500 "net" was received by defendant on a resale by her of the property was to be placed to the credit of plaintiff on account of an indebtedness of $2,500 owing by plaintiff to defendant, which indebtedness was evidenced by a promissory note and trust deed. A part of such indebtedness arose from the claim of defendant that the sum of $500 thereof represented the cost of assigning from plaintiff to defendant a lease of the real property upon which stood the apartment house in which the furniture and furnishings sold by plaintiff to defendant were located.

In accordance with the allegations contained in the complaint, on the trial of the action plaintiff attempted to prove that, notwithstanding the language of the contract as finally written, to wit, in effect that whatever sum in excess of $16,500 *net* for which the property might be sold was to belong to plaintiff, the intention of the parties was that any sum in excess of $16,500 (omitting the word "net") which the property might bring on a resale was to become the property of plaintiff.

[1] Section 3399 of the Civil Code provides that:

> "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention. * * *"

Originally the proposed contract between the parties, which plaintiff had read, or which had been read to her, and with which she was thoroughly familiar, did not contain the word "net" in connection with the resale price of the personal property. No claim is made by plaintiff that the interlineation of the word "net," following the figures "$16,500," arose from a "mutual mistake of the parties"; but the prayer of the complaint for a reformation of the contract rests on the allegation that the insertion of the word "net" had its origin in the "mistake of one party which the other at the time knew or suspected," and by reason of which alleged mistake the contract failed to "truly express the intention of the parties." The findings, conclusions of law, and judgment by the trial court are all in accordance with the allegations of the complaint. Appellant, however, contends that such findings of fact are not supported by the evidence. An examination of the testimony of plaintiff shows that, so far as she was concerned, at the time she signed the contract she had no knowledge that the word "net" followed the statement of the resale price of $16,500, and assumed that no change had been made in the language used in the contract between the time when she read it, or it was read to her, and the time when the contract was signed by her. On the other hand, defendant testified to facts from which it appeared that she had knowledge of the fact that such change had been made. The conclusiveness of the finding that such change was made without the knowledge or consent of plaintiff, and that the alleged mistake on the part of plaintiff in signing the contract in its altered form constituted a mistake on her part which was known or suspected by defendant, depended entirely upon the credibility which the trial court accorded to the testimony of the several witnesses in the case. While witnesses on behalf of defendant testified in substance that prior to the time when plaintiff signed the contract the matter relating to the appropriate insertion therein of the word "net" was fully discussed by plaintiff and defendant in the presence of witnesses, and that at the same time, with the consent of plaintiff, such word was interlined in the language of the contract as it finally appeared, it was the province of the judge of the trial court to weigh the evidence and to determine where lay the truth. He had the right to accept as true the whole or any part

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

of the testimony of any of the witnesses; and, judging solely from the findings, it is clear that he adopted as true the statement on the part of plaintiff that she did not know of the change made in the contract, and from the testimony of defendant and her witnesses, that at the time the contract was executed defendant "knew or suspected" that the "mistake" on the part of the plaintiff had been made. It follows that appellant's point cannot be sustained.

[2] Appellant also complains that after in substance finding that the contract (as finally written and signed) with the word "net" following the stipulated basic resale price of $16,500 for the personal property did not "truly express the intention of the parties," but that the contract should be revised so as to express their intention to the effect that the resale price might be $16,500, without reference to whether such sum was to be considered as "net," the further finding of fact was made by the court that the sale of the personal property was made for the sum of $19,000, and that in the circumstances defendant should be allowed a 5 per cent. commission as a reasonable brokerage charge to be paid to the agents who brought about the sale, as an offset against the difference between the sale price of $16,500 and the $19,000 for which the personal property was actually sold. Appellant directs attention to the fact that no issue was presented by the pleadings as to what constituted a reasonable brokerage commission for the sale of the property, as well as to the further fact that no evidence was introduced by either party to the litigation with reference thereto. It is apparent that, if the proposed sale price of $16,500 was not to be construed as "net," and in pursuance of the terms of the contract between the parties a credit for broker's commission for effecting a sale of the personal property was not within their contemplation, no allowance therefor should have been made to defendant by the trial court. But it is also clear that, by allowing such a commission as an offset to defendant, she was benefited thereby to the extent of $950, and consequently cannot be heard to complain on account thereof.

[3] In the original transaction between the parties, in payment of the furniture and furnishings belonging to plaintiff, defendant transferred and conveyed to plaintiff certain real property. In order to adjust the difference in values of the respective properties, etc., it was agreed that plaintiff give to defendant a note and trust deed, amounting to the sum of $2,500, covering the real property in the transaction. The agreement then provided that:

> "And it is further agreed that the party of the first part (defendant) will use $500 of the amount secured by said trust deed note in her favor to pay the amount demanded by the landlord of the said Hirsh Apartments as a condition precedent to securing an assignment of the lease of said premises from party of the second part (plaintiff) to party of the first part (defendant), the remaining $2,000 secured by trust deed note to be and remain the property of the party of the first part, subject to the conditions hereinafter stated."

On the trial of the action, it was shown that plaintiff never had a lease of the real property upon which the apartment house was located, and consequently that nothing was paid by defendant for the assignment of such supposed lease. However, it was shown that several months later, when the furniture and furnishings were resold, defendant did pay the sum of $500 to the landlord for an assignment of a lease which she had acquired from the landlord after the original transaction had taken place between the plaintiff and defendant. The conclusion of the trial court was that defendant held the $500 for the use and benefit of plaintiff, and judgment was ordered accordingly. With reference thereto, appellant does not contend that the evidence does not support the findings. The criticism is that, as it appeared that the $500 was actually spent by defendant in obtaining an assignment of a lease, defendant should not be obligated to repay the amount to plaintiff. But it should be remembered that the agreement was that the $500 should be used for the purpose of obtaining a *particular* assignment of a specified lease, which was not the assignment which defendant procured, and that, according to the finding and conclusion by the trial court, the amount actually paid by defendant for the assignment could not be credited to her, for the reason that the contract between the parties (as reformed) did not permit of such allowance to defendant on a resale of the personal property.

It is ordered that the judgment be and it is affirmed.

We concur: CONREY, P. J.; YORK, J.

90 Cal. App. 709

FIRST NAT. BANK OF ORLAND v. BALL, County Treasurer. (Civ. 3488.)

District Court of Appeal, Third District, California. April 6, 1928.

1. Agriculture 🔑5—Counties 🔑167—Statute does not authorize supervisors to delegate powers or aid private persons who have taken on themselves the conduct of county fair or other advertising effort; assignee of county warrant issue to agricultural association could not recover thereon (Pol. Code, § 4041, subds. 6, 33).

Pol. Code, § 4041, subds. 6 and 33, relative to board of supervisors advertising the county and to the conducting of county fairs, does not authorize county boards of supervisors to delegate their powers or to assist private persons who have taken on themselves the conduct of a county fair or other advertising effort, and hence assignee of county warrant issued to agricultural association to maintain county fair could not recover thereon.

2. Counties 🔑50—Power vested in board of supervisors to perform certain acts cannot be delegated.

Power vested in the county board of supervisors to perform certain acts cannot be delegated.

Application by the First National Bank of Orland, a corporation, for a writ of mandate prayed to be directed to E. S. Ball, as Treasurer of the County of Glenn, requiring him to pay a certain warrant. Writ denied, unless amended petition be filed within stated time.

George R. Freeman, of Willows, for petitioner.

R. M. Rankin and Duard F. Geis, both of Willows, for respondent.

PLUMMER, J. This is an original application by the petitioner praying that a writ of mandate be directed to E. S. Ball, as the treasurer of the county of Glenn, to pay a certain purported warrant drawn upon the county treasurer of the county of Glenn, by J. W. Monroe, the auditor of said county.

The amended petition filed herein sets forth the following: The corporate existence of the plaintiff; the official character of the defendant; the fact of Monroe being the duly elected, qualified, and acting auditor of the county. The petition then recites:

"That on July 18, 1927, the board of supervisors of the county of Glenn duly made its order and appropriation in the words and figures following, that is to say: 'Ordered that the sum of $2,000 be, and is, appropriated from the advertising and exhibit fund, and allowed to the Glenn County Live Stock & Agricultural Association towards the maintenance of the annual Glenn County Fair, thereby inducing immigration to the county, and the auditor is directed to issue a warrant on said fund in favor of the secretary of said association covering said allowance. The petition then alleges that, in pursuance of said order, the auditor of said county proceeded to draw two warrants in the words and figures following, to wit:

"State of California, County of Glenn Auditor's Office, Glenn County, Calif. The County Treasurer of Glenn County will pay to Glenn
No. 704
August 9, 1927
$1000.00
County Agricultural Assn. or order the sum of One Thousand and no/100 dollars for donation to Glenn County Fair accrued August 9, 1927, allowed August 9, 1927, and charge to Advertising and Exhibit.
"[Signed] J. W. Monroe, Auditor,
"By Marion Banning."

"State of California, County of Glenn Auditor's Office, Glenn County, Calif. The County Treasurer of Glenn County will pay to
No. 1152
August 17, 1927
$1000.00
Glenn Co. Agricultural Assn. or order the sum of one thousand dollars for donation to Glenn County Fair, accrued August 17, 1927, allowed August 17, 1927, and charge to Advertising and Exhibit.
"[Signed] J. W. Monroe, County Auditor."

The petition then alleges that, after the issuance of said warrants, they were duly assigned to the petitioner herein, were presented for payment, and payment refused. Following these allegations, the petition sets forth that on the 7th day of September, 1927, the board of supervisors of Glenn county levied a tax of one cent on each $100 of the assessed valuation of the property of said county, to be used for advertising purposes, etc., as provided in subdivision 33 of section 4041 of the Political Code, and that, at the time of the presentation of said described warrants, there was, and is now, in the hands of the respondent as treasurer of said county, to the credit of the advertising fund of said county, the sum of $1,544.60, and that there will be available in said fund before the end of the present fiscal year the sum of $2,300. The prayer of the petition is that a mandate issue from this court directing the treasurer to forthwith pay the warrant dated August 9, 1927, and numbered 704.

Upon the return date named by this court in its order to show cause the respondent herein filed a demurrer to said petition, setting forth the following grounds: That said petition fails to state facts sufficient to warrant a writ of mandate; that the board of supervisors of said county of Glenn, on July 18, 1927, had no power or authority under the laws of this state to make the order and appropriation alleged in said petition; that the said appropriation purports to be and constitutes a donation or gift of the funds of the county of Glenn raised by taxation, and is prohibited by the express provisions of section 31 of article 4 of the Constitution of the state of California; that it does not appear from said petition what amount a tax levy of one cent on each $100 of assessed valuation of all property within said county would produce; nor does it appear that the said sum of $2,000, attempted to be appropriated as alleged does not exceed 70 per cent. of the auditor's estimate of revenue for the fiscal year of 1927-1928, that will accrue to the advertising and exhibit fund of said county of Glenn; that it does not appear from said petition that any warrant was issued in favor of the secretary of Glenn County Live Stock & Agricultural Association pursuant to the alleged appropriation; that it does not appear that any claims were filed against said county pursuant to the provisions of sections 4075 and 4076 of the Political Code; that it cannot be ascertained from said petition that said donation or appropriation was in consideration of any services rendered to the county of Glenn by the Glenn County Live Stock & Agricultural Association. Other grounds of demurrer were also set forth, but, not being of vital importance, are not herein stated. Subject to the demurrer, the respondent also filed an answer. The cause was then argued and submitted for the court to first determine the merits of the demurrer, and, in the event the demurrer should be overruled, to take up and consider the facts and the law as presented by the petition and answer and the accompanying proofs.

Before taking up and considering the questions presented by the respondent's demurrer, we may here state that the act approved May 9, 1927 (Stats. 1927, p. 621), amending section 4056b of the Political Code, did not become effective until some days after July 19, 1927, the day upon which the board of supervisors of the county of Glenn purported to make the appropriation as set forth in the petition. Hence, whether any of the provisions contained in said amendatory act would authorize the appropriation of money as attempted herein, or whether said act or any portion of the amendment to section 4056b of the Political Code is violative of section 31 of article 4 of the Constitution, is not before us for consideration.

At the time of the passage of the resolution by the board of supervisors of the county of Glenn, subdivision 33 of section 4041 of the Political Code constituted the only authority for any act on the part of the board of supervisors relative to the levying of a tax to raise money for advertising, exploiting, and making known the resources of the county of Glenn, as attempted by the resolution herein set forth. Subdivision 33 of section 4041 of the Political Code then read as follows:

> "To levy a special tax not to exceed two cents on the one hundred dollars of the assessed valuation of all property within the county to be used for advertising, exploiting and making known the resources of the county for the purpose of inducing immigration [thereto], and increasing the trade and commerce of, said county, or for the purpose of exhibiting or advertising the agricultural, mineral, or other resources of the county; and provided, however, that if said rate of two cents will not raise five thousand dollars in any one year the boards of supervisors may appropriate from the general fund of the county an amount sufficient to make up the deficiency existing between the amount raised as the result of the two cent levy and five thousand dollars; and provided, further, that such tax shall be in addition to any tax which may now or hereafter be authorized to be levied for the purpose of creating a fund to be used for collecting, preparing and maintaining an exhibition in any domestic or foreign exposition; and provided, further, that nothing herein contained shall prevent any county from creating a bonded indebtedness under the provisions of section four thousand eighty-eight of the Political Code of California for the purpose of obtaining funds with which to build, construct or furnish an exposition building or buildings for exhibiting and advertising its resources."

[1] There is nothing in this section which authorizes the board of supervisors to make any appropriation or any donation to finance, or assist in financing, any county fair conducted by a private association or by an association of private individuals. The subdivision set forth herein does authorize the county to levy a tax to be used for advertising, exploiting, and making known the resources of the county. In other words, it authorizes the board of supervisors to perform such services either by itself or by its agents, duly appointed, or with whom it has contracted for such purposes. However, it does not authorize the board of supervisors, in the event that some private association or association of individuals may go to work and hold a fair, to make either an appropriation, donation, or gift to such private association or association of individuals to aid in the financing or paying the expenses thereof after such fair has been held. To state that matter again in another form, the subdivision of the section referred to authorizes the board of supervisors, under its own management, direction, and control, to expend certain funds of the county, raised in a certain manner, for the particular purposes mentioned. There is nothing in the subdivision of the section set forth authorizing boards of supervisors to delegate their powers or to assist or aid private persons who have taken upon themselves the conduct of a county fair or other advertising efforts. Subdivision 6 of section 4041 of the Political Code authorizes the board of supervisors of counties to acquire and maintain buildings in which to hold expositions, etc., but there is nothing in that section authorizing the board of supervisors to delegate such powers.

[2] In the case of Stowe v. Maxey, 258 P. 717, this court had occasion to go extensively into the subject of delegation of powers by boards of supervisors, and we need only to refer to that case as authority to the point that power vested in a board of supervisors to perform certain acts cannot be delegated.

Upon the face of the petition, the order of the board of supervisors and the warrants drawn by the auditor appear to be a donation or a gift from the funds of the county to the Glenn County Live Stock & Agricultural Association. This, of course, is not authorized by subdivision 33 of section 4041 of the Political Code, and, if authorized, would contravene section 31 of article 4 of the state Constitution. Directing our attention more specifically to the petition, we find that there is no allegation contained therein, and nothing from which it can be inferred, that the board of supervisors of Glenn county ever contracted with any one for the collection or exhibit of agricultural or other resources of the county for the purposes of making, or to make, an exhibit thereof for the purposes of advertising such resources or for any purpose whatsoever. The petition does not show that the board of supervisors ever took any action whatever employing, authorizing, or contracting with any one to make such an exhibit. Whether such an exhibit was ever made does not appear from the petition. There being no showing that the board of supervisors of Glenn county ever took any action toward making such an exhibit or contracting with any one for such an exhibit, it follows that the petition fails to show that the county of Glenn ever became obligated to pay any individual or association of individuals for such service. No claim appears to have been presented showing the performance of such service, and, so far as the petition is concerned, there was no foundation laid for the appropriation of any money from the advertising fund, and no foundation laid for the issuing of the warrants set forth in the petition. Upon oral argument, it was suggested that donations and appropriations had been made by the supervisors of Glenn county for many years as set forth in the petition. We do not very well see how the want of legislative authority can thus be supplied or a constitutional section amended by long-continued violations. It may be further added that the petition does not show that the requirements of section 4071 of the Political Code as to the aggregate of allowances which may be made against any fund prior to the 1st day of January of any fiscal year had been complied with.

Without going more specifically into the various objections urged by respondent, it is sufficient to say that what we have set forth shows that the petition does not state facts sufficient to constitute a cause of action, and that the respondent's demurrer must be sustained. As counsel for petitioner requested permission to amend in the event that respondent's demurrer should be sustained, and not being advised as to whether the defects in the petition herein pointed out may be cured, time will be given for the filing of an amended petition, if the petitioner is so advised.

It is therefore ordered that the demurrer interposed to the petition herein be sustained, with leave to the petitioner to file an amended petition, if so advised, within 30 days after the filing of this opinion, and, if such amended petition be not filed, then and in that event the prayer of the petition for a writ of mandate stands as denied.

We concur: HART, Acting P. J.; BUCK, Justice pro tem.

90 Cal. App. 764

SHAVER et al. v. UNITED PARCEL SERVICE et al. (Civ. 6163.)★

District Court of Appeal, First District, Division 2, California. April 11, 1928.

Hearing Denied by Supreme Court June 6, 1928.

1. Automobiles 🔑245(2, 68)—Negligence and contributory negligence held for jury, in action for death of one trying to stop loaded runaway trailer which crossed highway.

In action for death resulting from collision between automobile and loaded runaway trailer which rolled from gravel bunker adjacent to highway across road, and which deceased was trying to stop at the time of the accident, issue of negligence of truck driver and contributory negligence of deceased *held* for jury.

2. Evidence 🔑241(1)—Admissions of employee not prompted by excitement of accident, are no part of res gestæ and not binding on employer in action for employee's negligence (Code Civ. Proc. § 1870, subd. 2).

Admissions of employee, which are not prompted by the excitement of the accident, are no part of the res gestæ, and cannot bind employer in action for injuries for employee's negligence, and are incompetent, under Code Civ. Proc. § 1870, subd. 2.

3. Evidence 🔑222(8), 243(4)—Statement, immediately after accident, of employee driving truck, "I could have stopped," held competent as against employee, but incompetent to bind employer in action for death (Code Civ. Proc. § 1870, subd. 2).

In action against truck driver and his employer for death resulting from accident due to alleged negligence of employee, employee's statement immediately after accident, "I got out of this lucky; I could have stopped, but I thought the trailer was going to stop," *held* competent as admission against interest of driver, under Code Civ. Proc. § 1870, subd. 2, but incompetent to bind employer.

4. Appeal and error 🔑1053(6)—Admission, over employer's objection, of admissions of employee driving truck, held not prejudicial error, in action against employer and employee for death, where evidence was subsequently limited to employee.

In action against employer and employee for death resulting from employee's alleged negligence in driving truck, error in admitting testimony, over objection of employer, as to employee's admission after the accident that he could have stopped, *held* not prejudicial,

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★Hearing denied by Supreme Court.

where the evidence was subsequently limited to the employee, and jury was correctly instructed as to its application.

5. Appeal and error 🔑1053(2)—Erroneous admission of evidence is cured by subsequent elimination with instructions to disregard it.

As a general rule, the erroneous admission of evidence is cured by its subsequent elimination from the record, where the jury is clearly instructed to disregard the testimony.

6. Appeal and error 🔑930(2)—Jury is presumed to have understood and observed unambiguous instructions.

Jury must be deemed to have understood and observed clear and unambiguous instructions.

7. Witnesses 🔑255(9)—Witness may refer to transcript of his testimony given at former trial to refresh recollection, provided record has first been established (Code Civ. Proc. § 2047).

For the purpose of refreshing the memory of a witness, it is competent to read or exhibit to him a transcript of his testimony respecting the same subject-matter given at a former hearing or trial under Code of Civ. Proc. § 2047, provided the record of the first trial has been first proved to be true and correct, but the authenticity of the record must first be established.

8. Appeal and error 🔑1048(4)—Error in permitting witness to use unestablished transcript of testimony at prior hearing to refresh recollection held not prejudicial, where witness' resulting testimony was merely cumulative (Code Civ. Proc. § 2047).

In action for death resulting from alleged negligence of truck driver, error in exhibiting to witness an unestablished transcript of his testimony, given at coroner's inquest concerning truck driver's admissions, for avowed purpose of refreshing his memory, *held* not prejudicial, under Code Civ. Proc. § 2047, where testimony of witness given after reference to the transcript was merely cumulative of testimony of another witness.

9. Trial 🔑29(3)—Court's remarks that jury did not have to accept expert's testimony held not prejudicial as invading jury's province, in view of instructions.

Remarks of court in admitting testimony of expert witness in response to question, "Does the use of a transit give you more accurate information than the use of angles?" that "the jury don't have to accept that, the statements of an expert, * * * if the statements of the witness do not appeal to their sound judgment," *held* not prejudicial as a comment on weight of evidence invading jury's province, even if question was proper and intelligible, where court added that it had no right to pass upon the weight of the evidence or the credibility of witnesses, but that such matters were within the sole province of the jury.

10. Evidence 🔑588—Jury may disregard testimony of witnesses which is not in accord with sound judgment.

Jury is not bound to accept testimony of either lay or expert witnesses, where their statements are not in accordance with common sense or sound judgment, since jury is sole judge of the weight of evidence and credibility of witnesses.

11. Appeal and error 🔑1064(1)—Instructions upon commonplace matters or reasonably cautionary instructions do not warrant reversal, in absence of prejudice.

Giving of instructions upon commonplace matters of which jurors are presumed to be cognizant, or reasonably cautionary instructions, is not ground for reversal, in absence of showing of prejudice.

12. Trial 🔑206—Competent expert testimony should be permitted to go to jury without disparagement.

Expert testimony, when competent and admissible, should be permitted to go to jury without disparagement like the evidence of any other witness, leaving them to pass upon its weight and sufficiency, but court may give reasonably cautionary instructions.

13. Automobiles 🔑243(5)—Evidence of effect of wooden ramp, which covered sidewalk, upon movements of trailer, held inadmissible, in action for death resulting from collision between truck and trailer which rolled from gravel bunker, adjacent to highway.

In action for death resulting from collision between truck and runaway trailer which rolled from gravel bunker adjacent to highway, rejection of testimony concerning effect of wooden ramp which covered sidewalk upon movements of trailer in crossing it upon former occasions *held* not error.

14. Appeal and error 🔑928(4)—Where record failed to show which side offered instructions, or what instructions were modified or refused, it was presumed all instructions were given at appellants' request, and appellants could not complain.

Where record failed to disclose what instructions, if any were modified or refused, or which instructions were offered by respondents, it was presumed that they were all offered by and given at the request of the appellants, who were therefore not in position to complain of any errors in the instructions.

Appeal from Superior Court, Los Angeles County; Harold Louderback, Judge.

Action by Daisy C. Shaver and another, by Irl D. Shaver, guardian ad litem, against the United Parcel Service, a corporation, and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

H. W. Kidd and Walter O. Schell, both of Los Angeles (Gerald F. H. Delamer, of Los Angeles, of counsel), for appellants.

Irl D. Brett, of Los Angeles, for respondents.

THOMPSON, Justice pro tem. This is an appeal from the verdict of a jury and the judgment of the court awarding $15,000 damages for the death of respondents' intestate, caused by the alleged negligence of appellants in driving their Ford truck into a loaded runaway trailer which had rolled from a gravel bunker adjacent to the highway, into Cromwell avenue in Los Angeles county. At the time of the accident, the decedent was engaged in trying to stop the trailer.

For grounds of reversal, the appellants contend that (1) the judgment is not supported by the evidence; (2) that the testimony fails to show negligence on their part; (3) that the evidence affirmatively establishes contributory negligence on the part of the deceased; and (4) that the court erred in the admission of testimony, in giving and refusing certain instructions, and in commenting on the weight of evidence to which an expert witness is entitled.

Cromwell avenue is a paved street 38 feet wide, extending east and west along the base of the Hollywood hills. A 6-foot cement sidewalk borders this avenue on the north, and is elevated above the level of the street about 6 inches. On the north side of this highway, at a point opposite the place where the accident occurred, the land slopes gradually upward to a gravel pit and sand bunkers owned by William Kerr, which are situated 20 feet from the upper edge of the sidewalk. The soil of the driveway leading to these bunkers consists of loose eroded shale or deteriorated granite. Opposite this driveway, the sidewalk was covered with timbers. A plank apron furnished the means of descent from the elevation of the walk to the level of the street. West from the point where the accident occurred, two streets join Cromwell avenue from the south, but do not extend beyond it The nearest street to the west is Observatory avenue, which is 30 feet distant, and Commonwealth avenue is 300 feet beyond. Cromwell avenue, upon which the accident occurred, is perfectly straight in this locality, and ascends with a considerable grade from Commonwealth avenue to the point where the collision occurred. The view from Commonwealth avenue to the bunkers and the street below is clear and unobstructed.

On February 2, 1924, at about 9 o'clock in the forenoon, the deceased and one Burke were engaged in loading an automobile trailer with gravel at these bunkers. For this purpose the trailer was backed against the bunker, and gravel was deposited in the box by means of a chute which extended half the length of the vehicle, thus loading the front part first, after which the trailer was moved forward in order to load the rear end. The driveway, where the trailer stood, descended slightly to the level of the sidewalk. In spite of this slight grade, the trailer would usually stand stationary without blocking the wheels. But, because the weight and force of the gravel in the process of loading would sometimes start the trailer forward, the wheels were blocked by placing a piece of planking 3 inches thick and a foot in length upon the ground in front of a rear wheel. At the time of the accident, Mr. Burke stood in the trailer box distributing the gravel as it was deposited from the chute. The deceased was engaged outside upon the ground. When the front end of the box had been filled, according to custom, the plank which blocked the rear wheel was kicked forward 2 or 3 feet to permit the machine to roll away from the bunker so as to load the rear end. Upon this occasion, however, the block failed to stop the car. The witness Nemmo testified: "* * * The ground was soft, and the block failed to stop the trailer." The weight of the partially loaded car crushed the block into the soil, and it rolled slowly on into the street. Upon observing that the block failed to stop the car, the deceased ran ahead of it and attempted to force the end of the tongue which protruded ahead of the car into the earth with his foot. Failing in this effort, standing upon the tongue, he reached for the brake lever at the left side of the box, which he applied with all his strength. While the speed of the car was greatly checked, it nevertheless continued to move forward no faster than a man could walk, and ran into and across Cromwell avenue at right angles.

About the time this trailer started on its course for the highway, the appellant Faulds drove a Ford truck up Commonwealth avenue and turned into Cromwell avenue within plain view of the scene above described, not more than 350 feet away. He knew of the presence of the bunkers. The runaway trailer was 16 feet in length, and the body was painted red. There was no traffic upon this highway, and nothing to obstruct a clear view of the trailer as it slowly ran across the pathway of the approaching truck. In spite of this evident danger, the appellant Faulds drove his car up this grade to the point of impact at a rate of speed variously estimated at from 20 to 35 miles an hour. As he reached a point 30 or 40 feet from the point of collision, his car was seen to turn first sharply to his left as though he were intending to pass behind the trailer, then he appeared to speed up and turn to the right with the evident intent of dashing ahead of the trailer. No horn or other warning of his approach was given, and there is no evidence that the deceased even knew of his danger.

Mr. Burke, who held his position in the trailer, testified:

> "Mr. Shaver first stood with both feet on the trailer tongue, trying to push the tongue into the dirt, pulling the brake at the same time to stop it. * * * When he saw he wasn't going to make it that way, he took one foot off the trailer * * * so as to get more pull—more leverage. * * * The truck kept coming on. When the (defendants') truck got to the east side of the center of the street (Observatory avenue) it made a noticeable turn to the left, * * * then it made a turn to the right again, and then straightened its course out. It looked as if the truck slowed down and then speeded up again, and it looked to me as if the

driver of the truck tried to get in front of the trailer, and there was not room. * * * Mr. Shaver was standing, at the time of the impact, with his left foot on the trailer tongue and his right foot on the ground walking backward slowly. * * * Mr. Shaver was wedged in between the Ford and the trailer. The Ford had run over the trailer tongue."

The appellant Faulds testified:

> "From Commonwealth east to Observatory I was driving uphill, and continued to drive uphill until the time of the accident. * * * I did not see the bunker, but I knew it was there. I did not see the trailer at all until the time of the impact."

In attempting to dash through between the south curbing of Cromwell avenue and the approaching trailer, it is quite evident the Ford truck struck the protruding tongue of the trailer and knocked the deceased from his position on the tongue, wedging him in between the trailer and the truck. Both machines stopped. The tongue of the trailer extended between the front and rear wheels of the truck, which was jammed against the south curbing of the street. The trailer had to be shoved back to release the body of the deceased, which then fell to the pavement. He was taken to the emergency hospital, and soon died from the effect of the injuries which he had sustained.

[1] The appellant Faulds had ample opportunity to avoid the accident. He took a desperate chance, as the result conclusively proved, in attempting to pass ahead of the trailer. He claims to have been traveling only 20 to 25 miles an hour, and testified: "* * * At the speed that I was going, I could have stopped the Ford between 20 and 25 feet." The deceased was doing his utmost to stop the trailer, and was evidently unaware of the presence of the speeding truck. Observing the predicament of the runaway trailer, and the imminent danger of attempting to pass ahead of it, it was the duty of the driver of the Ford to slacken his speed or stop if necessary to avoid the collision. We are of the opinion that his conduct under the circumstances furnishes ample evidence of negligence on his part. The question of appellants' negligence and of the charge of contributory negligence on the part of the deceased were matters for the determination of the jury, and we are satisfied that their findings upon these subjects are supported by substantial evidence.

[2-6] Two of respondents' witnesses were permitted to testify that the driver of appellants' machine, immediately after the accident had occurred, stated: "I got out of this lucky; I could have stopped, but I thought the trailer was going to stop." This testimony was received over the objection of the appellants on the ground that it was incompetent and that it constituted no part of the res gestæ. Subsequently the court reversed this ruling and struck the evidence out so far as its application to the appellant corporation was concerned, permitting it to stand only as admissions against the appellant Faulds. The court said:

> "It is received against Faulds (only). The jury is so advised, and will note the (subsequent) instruction (which will be given) with relation to the matter stricken out. * * * The jury is admonished to disregard these statements of the driver as to (their application to) the defendant corporation."

Instruction number 10, which was later given, directed the jury that:

> "You must not consider for any purpose any evidence * * * which has been stricken out by the court. Such evidence is to be treated as though you had never heard it."

The statements of the chauffeur of an automobile, made subsequent to an accident in which he is involved, are competent as admissions against the interest of the driver. Lampton v. Davis Standard Bread Co., 48 Cal. App. 116, 119, 191 P. 710; section 1870, Code Civ. Proc. subd. 2. But the admissions of an employee which are not prompted by the excitement of the occasion and are no part of the res gestæ cannot bind the principal and are incompetent. Luman v. Golden Ancient Channel M. Co., 140 Cal. 700, 709, 74 P. 307; Kimic v. San Jose-Los Gatos, etc., Co., 156 Cal. 379, 390, 104 P. 986; Baker v. Western Auto Stage Co., 48 Cal. App. 283, 192 P. 73; 3 Jones, Com. on Ev. 2217, § 1207. The application of the forgoing admissions was properly limited to the appellant Faulds, and they were properly stricken from the record to the extent to which they may have affected the appellant corporation. It was not prejudicial error to have first admitted the testimony as affecting both appellants, since the evidence was subsequently properly limited, and the jury was clearly instructed as to its application. Shupe v. Rodolf, 185 Cal. 371, 197 P. 57; Rystinki v. Central California T. Co., 175 Cal. 336, 342, 165 P. 952; Atkinson v. United Railroads of S. F., 71 Cal. App. 82, 97, 234 P. 863; 2 Cal. Jur. 1021, § 607. It is a general rule that the erroneous admission of evidence is cured by its subsequent elimination from the record, where the jury is clearly instructed to disregard the testimony. 4 C. J. 989, § 2972; Walker's Errors in Civ. Proc. 549, § 177. A jury must be deemed to have understood and observed clear and unambiguous instructions. McCollum v. Barr, 38 Cal. App. 411, 429, 176 P. 463; Johns v. Pond, 38 Cal. App. 643, 649, 177 P. 293; Keena v. United Railroads, 197 Cal. 148, 152, 239 P. 1061; 24 Cal. Jur. 763, § 44.

[7, 8] When the respondents' witness Nimmo was first asked regarding the foregoing statement of the appellant Faulds, he said that he did not recall the conversation. Over the objection of appellants, he was then shown a transcript of his testimony on that

subject which was previously given at the coroner's inquest, for the avowed purpose of refreshing his memory. Upon examination of this record, the witness asserted that he recalled the incident, and then testified to the foregoing statement, which conformed to his evidence at the inquest. It is claimed by the appellants that this was error. We are of the opinion, however, that under the circumstances of the present case the ruling was not prejudicial, in spite of the fact that the authentication of the transcript of the evidence adduced at the coroner's inquest was not first established, for the reason that Mr. Burke, another witness, testified to precisely the same statement, and the evidence complained of was therefore merely cumulative. For the purpose of refreshing the memory of a witness, it is competent to read or exhibit to him a transcript of his testimony respecting the same subject-matter, given at a former hearing or trial, after the record has been first proved to be true and correct. People v. Mercado, 59 Cal. App. 69, 74, 209 P. 1035; section 2047, Code Civ. Proc.; 5 Jones Com. on Ev. 4689, § 2386; 2 Hyatt on Trials, 1186, § 1246. This rule, however, is for the purpose of awakening a dormant memory and stimulating present recollection of circumstances sought to be elicited. The former testimony may not be received as proof to establish a fact in the present case, except that, pursuant to the exercise of great caution, a witness may be permitted to testify from a writing made by him or under his direction, in accordance with the requirements of section 2047, Code of Civil Procedure, even though he may retain no recollection of the particular facts. The authenticity of a record from which a witness is permitted to refresh his memory should, however, be first established. Since the ruling complained of in the present case affected only evidence which was cumulative, it was harmless, and did not constitute prejudicial error. Siemon v. Finkle, 190 Cal. 611, 618, 213 P. 954; 2 Cal. Jur. 1020, § 607.

It is contended that the court invaded the province of the jury in commenting upon the weight to be given to the testimony of an expert witness. William Kerr, the owner of the bunkers in question, testified that he was an architect and builder, and that he had taken certain measurements "with tape lines and straight edges" from which he prepared the diagram which was received in evidence. In opposition to this testimony, the appellants called Mr. Borders, whom they sought to qualify as an expert engineer. While it appeared that he had taken the engineering course at the Kansas University for two years, he was not a graduate of any institution, and his experience consisted of three years' service in the army and in establishing railroad grades, during which he acted as a transit or level man. However, the court assumed that he was qualified as an expert, and, over the objection of respondents upon that ground, he was permitted to answer the question, "Does the use of a transit give you more accurate information than the use of angles?" This was for the evident purpose of discrediting the measurements testified to by Mr. Kerr, but our attention is not called to any figures wherein it is claimed the data secured by these gentlemen differed in any respect. Borders testified to no other material fact. It is manifest that, if his measurements did not differ from those from which Mr. Kerr prepared his diagram, there would be no prejudice, even if the court's remarks respecting an expert were indiscreet. However, we are disposed to think they are scarcely open to this criticism. In permitting the answer to that question, the court said:

> "I will allow the testimony. The jury don't have to accept that—the statements of an expert. An expert is for the purpose of assisting the jury in reaching their conclusions, and, if the statements of the witness do not appeal to their sound judgment, they do not have to accept it."

The court then added:

> "I have prepared an instruction (regarding the weight to be given to the opinions of experts) which I will give to you so that you can govern yourselves regarding (the consideration of) expert testimony."

The instruction to which the court referred was in fact given as follows:

> "The opinions of experts are not conclusive; their opinions are not to be substituted for the common sense and judgment of the jury. The purpose of the introduction of such evidence is to supplement the general knowledge and experience of the jury in relation to the matters before the jury, and thereby to aid the jury in the exercise of its own judgment to the end that a more just and accurate conclusion may be drawn from the evidence."

The jury was further instructed that:

> "Neither the judge nor the jury may trespass upon the province of the other. Our provinces are entirely distinct and separate, and you will understand that in this charge the court in no manner or form is expressing or desiring to express any opinion on the weight of the evidence, or any part of it, or on the truth or falsity of any witness' testimony, or that any alleged fact in the case is or is not proved."

[9] The question which prompted the remarks of the court which were criticized by appellants, to wit, "Does the use of a transit give you more accurate information than the use of angles?" seems unintelligible. It would appear to require something more than the wisdom of an expert engineer to answer this question. Probably it was the intention to ask this witness whether the use of a transit would furnish more accurate measurements for a diagram than would the use of a straightedge and tape line. A surveyor's transit is used for measuring distances and

horizontal angles. Cent. Dict. A straightedge and tape line may be used for the same purpose. Common knowledge should teach the nonexpert that the transit is more reliable. It may therefore be doubtful whether this inquiry is a proper subject for expert testimony. But, assuming that it was a proper, intelligible question, and that the testimony of these expert witnesses conflicted with respect to their measurements, we nevertheless think that the remarks of the court were not prejudicial. The effect of the court's language inferred that whatever may be the answer of the witness to this unanswerable question, the jury is not bound to accept the reply unless it appeals to their sound judgment. In the instruction which followed this remark, the court merely said that the opinions of experts were not to be substituted for common sense and sound judgment, and that their opinions were not necessarily conclusive. This instruction was coupled with the explicit statement that the court had no right or disposition to pass upon either the weight of the evidence or the credibility of the witnesses, but that these matters were within the sole province of the jury. Certainly, under such circumstances, the jury could not have been misled into believing that the court was discrediting the testimony of this expert witness. What was said respecting the evidence of experts would apply with equal force to the testimony of any other witness. Since the jury is the sole judge of the weight of evidence and the credibility of witnesses, it follows that ordinarily the jury is not bound to accept statements which are not in accord with common sense or sound judgment. And it is equally true that the testimony of a witness is not necessarily conclusive.

[10-12] The giving of instructions upon commonplace matters of which the jurors are presumed to be cognizant, or even reasonably cautionary instructions, is not ground for reversal, in the absence of a showing of prejudice. 2 Cal. Jur. 1027, § 611, and authorities there cited. It is true that expert testimony, when competent and admissible, like the evidence of any other witness, should be permitted to go to the jury without disparagement, leaving them to pass upon its weight and sufficiency. Estate of Hess, 183 Cal. 589, 593, 192 P. 35; Abbott's Trials (4th Ed.) 765, § 47. Under the circumstances of the present case, however, we are of the opinion that the province of the jury was not invaded by the declarations of the court and that its remarks were not prejudicial.

[13] Nor was there error in the court's sustaining respondents' objection to a question propounded to Mr. Kerr on cross-examination regarding the effect of the wooden ramp which covered the sidewalk, upon the movements of the trailer in crossing it upon former occasions. No special reason for eliciting this evidence is suggested. It does not appear how his answer would have affected the result in the present case, or that it would throw any light on the circumstances surrounding the accident.

[14] In their brief, the appellants complain of the court's refusal to give, or its modification of, some forty-two instructions offered by them. The bill of exceptions sets out eighty-nine instructions in consecutive order, but fails to indicate which of them, if any, were refused or modified, how they were modified, or by whom they were offered. All that the bill of exceptions contains in this regard is the following:

> "The defendants thereupon tendered to the court the following written instructions, and requested that (they) be given. The court then refused to give the following (one) instruction (to wit): 'You are instructed to return a verdict in favor of the defendants.' The court then and there refused to give the remaining instructions, except as otherwise given in the instructions by the court."

If the record fails to disclose the party at whose request the instructions were given, it will be presumed they were offered by the appellant, in which event he may not complain of any errors therein contained. Sutter Butte C. Co. v. American R. & A. Co., 182 Cal. 549, 554, 189 P. 277; Gray v. Eschen, 125 Cal. 1, 5, 57 P. 664; Bognuda v. Pearson, 71 Cal. App. 105, 110, 234 P. 857; 2 Cal. Jur. 870, § 509. The last paragraph of the bill of exceptions preceding the instructions which appear therein, is ambiguous and unintelligible; but from the first paragraph above quoted, to wit, that "the defendants thereupon tendered to the court the following written instructions, and requested that they be given," leaves the inevitable conclusion that the defendants offered all the instructions which appear in the bill of exceptions. With the exception of the first instruction above quoted, the authenticated record does not show that any of these instructions were either modified or refused. Since it is utterly impossible for this court to ascertain what instructions, if any, were modified or refused, or which ones were offered by the respondents, it must be assumed that they were all given at the request of the appellants, who may therefore not complain of any errors which they may contain.

For the foregoing reasons, the judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

91 Cal. App. 71

SPINAK v. PRIDHAM. (Civ. 5152.)

District Court of Appeal, Second District, Division 1, California. April 16, 1928.

Appeal and error ⚷1039(13)—Evidence and finding as to reasonable market value of services under contract, though outside of issues, held not ground for complaint, where amount awarded was less than provided in contract.

In suit on contract whereby plaintiff agreed to furnish certain drawings and designs for use in construction of house by defendant, though evidence and finding as to reasonable value of designs furnished by plaintiff was outside the issues, defendant cannot be heard to complain, where there was a finding that plaintiff fulfilled his contract, and amount awarded was less than that provided for in contract.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Leon Spinak, doing business under the fictitious name of Leon Spinak & Co., against R. W. Pridham, for services under contract. Judgment for plaintiff, and defendant appeals. Affirmed.

Hill & Morgan and Kenneth K. Wright, all of Los Angeles, for appellant.

Frank F. Oster, of Los Angeles, for respondent.

HAHN, Justice pro tem. It is alleged in the complaint in this action that in May, 1923, plaintiff and defendant entered into a contract whereby plaintiff agreed to "prepare and furnish for defendant's use and benefit certain sketches and working details for the construction of certain fixtures and embellishments of a residence then being constructed by defendant in said city and, whenever by defendant required so to do, to exercise an advisory supervision over the construction and incorporation of such fixtures and embellishments in said residence; and, in consideration of plaintiff's said promise and agreement, defendant promised and agreed in said contract to pay to plaintiff the sum of $600." The complaint further alleges that the plaintiff has duly performed all of the conditions of said contract to be by him performed, and that defendant has repudiated said contract, and refused to pay him said sum or any part thereof.

The answer denies each and all of the allegations of the complaint except that of nonpayment of the alleged claim. Judgment went for plaintiff in the sum of $400, from which defendant appeals.

Appellant presents his grounds for a reversal of the judgment under three heads: First, the evidence is insufficient to support the findings; second, the findings do not support the judgment, and the judgment is contrary to law; third, the court committed error in its admission and rejection of evidence.

The findings complained of may be briefly summarized as follows:

First. That plaintiff and defendant entered into a contract whereby plaintiff agreed to prepare and furnish for defendant "certain designs" for defendant's house, "and to supervise the incorporation of these designs in said house," for which defendant agreed to pay plaintiff the sum of $600.

Second. That the plaintiff did not agree, nor did the parties to the contract understand, that plaintiff was to furnish complete working details such as might be required by a planing mill incident to its work, but only such working details as would enable a competent mechanic to execute the designs furnished.

Third. That plaintiff furnished the designs for the fixtures and embellishments in accordance with said contract and as therein required of the plaintiff, and that the defendant used said designs and had the benefit of them.

Fourth. That the designs furnished were of the reasonable value of $400.

Fifth. That the plaintiff did not supervise the incorporation of the fixtures and embellishments, and defendant never requested plaintiff so to do.

Appellant urges that the contract found by the court to have been entered into between the parties required of the plaintiff only that he furnish the "designs," while the contract pleaded and testified to by the plaintiff provided that plaintiff was to furnish "sketches" and "working details." Furthermore, that the court found that the contract required plaintiff to "supervise" the work, while the contract pleaded and testified to by plaintiff provided that plaintiff was "to exercise an advisory supervision" only when requested so to do by defendant.

It must be conceded that the findings are inaccurately drawn and lacking in concise adherence to the issues as set forth in the pleadings. However, when read together and analyzed, it cannot be said that they do not declare upon the material issues as determined by the court. There is sufficient evidence in the record to support the view evidently taken by the court that what the plaintiff agreed to furnish, and which in the complaint was designated as "sketches and working details," was in fact included in the term "designs." Apparently, during the trial, the chief controversy on the question of what plaintiff was to furnish, aside from the question as to whether or not a contract was entered into, seemed to center around the detailed drawings which were required by the planing mill in getting out the staircase that was to be erected in the house.

Plaintiff testified that the designs he furnished included a number of detailed drawings which were sufficient to enable any mechanic to construct the work as delineated, and that was all the contract required of him. He admitted that he did not prepare full-sized detailed drawings for the staircase, as desired by the mill, claiming that such drawings were not contemplated by either the defendant or himself, and not included in the agreement. Defendant's testimony on this point conflicts with that of plaintiff.

Smith, the contractor who had charge of the building, testified that the drawings and designs furnished him by plaintiff were sufficient to enable him to do all of the work contemplated by the designs, except that the mill required certain detailed drawings which were not furnished by the plaintiff. The court found that the contract did not require the plaintiff to furnish these detailed drawings for the mill. There being sufficient evidence to support this finding, this court will not disturb it.

The apparent conflict pointed out by appellant between the findings and the complaint as to the matter of supervising the work consists rather in the form of language used than in the substance.

The testimony on this point is somewhat extended, and more or less conflicting as to just what was the intention of the parties. It clearly appears that no request was ever made of the plaintiff to examine or supervise the work. There is sufficient evidence to have justified the trial court in concluding that the supervising, whatever was meant by the term, was to be furnished only at defendant's request, but was not regarded as of any importance by the defendant, and was in fact waived by him.

It is next pointed out that the complaint sounds in contract and not in quantum meruit; hence that the finding that the reasonable market value of the designs furnished by the plaintiff is the sum of $400, is outside of the issues raised in the pleadings; also that the judgment has no support in the proper findings, and therefore the judgment is contrary to law.

It must be conceded, and in fact is so conceded by respondent, that the finding as to the reasonable value of the designs furnished is outside of the issues raised by the pleadings. Respondent frankly concedes that he does not urge the sustaining of the judgment on the court's theory that he was entitled recover for the reasonable value of the designs, but that his recovery must rest upon his contract pleaded and the evidence in support thereof. Respondent's answer to appellant's attack upon this finding is that it may be treated as surplusage, as there are sufficient other findings to sustain the judgment in his favor. Moreover, he urges that appellant cannot be heard to complain, because the court awarded respondent only $400 on the theory of the reasonable value of the designs, when upon the evidence and the findings, he should have been awarded the sum of $600. In other words, conceding that the court erred in the matter of taking evidence on the question of the reasonable value of the designs, and in making a finding upon that question, there is a finding that plaintiff fulfilled his contract, and, there being evidence sufficient to sustain that finding, a judgment not to exceed $600 should be sustained. We think respondent's contention answers appellant's criticism.

The last point urged by appellant is in criticism of a ruling of the court sustaining respondent's objection to a question asked of a witness by appellant. We have examined the record on this point, as well as the citations presented, and are of the opinion that the error, if any, committed was wholly immaterial.

For the foregoing reasons, the judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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90 Cal. App. 616

CITY OF PETALUMA v. HICKEY.
(Civ. 6079.)

District Court of Appeal, First District, Division 2, California. April 4, 1928.

1. Payment ⚷84(2)—City's payment of penalty to purchaser at sale for assessment held not recoverable as made under mistake of law (Pol. Code, § 3779 [1889]).

Fact that city, during litigation on owners' tender of street assessment and penalty, paid purchaser at sale to enforce assessment what he had paid for land, plus penalty, under Pol. Code, § 3779 (1889), did not make payment of such penalty one under mistake of law, justifying city's recovery thereof in equity, although city paid money through one of its officers acting on legal advice.

2. Municipal corporations ⚷894—City may recover as involuntary trust illegal payment of penalty on street assessment to purchaser at sale to enforce assessment.

Where owners of property were adjudged liable only for street improvement assessment, and not for penalty thereon, and city, pending such litigation, paid purchaser at sale to enforce assessment, amount of assessment and penalty, in view of charter, such city was entitled to recover as involuntary trust money illegally paid by city treasurer for penalty.

3. Limitation of actions ⚷39(11)—City's action to recover illegal payment nearly six years thereafter held barred (Code Civ. Proc. §§ 337–340, 343).

Under Code Civ. Proc. §§ 337–340, 343, city's action to recover illegal payment by city treasurer nearly six years after such payment was barred.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. Limitation of actions 🔑39(11)—Action to recover payment from involuntary trustee must be commenced within four years (Code Civ. Proc. § 343).

Under Code Civ. Proc. § 343, action against involuntary trustee to recover money paid must be commenced within four years.

5. Municipal corporations 🔑894—City's right as to recovery of illegal payment to city official held same whether he was or was not municipal officer.

City's right to recover illegal payment to city official purchasing land on sale to enforce street improvement assessment was same whether he was or was not municipal officer.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by the City of Petaluma against W. J. Hickey. From a judgment for defendant, plaintiff appeals. Affirmed.

Fred S. Howell, of Petaluma, Hartley F. Peart, of San Francisco (Chas. V. Barfield, of San Francisco, of counsel), for appellant.
E. J. Dole, of Petaluma, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover a judgment for money. The defendant appeared and answered. The trial was had before the lower court, sitting without a jury. That court made findings of fact in favor of the defendant, and from a judgment entered thereon the plaintiff has appealed and has brought up a bill of exceptions.

The controversy is an outgrowth of a street improvement proceeding. J. E. Cavanagh et al. owned two tracts in the city of Petaluma. The city commenced a proceeding for the opening, extending, and widening of Douglas street. Thereafter such proceedings were had that both tracts were sold to W. J. Hickey for the nonpayment of the assessment. He paid the total sum of $6,015.02. Later the owners tendered and deposited for plaintiff's account the amount claimed as payable on redemption, and at the same time served and filed a protest. Later litigation followed. The result of one proceeding was that the owners obtained a final judgment to the effect that they were mistaken in their contention that the proceeding as a whole was invalid, but that they were correct in contending that they were not liable for $3,337.85, claimed to be due as a penalty. Cavanagh v. Shaver, 56 Cal. App. 758, 207 P. 275. While that litigation was pending, the officers of the plaintiff caused to be paid, and did pay, to W. J. Hickey, this defendant, $10,047, whereas he had paid $6,015.02. In other words, there was paid to W. J. Hickey the total sum tendered under protest by the owners, with interest thereon, instead of the actual amount which the defendant had paid in, together with interest thereon—both payor and payee assuming that the aforesaid penalty, $3,337.85, was a legal charge against the redemptioners and in favor of the purchaser at the sale. Pol. Code, § 3779 (1889).

The defendant contends that the plaintiff's complaint does not state a cause of action, and that plaintiff's cause of action, in any event, is barred by the statute of limitations. On the other hand, the plaintiff contends that its complaint states a cause of action on any one of the following theories: (1) That the money was paid under a mistake of fact; (2) that the money was paid under a mistake of law; (3) that the money was impressed with a trust; and (4) that the money was illegally paid out.

In presenting the first contention, the plaintiff cites some of the evidence as showing that there was a mistake of fact. The evidence does not support the contention. A reading of the entire record shows that there was no mistake of fact. Furthermore, the trial court in its findings, among others, found that there was no mistake of fact. The most that can be said in behalf of this theory is that there may be a little conflict in the evidence. This we do not concede, but, even though there were a conflict, under well-established rules this court would have no power to interfere with the finding.

[1] Turning to the contention that the plaintiff's complaint pleads a mistake of law, it is perfectly clear that the facts of this case are not such that a court of equity will take jurisdiction and grant a decree. In the case of Goodenow v. Ewer, 16 Cal. 461, at page 471 (76 Am. Dec. 540.), the court said:

> "Indeed, the weight of authority in the United States is that the mistake, *unless accompanied with special circumstances, such as misrepresentation, undue influence, or misplaced confidence*, constitutes no ground for relief." (Italics ours.)

That decision has been cited and followed. Boggs v. Fowler & Hargrave, 16 Cal. 560, 565, 76 Am. Dec. 561; Burt v. Wilson, 28 Cal. 632, 87 Am. Dec. 142; Kopp v. Gunther, 95 Cal. 63, 74, 30 P. 301; Brackett v. Banegas, 116 Cal. 278, 284, 48 P. 90, 58 Am. St. Rep. 164; Rued v. Cooper, 119 Cal. 463, 467, 51 P. 704; Cooley v. County of Calaveras, 121 Cal. 482, 485, 53 P. 1075; Wingerter v. San Francisco, 134 Cal. 547, 66 P. 730, 86 Am. St. Rep. 294; Lewis v. San Francisco, 2 Cal. App. 112, 117, 82 P. 1106; Bowman v. Payne, 55 Cal. App. 789, 796, 204 P. 406. In the case under consideration the mistake of law, if any, was not "*accompanied with special circumstances,*" such as will confer jurisdiction on a court of equity to grant relief as for a mistake of law. The fact that the money was paid out by one of the officers of the plaintiff, acting under legal advice, does not alter the rights of the plaintiff. The plaintiff contends otherwise, and it cites 2 Pomeroy, Equity Jurisprudence, § 849. That section is not applicable to the facts of this case. Section 851 is applicable, and supports what we have said. Douglass v. Todd, 96 Cal. 655, 31 P. 623, 31 Am. St. Rep. 247, was a motion to be relieved of a default. It contains nothing tending to support the contention of the plaintiff. Benson v. Bunting, 127 Cal. 532, 59 P. 991, 78 Am. St. Rep. 81, involved constructive, if not actual, fraud consisting in the plaintiff's attorney entering into a contract purporting to serve the defendant also. Gregory v. Clabrough's Executors, 129 Cal. 475, 62 P. 72, rested on the special circumstances that the plaintiff made a mistake of law by reason of the fact that he was led to consult the defendant's attorney, who gave the incorrect advice. It is patent that not one of these cases supports the points to which the plaintiff cites it.

[2] The contentions that the money was impressed with a trust and that the money was illegally paid out are so interwoven that they need not be discussed separately. In support of its contention, the plaintiff cites and relies on 21 Ruling Case Law, 174. Turning to the authority cited, it appears that the text purports to be based on several cases, among which is Lamar Township v. City of Lamar, 261 Mo. 171, 169 S. W. 12, Ann. Cas. 1916D, 740. On page 744 (261 Mo. 189, 169 S. W. 15) the Supreme Court of Missouri states:

> "Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to their hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out. Manifestly, none of the reasons which operate to render recovery of money voluntarily paid under a mistake of law by a private person, applies to an officer. The law which fixes his duties is his power of attorney; if he neglect to follow it, his cestui que trust ought not to suffer. In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority."

And see People v. Fields, 58 N. Y. 491, 505.

We have no quarrel with that rule. In this state the rule is statutory so far as one of the counties is concerned. Pol. Code, § 4005b; Riverside v. Yawman & Erbe Mfg. Co., 3 Cal. App. 691, 86 P. 900. Section 4, article III, of Freeholder Charter of the city of Petaluma, is not so specific, but it is broad enough to make the same rule applicable to the plaintiff. People v. Ingersoll, 58 N. Y. 1, 35, 17 Am. Rep. 178. The doctrine of the Lamar Case was decided in New York in the Tweed Cases. People of the State of New York v. Ingersoll, 58 N. Y. 1; People of the State of New York v. Fields, 58 N. Y. 491. Those cases were commenced by the Attorney General. It was contended that the Attorney General had no authority to maintain the actions. Before the court could decide that contention, it became necessary to ascertain exactly what was the nature of the action which the Attorney General was attempting to maintain. Both opinions are very long. They consider all of the factors in great detail, and decide that the moneys involved in those actions were obtained by the defendants unlawfully, and through acts of fraud from the city treasury, and that defendants were liable as for moneys had and received. In the case entitled Board of Supervisors v. Ellis, 59 N. Y. 620, fraud was not involved. Ellis, a supervisor, had put in claims, and had been paid by the county treasurer certain moneys as per diem and mileage which the statute did not authorize. The court cited and followed the Tweed Cases on the rule to which we have cited them. It is clear, therefore, that, when the moneys were in the hands of the city treasurer of Petaluma, the treasurer held them as trustee for the municipality. Afterwards when he, without authority of law, paid the moneys to the defendant, an involuntary trust was created. Civ. Code, § 2224.

[3, 4] Excepting the contention that the action was not commenced in time, we think the complaint pleaded facts showing a cause of action against the defendant on the theory that he held the moneys as an involuntary trustee. This conclusion brings us to a consideration of the statute of limitations. The defendant pleaded, and the trial court found, that the action was barred by the provisions of sections 337, 338, 339, 340, and 343 of the Code of Civil Procedure. The undisputed facts are that the money was paid to the defendant on July 6, 1918; and that this action was commenced by the filing of the complaint on the 3d day of May, 1924, nearly six years thereafter. As we have shown above, the liability of the defendant, if any, was that of an involuntary trustee, but it has been frequently adjudged that an action against an involuntary trustee must be commenced within four years, and that the statute applicable is section 343 of the Code of Civil Procedure. Nougues v. Newlands, 118 Cal. 102, 106, 50 P. 386; Broder v. Conklin, 121 Cal. 282, 288, 53 P. 699. The statute of limitations had run.

[5] At all times prior to the 1st day of January, 1919, and during the pendency of the street opening proceeding, C. R. Wingfield, F. H. Snow, and W. J. Hickey were commissioners in the street opening proceeding. C. R. Wingfield and F. H. Snow, as such commissioners, made an order directing the pay-

ment of the moneys in suit to W. J. Hickey. From time to time the plaintiff adverts to the official capacity of the defendant. It does not contend that the defendant, as a trustee, dealt with himself, and therefore violated a well-established rule of law (Shakespear v. Smith, 77 Cal. 638, 20 P. 294, 11 Am. St. Rep. 327); therefore we see no pertinency in the foregoing facts, and have not confused the record by constantly adverting thereto. If there was no authority in law to pay the moneys to the defendant, the plaintiff's rights are the same whether defendant was or was not a municipal officer.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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91 Cal. App. 84

LANG v. McKINNEY BLUEPRINT PAPER CO. et al. (Civ. 6180.)

District Court of Appeal, First District, Division 1, California. April 17, 1928.

1. Automobiles ⚿217(4)—Pedestrian injured by motorcycle held not guilty of contributory negligence for continuing to cross intersection after first bell for traffic change sounded.

Pedestrian, suing for injuries on being struck by motorcycle while crossing intersection, and while standing between moving street car and automobile traffic, was not guilty of contributory negligence in continuing to cross after hearing first bell for traffic change sounded.

2. Automobiles ⚿244(6)—Evidence held to sustain finding of negligence of motorcyclist suddenly darting from behind street car and striking pedestrian.

In action for injuries to pedestrian struck by motorcycle, evidence that motorcyclist suddenly darted from behind street car and struck pedestrian standing between street car and automobile traffic, and as to speed of motorcycle, *held* to sustain finding that motorcyclist was negligent.

3. Appeal and error ⚿999(1)—Jury's verdict is controlling on appeal, where only questions involved were issues of fact.

Where only questions involved constituted issues of fact to be determined by jury from all the circumstances present, verdict of jury is controlling on appeal.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Robert Lang against the McKinney Blueprint Paper Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Rosecrans & Emme, of Los Angeles, for appellants.

J. C. Craig, Elmer P. Bromley, and V. L. Ferguson, all of Los Angeles, for respondent.

KNIGHT, J. This is an action to recover damages for personal injuries sustained by plaintiff as a result of being struck by a motorcycle driven by defendant Jorgensen, who at the time was performing a service for his codefendant and employer, McKinney Blueprint Paper Company. The action was tried before a jury and plaintiff was awarded a verdict of $2,750. Defendants appeal, urging as grounds for reversal that the evidence shows that plaintiff was guilty of contributory negligence, and is insufficient to prove negligence on the part of defendants.

The facts are not disputed, and in substance are as follows: The accident happened at the intersection of Third and Hill streets, Los Angeles, which streets cross each other at right angles, Hill street running north and south, and along its center are laid the double tracks of the electric street cars. There was a safety station on the west side of Hill street just north of its intersecting line with Third, provided for persons desiring to board the south-bound street cars on Hill street, and traffic signals were maintained at this intersection. Respondent started to walk easterly, with the traffic, across Hill street from the northwest corner to the northeast corner of said intersection, and, upon reaching the westerly street car track, the first bell of the traffic signal sounded to clear the traffic going east and west on Third street, preparatory to the sounding of the second bell to open the traffic going north and south on Hill street. Having ample time to reach the curb on the other side of Hill street before the second bell sounded, respondent continued to go forward with the traffic, but, when he got as far as the easterly street car track, he was prevented from going farther on account of automobiles turning northerly into Hill street from Third; and, while thus waiting to proceed, the second bell of the traffic signal sounded, releasing the traffic going north and south on Hill street. Immediately thereupon a north-bound street car, which had been waiting south of the intersection, moved forward on the easterly track behind respondent, and a line of automobiles traveling parallel with the street car proceeded to pass in front of him; consequently respondent was unable to go in either direction, and, while standing as far back toward the car track as was safe, and as far forward as possible toward the line of automobiles passing in front of him, Jorgensen, mounted on his motorcycle, came suddenly from behind the street car which he had been following, and at a rapid rate of speed attempted to pass between the street car on his left and the line of automobile traffic on his right, with the result that he struck respondent, knocking him violently to the

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

pavement, the force of the impact causing a compound comminuted fracture of the right leg, the bone being splintered and protruding through the flesh. Respondent was a farm laborer, and at the time of the accident was 58 years of age. The severe fracture he sustained caused delayed union of the bones, and, besides enduring much pain, he was compelled to lie in bed on his back 3 months; and at the time of the trial, in May, 1925, which was approximately a year after the accident, he was still on crutches, and the medical testimony shows that the injured limb will never reach its normal strength.

[1] Appellants contend that respondent was guilty of contributory negligence because he continued to go forward after hearing the first bell sounded. There is no good reason to hold that he should not have done so. Clearly, he had the right to cross the street at this particular point, and he was proceeding in a lawful and careful manner with the traffic, and doubtless would have been able to reach the other side before the second bell sounded but for the automobiles turning the corner from Third street into Hill, and preventing him, a situation which he could not foresee at the time the first bell sounded; and, when the second bell sounded, he was held between the street car and the automobile traffic, with no choice in the matter except to stand still in the only available place left for him to stand.

[2] As to the question of Jorgensen's negligence, it is plain that, if he had continued to follow the course behind the street car, or, desiring to pass the car, had swung to the right behind the line of the automobile traffic, the accident would not have happened; but, as he admitted immediately after the accident, he was in a hurry, and, consequently, as other evidence shows, he was traveling at a speed of at least 20 miles an hour, as one witness testified, in a section where the traffic "was about the heaviest in the city," in an attempt to pass the street car by darting between it and the line of automobiles traveling parallel with him, and in doing so struck the respondent. Furthermore, according to Jorgensen's testimony, when he reached the center of the intersection he saw respondent standing between the street car track and the automobile traffic; and it may be reasonably inferred therefrom that, if he had been traveling at a careful rate of speed, considering the conjested condition of the intersection, he would have been able to stop before striking respondent.

[3] In our opinion, the foregoing evidence is ample to sustain the verdict and the judgment; and, in any event, there is no express statute here involved regulating the conduct of the parties, and therefore the only two questions involved in this appeal, as to whether respondent used ordinary care in crossing said street, and whether Jorgensen exercised the same measure of prudence in operating his motorcycle, constituted issues of fact to be determined by the jury from all the circumstances present, including the condition of the traffic at the particular time and place in question, and, the jury having resolved these issues in respondent's favor, its verdict is controlling on appeal. Burgesser v. Bullocks, 190 Cal. 673, 214 P. 649.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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91 Cal. App. 78

LORENZ v. HUNT et al. (Civ. 3461.)★

District Court of Appeal, Third District, California. April 16, 1928.

Hearing Denied by Supreme Court June 14, 1928.

Homestead ⟹70—Lot on which owner conducted dance hall adjoining residence held not to constitute "homestead" (Civ. Code, § 1237).

Lot on which owner maintained a public dance hall adjoining residence *held* not to constitute a homestead within Civ. Code, § 1237, in that character of business maintained thereon was one entirely foreign to the conception of a home.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Homestead.]

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Carrie M. Lorenz against A. D. Hunt, also known as Arthur D. Hunt, and another. From the portion of the judgment holding a homestead declaration of defendants invalid as to certain lot, defendants appeal. Affirmed.

See, also, 264 P. 336.

W. H. Carlin and W. E. Davies, all of Marysville, for appellants.

Erling S. Norby, of Marysville, for respondent.

BARTLETT, Justice pro tem. This is an action asking that a homestead declaration be set aside and declared invalid, and the lands described in the declaration adjudged subject to the lien of a judgment which plaintiff obtained against the defendant A. D. Hunt subsequent to the filing and recording of the homestead declaration by his wife, Luella Mae Hunt. The trial court set aside the declaration in so far as it affected one of the lots described, declared valid the homestead as to two adjoining lots, and also declared certain insurance moneys due defendants on account of the destruction of a dance hall that was on the lot held not within the homestead, subject to the lien of the writ of

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★Hearing denied by Supreme Court.

execution issued on plaintiff's judgment. Defendants appeal from that portion of the judgment declaring the homestead declaration invalid as to lot No. 28 of the subdivision of tract No. 11 of the Yuba Gardens, situated about one mile south of Marysville in Yuba county, Cal.

As the facts in the case, the trial court found that on May 8, 1925, judgment was entered in the superior court of Yuba county, Cal., in favor of plaintiff and against defendant A. D. Hunt for the sum of $2,500 and costs; that no part of this judgment has been paid; that a writ of execution thereon was duly issued and levied on July 17, 1925, on all the interest of defendant A. D. Hunt in and to two parcels of real property in Marysville, Yuba county, Cal., parcel No. 1 being lots 27 and 28 of tract 11 of Yuba Gardens, and tract No. 2 being commonly known as the "Shoemate place," this parcel containing 87/100 of an acre of land; that defendant Luella Mae Hunt is and was at all times mentioned in the proceedings the wife of defendant A. D. Hunt; that, after the levy of the writ of execution, a large dance hall on lot 28 of subdivision of tract 11 was destroyed by fire; that certain insurance money payable to defendants on account of this fire damage has also been levied upon by plaintiff; that on April 25, 1925, defendant Luella Mae Hunt, as the wife of A. D. Hunt, filed and recorded a declaration of homestead on the properties above mentioned; that the parcels of land are contiguous, but were bought by defendants from different parties under different conveyances; that, when the declaration was filed, defendants were actually residing on the parcel of land known as the "Shoemate place," their dwelling house being thereon; that a portion of this dwelling house was used as a merchandising store, having in front of it a gasoline and oil station; that the only use made of lot 27 by defendants was for pasturing one cow and some Shetland ponies; that lot 28 was never at any time used for residence purposes or for the use of the home; that on lot 28 a large dance hall was situated where defendants held Saturday night public dances for several years prior to the trial of this action, and until this dance hall was destroyed by a fire occurring some time after the levy of plaintiff's writ of execution. As conclusions of law on the findings, the court declared defendants entitled to a judgment validating the homestead on lot 27 of tract No. 11 of Yuba Gardens and the diagonal plot of land adjoining lot 28 of tract 11 of Yuba Gardens, and declaring plaintiff entitled to judgment declaring invalid the homestead as to lot 28 of the subdivision of tract No. 11 of Yuba Gardens, and adjudging this last lot subject to the lien of plaintiff's judgment and writ of execution, and also adjudging the insurance moneys due defendants on account of the destruction by fire of the dance hall on lot 28 subject to plaintiff's writ of execution levied thereon.

Whether or not the determination of the trial court that the homestead was invalid as to lot 28 of the subdivision of tract 11 and the improvements thereon is the proper adjudication of that question under the evidence in the case is the only matter presented for decision on this appeal.

Section 1237 of the Civil Code specifies as the property of which a homestead consists:

> "The dwelling house in which the claimant resides and the land on which the same is situated, selected as in this title provided."

The trial court in this case awarded defendants the land on which their dwelling house was situated and said house. The facts in this case are very similar to those in the leading case in California relative to property that can be impressed with the privileges of homesteads. Gregg v. Bostwick, 33 Cal. 220, 91 Am. Dec. 637. There a homestead declaration was filed covering four town lots in Napa City. The family lived on one lot, and on the other lots were a bank or gymnasium building, a storehouse, and several dwellings, all used by tenants of the homesteader. The action was one in equity to restrain the collection of a judgment against the homesteaders. As in this case, the trial court declared valid the homestead in so far as it covered the lot on which the residence of the family was situated, and declared that the residue of the properties was subject to sale under the execution issued on the judgment. In its opinion the court says:

> "The primary object of all legislation upon the subject of homestead exemption is not, as claimed by counsel for the appellants, to exempt from forced sale a certain amount of the real estate of the head of a family, including the homestead, whether estimated by quantity or value, but to exempt the homestead, including quantity or value, within the limits specified. * * * In all cases like the present, two questions only are presented: First—what is the debtor's homestead as a matter of fact? or, in other words, how much of the land in question has he actually occupied and used as a homestead? and, second—what is its value? Whatever, in fact, constitutes his homestead at the time of making the declaration and does not exceed five thousand dollars in value, must be declared exempt. Both are questions of fact, except so far as the first may rest on legal definition.
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> "Both in the Constitution and in the statute the word 'homestead' is used in its ordinary or popular sense—or, in other words, its legal sense is also its popular sense. It represents the dwelling house, at which the family resides, with the usual and customary appurtenances, including outbuildings of every kind necessary or convenient for family use and lands used for the purposes thereof. * * * Whatever is used—being either necessary or convenient—as a place of residence for the family as contradistinguished from a place of business, consti-

> tutes the homestead, subject to the statutory limit as to value. If, however, it is also used as a place of business by the family, which frequently happens, it may not therefore cease to be a homestead, if it would be necessary or convenient for family use independent of the business."

A similar question was presented in the case of In re Allen, 78 Cal. 293, 20 P. 679, where a homestead was set apart in an insolvency proceeding. The homestead declaration covered lots 4 and 5 of block 39 of the town of Chico. The lots adjoined each other, and were worth together under $5,000. The family dwelling was on lot 5, and outhouses and chicken yard covered the rear portion of lot 4. The front portion of lot 4, 89 feet in depth, was used for business purposes. Upon this part of lot 4 was a two-story building which the court found had since its erection been used principally for business purposes, to wit, general blacksmithing, wagon building, and repairing, painting, and varnishing wagons, the balance of the 89 feet being used in connection with the business. The judgment setting aside the two lots as a homestead was reversed, and the cause remanded for a new trial, the court basing its action on the decision in the case of Maloney v. Hefer, 75 Cal. 422, 17 P. 539, 7 Am. St. Rep. 180, wherein it is said:

> "It is the principal use to which property is put, and not quantity, which furnishes the test in determining the question whether or not property is subject to dedication as a homestead."

In the case last cited, the homestead was filed by a wife on a lot which had two houses thereon, declarant residing in the rear house, and the front one being occupied by tenants when the homestead was filed. The action was to quiet title to the portion of the lot occupied by the front house, which had been sold and a sheriff's deed executed therefor. The court found the front house and premises were not the homestead, and awarded the title to the purchaser at the sheriff's sale and the judgment was affirmed.

The facts in the case of Guernsey v. Douglas, 171 Cal. 329, 153 P. 227, are quite similar to the case at bar. This was an action brought to set aside a homestead declaration which covered adjoining uninclosed lots on one of which the family residence was situated. No use was made of the other lots, except that the owner occasionally stored his painter's tools on them, sometimes pasturing a horse thereon, and cut wild grass from them for horse feed. The trial court declared the homestead invalid as to the lots other than the one the dwelling house was situated upon, and, on appeal, the judgment was affirmed.

An analysis of the cases cited by counsel for appellant wherein homesteads upon property on which were structures used for business purposes as well as the dwelling house occupied by the declarant and family will show facts different from those concerning the lot and improvements in question here. The properties in Ackley v. Chamberlain, 16 Cal. 181, 76 Am. Dec. 516, constituted a farm of 160 acres, upon which there was originally erected a dwelling house, which subsequently was enlarged and used for both residence and hotel purposes. The court says:

> "A homestead is the residence of the family—is the place where the home is—and it would seem unreasonable, upon first impressions, that premises should be regarded as a homestead, unless devoted principally to such residence and home. It would seem unreasonable, for example, that a gas factory should be impressed with the character of a homestead, because the owner resided with his family in the upper story of the building, or that a storehouse should become exempt from execution, because the owner occupied the basement in the same way. The question whether property devoted chiefly to business purposes can be subject to a homestead claim is full of embarrassment, and we are not required to lay down any positive rule on the subject in the present case. In this case the building was intended for a dwelling house, as well as a hotel. It was the intention of the owner in its construction to make it his residence. It was occupied by him and his family as such residence before it was ever used as a hotel. The nature and extent of the business did not interfere with its general character as a dwelling house. The keeping of boarders and accommodation of lodgers and travelers were not inconsistent with the main purpose of taking up the one hundred and sixty acres, and the erection of the building."

The case of Heathman v. Holmes, 94 Cal. 291, 29 P. 404, differs widely in its facts from those in the proceeding under discussion. There the homestead declarant purchased the lot in question for the purpose of making a home thereon for himself and family, and did erect such home, and lived therein for some three years before erecting a large addition thereto and leasing the greater portion of the house for business purposes. He reserved for living purposes a portion of the building, and continued to actually reside therein with his family. The fact that the building continued to be the bona fide residence of the claimant was made the test upon which the homestead character of the properties was upheld. The case of Laughlin v. Wright, 63 Cal. 113, announces the same conclusion that the bona fide use for residence purposes will overcome the objection that the properties are also used for business purposes.

In Hohn v. Pauly, 11 Cal. App. 724, 106 P. 266, the original purpose of the building was to provide both a home and a place for boarders and lodgers. There is no question as to the premises homesteaded being the bona fide home of the declarant when the homestead was filed.

The use made of the lot in question here, adjudged subject to plaintiff's judgment, is shown by the evidence to have been the maintaining thereon of a dance hall by defendants where public dances for monetary remuneration were conducted. The character of the business maintained is one entirely foreign to the conception of a home. The judgment in this case does not affect the homestead declared other than to limit its extent to the property occupied for residence purposes and the business of store keeping and oil station and supplies which was being conducted on the Shoemate lot, when the declaration was made. In adjudging the Shoemate lot and lot 27 of the subdivision of tract 11 a homestead, and not subject to the plaintiff's judgment, the trial court gave as liberal a construction to the homestead law as should be given under the facts in this case, and no sufficient reason appears for changing the adjudication made in this instance by that court.

The judgment is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

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90 Cal. App. 782

W. P. HERBERT CO. v. POWELL et al.
(Civ. 5074.)

District Court of Appeal, Second District, Division 1, California. April 11, 1928.

1. Automobiles 🔑19—Seller's indorsement of certificate of registration in manner in which it was issued him passes title to innocent purchaser.

For purpose of passing title to automobile to an innocent purchaser for value, seller may indorse certificate of registration in the manner in which it was issued to him, such indorsement being sufficient.

2. Automobiles 🔑19—Buyer's transfer of automobile purchased and delivery of registration certificate constituted some evidence of authorization to transferee to indorse certificate (Civ. Code, § 1052).

Transaction by which buyer of automobile to whom certificate of registration was issued turned it over to third party, contemplating payment at some future time, and delivered registration certificate, constituted some evidence of authorization to the third party to indorse the certificate of registration in case of reregistration of the automobile under Civ. Code, § 1052.

3. Criminal law 🔑323—Commission of crime is not presumed (Code Civ. Proc. § 1963, subd. 1).

It is well settled that commission of crime cannot be presumed, under Code Civ. Proc. § 1963, subd. 1.

4. Automobiles 🔑19—It was not presumed that person to whom automobile and registration certificate were delivered indorsed transferor's name to certificate on resale of car without authority (Civ. Code, § 1052; Code Civ. Proc. § 1963, subd. 1).

Where buyer of automobile delivered car and registration certificate to another to help him out, contemplating future payment for the car, it was not presumed that the third person acted without authority in indorsing transferor's name on certificate on resale of automobile and reregistration, under Code Civ. Proc. § 1963, subd. 1, and in view of Civ. Code, § 1052, permitting transfer without writing unless writing is expressly required since commission of crime will not be presumed.

5. Automobiles 🔑19—Discrepancy between initials given by person selling car and those shown by certificate of registration held not to preclude buyer's status as bona fide purchaser, where inquiry would not have disclosed claim of original conditional seller (Civ. Code, § 19).

Fact that person from whom plaintiff purchased automobile represented himself as N. E. Whittemore and produced certificate of registration showing that W. E. Whittemore was registered owner did not prevent purchaser's occupying position of bona fide purchaser as against original conditional seller of car under Civ. Code, § 19, where diligent inquiry would not have disclosed any claim of the conditional seller, but would have merely shown that the owner's name was incorrectly stated in the certificate.

6. Estoppel 🔑75—Conditional seller of automobile, permitting buyer to have new certificate issued showing buyer's legal and equitable title, is estopped as against bona fide purchaser from buyer (Motor Vehicle Act 1913).

Conditional seller of car by indorsing certificate of registration and delivering it to buyer and permitting him to have a new certificate of registration issued in his own name in which he appeared to be the legal and equitable owner of the automobile is estopped to claim title under Motor Vehicle Act (St. 1913, p. 641) as against any bona fide purchaser from buyer.

7. Automobiles 🔑19—Conditional seller of automobile was not relieved from negligence in permitting buyer to take out certificate showing legal and equitable title by fact that certificate incorrectly stated buyer's initials.

Fact that mistake was made in one of initials of buyer's name in reissuing certificate of registration to him did not relieve conditional seller from result of its negligence in permitting buyer to take out new certificate in which he appeared to have both legal and equitable title.

8. Automobiles 🔑19—Delivery of automobile and registration certificate without written statement of transfer held not to effect sale (Civ. Code, § 1052; Motor Vehicle Act 1919).

Transaction by which buyer in whose name automobile was registered delivered the registration certificate and the automobile to another, contemplating future payment, *held* not to constitute legal transfer of ownership of automobile under Civ. Code, § 1052, since Motor Vehicle Act (St. 1919, p. 191) requires signing of statement of the transfer as condition to reregistering car in transferee's name and makes intended transfer incomplete before transferee's receipt of certificate.

9. Automobiles 🔑19—Requirement of written contract on transfer of automobile impliedly becomes part of agreement for sale (Motor Vehicle Act 1919).

Provision of Motor Vehicle Act (St. 1919, p. 191), relative to requirement of written contract for transfer of car, impliedly becomes part and parcel of agreement for sale, since without compliance with statutory requirement no delivery of automobile could legally be made.

10. Automobiles 🔑19—Alleged oral authorization by delivery of car and registration certificate to agent held insufficient to permit agent's execution of statement of transfer in principal's name (Civ. Code, §§ 1052, 2309; Motor Vehicle Act 1919).

Alleged oral or implied authorization to agent to whom automobile and registration certificate were delivered *held* insufficient to permit agent's use of principal's name in selling car and executing statement of transfer under Civ. Code, § 1052, and Motor Vehicle Act (St. 1919, p. 191), since contract for transfer of title to automobile is required by law to be in writing, and authority to enter into it must therefore be given by instrument in writing under Civ. Code, § 2309.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by the W. P. Herbert Company against John W. Powell and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Salisbury & McNeil, Verne E. Robinson, and Wiley J. Shannon, all of Los Angeles, for appellant.

Carroll Allen, of Los Angeles, for respondent Anglo-California Trust Co.

HOUSER, J. The action upon which this appeal is based was for alleged damages which resulted to plaintiff from an alleged conversion by defendants of an automobile of which plaintiff claimed to be the owner. The facts necessary to a determination of the controversy are as follows: The defendant H. A. Sellers Company was the owner of an automobile which, on a conditional sale contract, it sold to one N. E. Whittemore. By the terms of the contract between the parties, until the entire purchase price of the automobile should be paid, the legal title to the automobile was to remain in the Sellers Company. However, at the time the automobile was delivered to Whittemore, the Sellers Company indorsed and delivered to Whittemore the certificate of registration of the automobile, in which no mention was made of any claim on the part of the Sellers Company to the legal title to the automobile. On the same day Whittemore made application to have the automobile reregistered in his own name as the legal and equitable owner thereof. Instead of the certificate being issued to the applicant *N.* E. Whittemore, through some inadvertence it was issued to *W.* E. Whittemore. Two days later the Sellers Company assigned the conditional sale contract to defendant Anglo-California Trust Company. It further appears: That until shortly before the occurrence of the foregoing transaction Whittemore had been in partnership in business with one Stephens, but which partnership at the time when the purchase of the automobile in question was made had been dissolved. "That after the dissolution of said partnership, said Stephens represented to Whittemore that he was hard up and wanted to get started again, and said Whittemore, in order to help said Stephens along, turned said automobile over to him and told said Stephens to take it and when he got on his feet they would arrange for the payment of the same. That at said time said Whittemore also delivered to said Stephens the registration certificate in the car. Stephens left (Fresno) with said automobile for Los Angeles, and this was the last time that Whittemore ever saw or heard anything about said automobile until after the commencement of this action." On the third day following the purchase of the automobile by Whittemore, "a person representing himself to be N. E. Whittemore sold and delivered said automobile to W. P. Herbert Company, the plaintiff herein, and indorsed the certificate of registration thereon as registered and legal owner and delivered said certificate of registration to said W. P. Herbert Company. * * * That said W. P. Herbert Company purchased said automobile upon reliance on the facts set forth in the said certificate of registration, paid a valuable consideration for said automobile, and acted in good faith in said transaction and without knowledge of the claim of any other persons." Thereafter, on a conditional sale contract, the Herbert Company sold the automobile to one H. D. Coley, and then assigned the conditional sale contract to California Finance Company. Within a few months following the last-mentioned transaction the Sellers Company and the Anglo-California Trust Company took the automobile from Coley against his will and without his permission and then sold the automobile to other persons. Before the commencement of this action Coley and California Finance Company assigned their and each of their rights, etc., in the automobile to the Herbert Company. On such facts judgment was ordered in favor of the defendants, and plaintiff has appealed therefrom.

[1, 2] In principle, the law appears well settled that for the purpose of passing title to an innocent purchaser for value, Whittemore had the right to indorse the certificate of registration in the manner in which it had been issued to him. People v. Ryan, 74 Cal. App. 125, 127, 239 P. 419; Commonwealth v. Costello, 120 Mass. 358, 371; Ray v. American Photo Player Co., 46 Cal. App. 311, 189 P. 130; Emery v. Kipp, 154 Cal. 83, 86, 97 P. 17, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 792; Fallon v. Kehoe, 38 Cal. 44, 49, 99 Am. Dec. 347; Wilson v. White, 84 Cal. 239, 242, 24 P. 114. His transaction with Stephens in which "Whittemore, in order to help said Stephens along, turned said automobile over to him and told said Stephens to take it and when he got on his feet they would arrange for the payment of the same," at the same time delivering to Stephens "the registration certificate in the car," is some evidence of an authorization by Whittemore to Stephens, in case of a reregistration of the automobile, to indorse the certificate of registration. By statutory provision, in substance the rule is laid down that a transfer may be made without writing in every case in which a writing is not expressly required by statute. Section 1052, Civ. Code. See, also, Bedig v. Southern Pacific Co. (Cal. App.) 258 P. 148; Dingley v. McDonald, 124 Cal. 90, 94, 56 P. 790; Copp v. Mulcahy (Cal. App.) 258 P. 141; Straus v. Eaton, 47 Cal. App. 538, 190 P. 1033; Union Mutual L. I. Co. v. Broderick, 196 Cal. 497, 238 P. 1034; McGown v. Dalzell, 72 Cal. App. 197, 236 P. 941; Ralph v. Anderson, 187 Cal. 45, 200 P. 940; Humboldt Milling Co. v. Northwestern Pac. Ry. Co., 166 Cal. 175, 135 P. 503; Bickerdike v. State, 144 Cal. 681, 78 P. 270; Smith v. Peck, 128 Cal. 527, 61 P. 77; Edwards v. Wagner, 121 Cal. 376, 53 P. 821; Hellman v. McWilliams, 70 Cal. 449, 11 P. 659; Doran v. Doran, 99 Cal. 311, 315, 33 P. 929.

[3, 4] Although it appears that the Herbert Company purchased the automobile from "a person representing himself to be N. E. Whittemore," it may be inferred that the seller was none other than Stephens. The certificate of registration showed that the owner of the automobile was not *N.* E. Whittemore, but was *W.* E. Whittemore. Up to a time very shortly before the acquisition of the automobile by Whittemore, he and Stephens had been in partnership, and Stephens was presumably familiar with Whittemore's correct initials. Three days only had elapsed between the time of Whittemore's purchase of the automobile and its sale to the Herbert Company by some one who represented himself as *N.* E. Whittemore. A stranger to Whittemore probably would not have known Whittemore's correct initials, or noticed that the initials of Whittemore's name as they appeared in the certificate of registration were correct. Had the certificate of registration been indorsed by a person not authorized by Whittemore to do so, a criminal offense would have been committed; and the rule of law is well settled that commission of a crime cannot be presumed.

In the case of Bickerdike v. State, 144 Cal. 698, 701, 78 P. 277, 278, it is said:

> "The law presumes that a person is innocent of crime or wrong (Code Civ. Proc. § 1963, subd. 1) in civil as well as in criminal cases (Hunter v. Hunter, 111 Cal. 261, 267 [43 P. 756, 31 L. R. A. 411, 52 Am. St. Rep. 180]), and it will be presumed that the persons making the transfers and executing the powers of attorney did not attempt to personate others, and by so doing fraudulently procure property to which they were not entitled, but rather that they were the persons whom they represented themselves to be, the persons designated in the certificates of which they had possession, and the owners of the claims which they purported to sell."

See, also, Guidera v. Lapiana, 52 Cal. App. 460, 467, 199 P. 557; Cooper v. Spring Valley Water Co., 16 Cal. App. 17, 23, 116 P. 298.

[5] Section 19 of the Civil Code provides that:

> "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

Applying such statement of the law, it would seem that when the person from whom the plaintiff purchased the automobile represented himself as *N.* E. Whittemore and produced a certificate of registration showing that *W.* E. Whittemore was the registered owner, the plaintiff had "actual notice of circumstances sufficient to put a prudent man upon inquiry" regarding the fact whether *N.* E. Whittemore or *W.* E. Whittemore was the owner of the automobile. But had the plaintiff made diligent inquiry concerning such matter, all it could reasonably have discovered would have been the fact that while *N.* E. Whittemore was the correct name of the owner of the automobile, the certificate of registration had been incorrectly issued to him in the name of *W.* E. Whittemore. So far as any claim to or equity in the automobile by other persons was concerned, no reasonable inquiry on the part of the plaintiff would have disclosed the fact that either the H. A. Sellers Co. or the Anglo-California Company had or claimed to have any legal or beneficial interest in the automobile.

[6, 7] In the case of Hammond v. Hazard, 40 Cal. App. 45, 49, 180 P. 46, where the authorities are cited, it is held that by the provisions of the Motor Vehicle Act (Stats. 1913, p. 641), the owner of an automobile is required to have it registered in his name, and that such requirement warrants a finding by the trial court that the person in whose name an automobile is registered is in fact the

rightful owner thereof. See, also, 22 Cal. Jur. 667. It is clear that by indorsing the certificate of registration of the automobile and delivering it to Whittemore and permitting him to have a new certificate of registration issued to him in which he appeared to be the legal and equitable owner of the automobile, the Sellers Company and its assignee were estopped to claim title to the automobile, so far as any bona fide purchaser from Whittemore was concerned. Parke v. Franciscus, 194 Cal. 284, 228 P. 435. The fact that in issuing the certificate of registration a mistake was made in one of the initials of Whittemore's name would not have the effect of relieving the Sellers Company from the result of its negligence. It is apparent that because of such negligence on the part of the Sellers Company in permitting Whittemore to procure the issuance of the certificate of registration in his name, it thereafter became possible for him to convey a good title to the automobile to an innocent purchaser thereof for value. As is hereinbefore stated, no question is raised as to either the "innocence" or the "value" features of the transaction between the parties. But while Whittemore personally might have given a good title to the Herbert Company, the questions, first, as to whether orally, or by implication, Stephens was authorized to perform that act for Whittemore, and, secondly, as to whether in the absence of written authority so to do Stephens could be orally authorized to legally effect a reregistration of the automobile from Whittemore to the Herbert Company, require consideration. From the conduct of Whittemore and Stephens it may not be doubted that at least impliedly Stephens was authorized to cause the reregistration of the automobile in his own name. Had he done that and thereafter sold the automobile to the Herbert Company, in the absence of question of legality of such oral or implied authorization, it would seem incontrovertible that the Herbert Company would have received a valid title to the automobile. It may be argued that, while it may not be said that Stephens was expressly authorized to sell the automobile, nevertheless its transfer to him carried with it such a right, and that if he chose to exercise that right, the means necessary to its accomplishment were also carried with it. Manifestly, it would be a useless if not an idle act for Stephens perfunctorily to go through the form of causing a registration of the automobile to himself to be contemporaneously or immediately thereafter followed by a registration thereof to the Herbert Company, when, so far as the transaction among the interested parties was concerned, it might be consummated by the single act of reregistration as between Whittemore and the Herbert Company. But, if, without deciding that point, it be assumed that, equitably, so far as the immediate parties to the transaction were concerned, the sale was complete and had the effect of investing the Herbert Company with the ownership of the automobile, the question of its legality, so far as the Sellers Company and its assignee are interested, remains for consideration.

[8] At the time when the transaction herein involved occurred on the transfer of ownership of an automobile operated or driven on the public highways of this state, the Motor Vehicle Law (Stats. 1919, p. 191), among other things, in effect contained the provisions that for the purpose of reregistering the automobile a "statement of the transfer" should be signed by each of the parties to the transaction and the transferee make application for registration of the automobile in his name. Thereupon, "if satisfied of the genuineness and regularity of such transfer," the "department" * * * "shall register said motor vehicle in the name of said transferee" and issue a new registration certificate. The act then provides that:

> "Until said transferee has received said certificate of registration and has written his name upon the face thereof in the blank space provided for said purpose by the department, delivery of said motor vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose. * * *" Section 7.

The case of Parke v. Franciscus, 194 Cal. 284, 228 P. 435, is authority for the rule "that the certificate of registration, which serves the purpose of the certificate of ownership and the certificate of registration provided for in the act of 1923, must have been properly indorsed upon the reverse side thereof by the transferees of the 'ownership' or title or interest in the car, filed with the motor vehicle department and a new certificate of registration issued in the name of appellants before title was completely vested in them and before the transfer could be effective or valid for any purpose." It therefore appears that the transfer of an automobile involves "a writing" and that it may not be legally made otherwise. Section 1052, Civ. Code. As between Whittemore and Stephens, no attempt at compliance with the provisions of the statute having made by them, it follows that no legal transfer of the ownership of the automobile to Stephens ever took place.

[9, 10] If, for the purposes of the argument on the sale to the Herbert Company, it be assumed that the conduct of Whittemore and Stephens amounted to an oral or an implied authorization for Stephens to make and sign the "statement of the transfer" in behalf of Whittemore, the question of the validity of such an authorization becomes of importance. Section 2309 of the Civil Code provides:

> "An oral authorization is sufficient for any purpose, except that an authority to enter into

a contract required by law to be in writing can only be given by an instrument in writing."

From a consideration of the language of the statute it is apparent that, unless the various steps connected with the transfer of ownership of the automobile from Whittemore to the Herbert Company amounted to "a contract required by law to be in writing," the oral authorization by Whittemore to Stephens was sufficient. So far as the present inquiry is concerned, the statutory requirement contains two principal elements: First, the aggregate of the things necessary to be done leading to the issuance of a new certificate of registration must amount to a "contract"; and, secondly, it must be such a contract as is "required by law to be in writing"—which latter element has already received consideration. It is clear that the provisions of the Motor Vehicle Act (which, as hereinbefore set forth, in order that a new certificate of registration be issued to the purchaser of the automobile, required that a "statement of the transfer" should be signed by each of the parties to the transaction, and that not until after the new certificate of registration had been received by the purchaser and he had written his name upon the face thereof would the intended transfer of the automobile be deemed complete or valid or effective for any purpose—) by operation of law, or impliedly, become a part and parcel of the agreement of sale of the automobile—for without full compliance with the statutory requirements no "delivery" of the automobile could be legally made, nor would the intended transfer "be valid or effective for any purpose." In other words, whatever arrangement as to price, terms of sale, or otherwise, might be agreed upon by the seller and the buyer, the indispensable statutory prerequisite to a complete transfer of the ownership of the automobile presumably was as thoroughly understood and agreed to by each of the parties thereto as was any other covenant or condition therein; and while it was perhaps unnecessary that all the terms of the contract be written, the language of the statute directs and compels a designated portion thereof to be reduced to writing. So construed, it becomes manifest that within the meaning and intent of the provisions of section 2309 of the Civil Code—the contract being one "required by law to be in writing" —assuming the existence of an oral or an implied authorization to Stephens by Whittemore to enter into the contract in his behalf —such authorization was insufficient and could not be used as a basis for making the transfer of ownership of the automobile from Whittemore to the Herbert Company notwithstanding the good faith of the latter throughout the transaction. It follows that the judgment should be affirmed. So ordered.

We concur: CONREY, P. J.; YORK, J.

204 Cal. 145

BLANCO v. MARIAN REALTY CO. et al.

(S. F. 12318.)

Supreme Court of California. May 2, 1928.

Landlord and tenant ⚷165(6)—**Instruction that landlord owed highest degree of care to employee of tenant using freight elevator held error, ordinary care only being required.**

Landlord, providing freight elevator without operator for use of tenants, held, as respected employee of tenant riding on elevator while moving freight thereon, under duty of exercising only ordinary care, and instruction in such employee's action for injuries to effect that landlord owed him the highest degree of care was prejudicial error.

Department 2.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by F. Blanco against the Marian Realty Company and another. Judgment for plaintiff, and defendants appeal. Reversed.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

John Ralph Wilson, of San Francisco, for appellants.

Vincent W. Hallinan, of San Francisco, for respondent.

RICHARDS, J. This appeal is from a judgment in the plaintiff's favor in an action for damages for personal injuries alleged to have been suffered by him while riding upon a certain freight elevator or sidewalk hoist connected with certain premises owned by the defendant Marian Realty Company in the city and county of San Francisco, and within which there has been conducted and operated for the past several years a market bearing the name of "Crystal Palace Public Market," but which name is only a tradename which the said Marian Realty Company employed in defining the market establishment upon their said premises. Stalls or spaces upon the main floor of said premises are leased or rented to numerous persons for the conduct by each of his particular line of trade thereon, and by the terms of their respective leases each of said persons is entitled to a certain space in the basement of said structure for the keeping of the goods, wares, or supplies which are sold upon the main floor in their, and each of their, respective stalls. In connection with the aforesaid uses of said market the said defendant installed a sidewalk elevator or hoist, to be operated between the basement and the main floor of said market, for the benefit and convenience of these, its several tenants, in transporting their goods and supplies from their place of deposit in the basement to the main floor as needed in their several lines of trade. This elevator or hoist when thus installed was and has ever since been used for freight purposes only and was not a passenger elevator in any sense of the term. It was operated by mechanical contrivances with which it was connected by a rope passing through the elevator and by means of which whoever was engaged in bringing goods or supplies from the basement to the main floor started and stopped the said hoist. This operation of the contrivance was conducted by the tenants themselves or their employees in connection with its aforesaid uses, and the only connection which the said defendant had with its actual operation consisted in providing and keeping in condition the machinery by which, through the use of said rope, it was made to rise and descend.

The plaintiff herein was and for about two years prior to the accident which caused his injuries had been an employee of a tenant named Van Erp, who conducted a stall upon the main floor of said market, with its corresponding space in the basement, and during the time of his said employment plaintiff had used and operated said elevator or hoist almost daily, and was therefore fully acquainted with the construction and condition of said elevator or hoist and with its operation. There was no cage surrounding said appliance, but it was inclosed by the walls of the building upon three sides and had a gate upon the fourth side which opened into the basement of the building and also out upon the sidewalk upon its level with the main floor. The platform of the elevator did not fit this shaft very closely and there was a space of about eight inches between the edge of its platform and the rear wall of its inclosure. It was, however, in other respects the usual type of a sidewalk elevator, for the operation of which the defendant held a license and which was subject to periodical inspection. On the day of the plaintiff's injury he had gone down with another employee of his employer to procure supplies from the basement for use in the latter's stall upon the main floor, and, having loaded the elevator with such supplies, proceeded to raise the same to the sidewalk level, both occupying the elevator, but the other employee operating the rope by which it was made to rise to its sidewalk level. While thus engaged, and while said hoist was being raised, the plaintiff's foot in some manner became caught in the space between the platform and the rear wall, from which he received certain serious injuries which form the basis of the present action. The cause was brought to trial before a jury, which returned a verdict in the plaintiff's favor for the sum of six thousand dollars. The present appeal is from the judgment rendered upon such verdict.

The main contentions of the appellant relate to alleged errors of the trial court in instructing the jury as to the measure of the defendant's duty to the plaintiff under the foregoing state of facts. The trial court gave to the jury the following instruction:

> "The owners of a building maintaining a freight elevator, owe to persons rightfully riding upon the same, the highest degree of care and are responsible for the slightest negligence; in determining whether or not the plaintiff was rightfully riding upon the elevator herein, you may take into consideration the custom prevailing with regard to this particular elevator as to persons in charge of freight accompanying the same upon the elevator and being permitted to do so; if you believe that it was the custom for persons transporting freight upon this elevator to accompany the same and that such custom was permitted or acquiesced in by the owners of the building, or rendered necessary by the conditions attending the transportation of such freight on this elevator, then the plaintiff was rightfully upon the elevator and was entitled to the highest degree of care on the part of the owners of the building to protect him from injury."

The foregoing instruction was apparently based upon the case of Treadwell v. Whittier, 80 Cal. 575, 22 P. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175, wherein it was held that the owners of a building maintaining a freight elevator owed to persons rightfully riding upon the same the highest degree of care and are responsible for the slightest negligence. The case of Treadwell v. Whittier, however, was a case wherein the elevator in question was one operated by the owners of a building several stories in height and which was used by them for the purpose of transporting that portion of the general public which might become their customers to the several floors of their building, and also for the purpose of transporting their merchandise. The plaintiff in said case was one of said customers, and the elevator was one entirely and exclusively operated by the owners of the building, and it was therefore properly held therein that the owners of such building were bound to exercise the highest degree of care with respect to the passengers upon such an elevator. But that is not this case. The elevator or hoist in this case was not a passenger elevator, nor was the plaintiff, who was engaged in using the same at the time of his injury, in any proper sense of the term a passenger thereon. He was in fact as much the operator of said hoist as was his fellow employee by whose manipulation of its rope it was rising to the level of the main floor, or as his immediate employer would have been if it, and not the owners of the building, had maintained in place a person who would operate the same for the convenience of its other employees. This elevator or hoist was in fact nothing more than one of the appliances which the owner or owners of the building had supplied to the tenants thereof for their convenience, just as said owners might have supplied swinging or revolving doors at the entrances of their building, or stairways therein, and over the occupation or use of which said owners exercised no control, and with relation to which they owed no other or higher duty to their tenants or invitees than that of ordinary care.

The cases upon which the respondent relies to sustain the foregoing instruction, in addition to the case above cited, are in every instance cases of accidents arising out of the defective construction and operation of both passenger and freight elevators, and over the operation of which the defendant in each instance exercised full control. Such cases and the rules of law correctly announced therein have no application to the instant case and do not correctly define the duty which the owners of a building supplying such an appliance as a sidewalk elevator owe to their tenants, to whom or to the employees of whom the operation of said appliance is exclusively committed, and over which the owners of the building exercise no other control than that of providing the adequate machinery for its use, and with relation to which only freight is carried, and only the owner's tenants or their employees, when in charge of said freight and in the necessary manipulation of said hoist, are permitted to ride thereon.

The case of Employers' Liability, etc., Corp. v. Wagner, 215 App. Div. 566, 214 N. Y. S. 313, correctly states the rule with regard to such appliances, and the language of the court in so doing aptly applies to the instant case:

> "It is clear from the evidence in this case that the landlord supplied to the tenants of this building for their use the elevator in question. The landlord did not supply an operator. The tenants operated it and used it as they needed its use. Instead of carrying the materials they needed in their business up or down the stairs, the landlord supplied the elevator so that they could thereby carry up or bring down such materials. It was his duty to use reasonable care in the construction and maintenance of this elevator, to see that it was reasonably safe for the purpose for which it was used, and that the elevator shaft was protected by substantial and sufficient guard, door or gate, to prevent any one from falling into the shaft."

The cases of Kappes v. Brown Shoe Co., 116 Mo. App. 154, 90 S. W. 1158, and Burner v. Higman, 127 Iowa, 580, 103 N. W. 802, are also in point, and in each of said cases the rule was correctly laid down that the owners of a building providing a freight elevator for the use and convenience of their tenants to whom or to the employees of whom the actual operation of such an elevator was committed were bound to no more than ordinary care in the provision of such elevator and of the appliances by means of which it was to be operated, and that the rule with relation to the highest degree of care to be employed by the owners of buildings in the maintenance and operation by themselves of passenger elevators had no application to this class of cases.

It thus appears that the trial court was in error in giving the foregoing instruction to the jury and that the appellants were prejudicially injured thereby.

The appellant urges several other grounds of error, but in view of our foregoing conclusion we do not deem it necessary to engage in their discussion, since the questions involved therein may be avoided upon a retrial of the cause.

The judgment is reversed.

We concur: SHENK, J.; LANGDON, J.

POWERS v. PACIFIC DIESEL ENGINE CO. et al. (S. F. 12322.)★

Supreme Court of California. April 19, 1928.

Hearing Granted in Bank May 17, 1928.

1. Estoppel ⟹72—Equitable principle that one whose negligence causes one of two innocent persons to suffer by act of third must be sufferer held unavailable to purchasers of stock obtained from owner by fraud (Civ. Code, § 3543).

Equitable doctrine of Civ. Code, § 3543, that, where one of two innocent persons must suffer by act of third, he by whose negligence it happened must be sufferer, *held* not available to purchasers of certificates of stock obtained from owner by having her indorse them in blank on fraudulent representation amounting to larceny by trick and device.

2. Estoppel ⟹75—Purchasers of stock fraudulently obtained from owner cannot invoke equitable principle protecting one dealing with person having apparent ownership (Code Civ. Proc. § 1962, subd. 3).

Equitable principle of Code Civ. Proc. § 1962, subd. 3, that, where true owner clothes another with apparent authority and ownership of property, innocent third person will be protected, *held* not available to purchasers of certificates of stock obtained from true owner, who, without intending to invest any person with apparent ownership or control, was induced by false representation amounting to larceny by trick and device to indorse them in blank.

3. Corporations ⟹112, 143—Certificates of stock are not negotiable instruments, and transferee of certificates of stock takes them subject to all equitable and legal defenses.

Certificates of corporate stock are not negotiable instruments, and transferee takes such certificates subject to all legal and equitable defenses.

4. Estoppel ⟹116—Purchasers of stock obtained from owner by fraud held to have burden of showing negligence by owner sufficient to invoke doctrine of estoppel.

Where owner of certificates of stock was induced to indorse them in blank upon fraudulent representation that they were to be taken up for purpose of correcting errors prior to paying dividends, *held*, that burden was on purchasers to show acts on part of owner amounting to negligence of sufficient degree to invoke doctrine of estoppel, and owner was entitled to recover stock where purchasers failed to meet such burden.

Department 1.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Julia Powers against the Pacific Diesel Engine Company and others for the return and delivery of certain stock certificates. Judgment for plaintiff, and defendants A. E. White Company, C. J. Blumenthal, and B. Poust appeal. Affirmed.

William Klein and Arthur H. Barendt, both of San Francisco (Redman & Alexander, of San Francisco, of counsel), for appellants.

Boswell F. King and H. M. Anthony, both of San Francisco, for respondent.

PRESTON J. This is an appeal from a judgment in favor of plaintiff in an action for the return and delivery to her of certain stock certificates of Pacific Diesel Engine Company, a corporation. The facts, which are virtually undisputed, as established by the evidence and found by the court follow:

Plaintiff, a resident of Benecia and a lady of about 70 years of age, was the owner of two certificates representing 328 shares of stock, par value $10 per share, of said Pacific Diesel Engine Company. About May 8 or 9, 1925, two men called at her home, falsely representing to her that they had been sent by said company to take up its stock certificates for the purpose of correcting errors on its books prior to paying dividends. They told her that she would have her stock back in two weeks, and that they would also arrange for her to acquire additional shares, the rights to which she had relinquished under a prior subscription. By these false representations she was induced to and did indorse said certificates in blank and delivered them, without consideration of any kind, to said men, taking therefor a receipt signed "M. Klein." She was told that M. Klein was a man in the office; hence the signature of his name to the receipt.

About May 22, 1925, a licensed broker, Max Klein, but not identified as the fictitious "M. Klein," offered for sale and sold to appellant C. J. Blumenthal, a licensed broker operating under the name of A. E. White Company, said two certificates of stock at the current price on the open market, to wit, $1,049.96. The depreciation in value of the stock was due to the fact that the company had closed its plant and was in the hands of a receiver. Mr. Blumenthal then sent the certificates to the Diesel Company for transfer on its books to the name of his secretary, B. Poust. In the meantime plaintiff had suspected fraud and had communicated with the company. The company therefore held the certificates, and upon issuance of a temporary restraining order herein delivered them into the custody of the court. Subsequently findings and judgment were rendered in favor of plaintiff, ordering the return of said certificates to her. Defendants White Company, Blumenthal, and Poust have appealed.

[1, 2] If appellants have any claim to the stock it is because they obtained it under such circumstances as to estop the true owner from asserting her ownership as against them. It is true that, "where one of two innocent persons must suffer by the act of a

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★Superseded by opinion, 274 P. 512.

third, he, by whose negligence it happened, must be the sufferer" (section 3543, Civ. Code), and that where the true owner clothes another with apparent authority over and all the indicia of ownership of property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected (section 1962, subd. 3, Code Civ. Proc.; Woodsum v. Cole, 69 Cal. 142, 144, 10 P. 331; Wendling Lbr. Co. v. Glenwood Lbr. Co., 54 Cal. App. 691, 695, 202 P. 929, and cases there cited).

But appellants are in no position to invoke the aid of these equitable principles. There was no intent on the part of plaintiff to invest any person with apparent ownership or control over said stock. She believed that she was dealing directly with the corporation, and possession of the certificates was obtained from her by fraud amounting to larceny by trick and device. The fact of indorsement of the certificates under such circumstances is immaterial. Thus, also, cases cited by appellants, such as Rapp v. Hauger Motors Co., 77 Cal. App. 417, 246 P. 1067, wherein the intent and act of the true owner was to vest in another on his behalf power over property, are not applicable to the facts here.

[3, 4] Certificates of corporate stock are not negotiable instruments, and the transferee takes such certificates subject to all legal and equitable defenses. Barstow v. Savage M. Co., 64 Cal. 388, 1 P. 349, 49 Am. Rep. 705; Graves v. Mono Lake M. Co., 81 Cal. 304, 22 P. 665; Craig v. Hesperia Land Co., 113 Cal. 7, 13, 45 P. 10, 35 L. R. A. 306, 54 Am. St. Rep. 316; O'Dea v. Hollywood Cemetery Ass'n, 154 Cal. 53, 72, 97 P. 1; Kohn v. Sac. Elec. G. & R. Co., 168 Cal. 1, 8, 141 P. 626. "The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title." Barstow v. Savage M. Co., supra, at p. 391, 1 P. 350. See, also, Coolidge v. Austin, 22 Cal. App. 337, 134 P. 357, and Woodsum v. Cole, supra. The burden was upon appellants to show acts by the true owner amounting to negligence of a sufficient degree to invoke the doctrine of estoppel, and appellants in no way attempted to meet this burden. "But if the purchaser from one who has not the title, and has no real authority to sell, relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit. Barstow v. Savage Mining Co., 64 Cal. 388, 393, 1 P. 349 [352], 49 Am. Rep. 705. The burden is upon the one seeking to invoke the exception to the general rule. Woodsum v. Cole, 69 Cal. 142, 145, 10 P. 331; Kenniff v. Caulfield, 140 Cal. 34, 45, 73 P. 803." Stoner v. Security Trust Co., 47 Cal. App. 216, 223, 190 P. 500, 503.

No effort was made to produce the broker, Max Klein, although apparently there was no reason for failure to do so; his identity was neither connected with nor severed from that of the fictitious "M. Klein" and his alleged associates. The fact that the person who was alleged to have sold the goods was not present to testify in appellants' behalf was a circumstance properly considered in determining the probable truth or falsity of appellants' claim. Peo. v. Cline, 83 Cal. 374, 378, 23 P. 391. The cases of Swim v. Wilson, 90 Cal. 126, 27 P. 33, 13 L. R. A. 605, 25 Am. St. Rep. 110, and Barstow v. Savage Mining Co., supra, and other authorities, review thoroughly the principles governing the situation before us and compel a resolution of all points in favor of plaintiff. Prolonged discussion is unnecessary. The thieves could pass no title to appellants, and plaintiff had the right to pursue her property. No error was committed by the trial court in failing to find upon the cross-complaint of defendant Blumenthal, which alleged refusal of the Diesel Company to transfer the stock on its books and prayed judgment against plaintiff for conversion thereof. Such finding, if made, would have been adverse to appellants and its absence is immaterial.

In this cause the appellants did not controvert by evidence any of the allegations of the complaint or any of the testimony of plaintiff. The rules of law controlling the cause are well settled. The appeal clearly appears to have been taken for delay. Judgment affirmed, with $100 damages to plaintiff for a frivolous appeal.

We concur: CURTIS, J.; SEAWELL, J.

204 Cal. 101

BENNETT v. CHANSLOR & LYON CO. et al.
(S. F. 12311.)

Supreme Court of California. April 21, 1928.

1. Automobiles ⚷244(11)—Negligence ⚷135—Evidence held to support judgment for plaintiff for injuries in automobile collision at street intersection, as against contention that negligence of plaintiff's husband, and not defendants, caused injury.

In action for injuries sustained in automobile collision at street intersection, evidence *held* to support judgment for plaintiff who was riding with husband, as against contention that no negligence of defendants was shown, and that proximate cause of accident was negligence of plaintiff's husband, in view of conflicting evidence as to whether car in which plaintiff rode had lights, and speed at which cars were traveling, and instruction that husband's contributory negligence would bar recovery.

2. Appeal and error ⚷994(2), 1002—Appellate court cannot determine credibility of witnesses and conflicts in proof.

Appellate court cannot usurp function of jury and trial court by determining, in place of those arbitrators of fact, credibility of witnesses and conflicts in proof.

3. Negligence ⚷113(6)—Complaint, in action for injuries in automobile collision at street intersection, held not demurrable as ambiguous, and not stating cause of action, for failure to allege with whom plaintiff was riding as guest.

In action for personal injuries sustained in automobile collision at street intersection, demurrer urging that complaint was ambiguous, unintelligible, and failed to state cause of action in not showing with whom plaintiff was riding as guest, nor who owned automobile in which she rode, *held* properly overruled, since imputed negligence is matter of defense.

4. Negligence ⚷122(1)—In action for injuries in automobile collision, defendant must show relationship under which driver's negligence would be imputable to plaintiff and bar recovery.

Where, in action for injuries sustained in automobile collision, relationship between driver of vehicle and injured passenger was such that his negligence would be imputable to her and bar recovery, burden is on defendants to prove such relationship; plaintiff not being required to anticipate defenses.

5. Trial ⚷296(4, 5)—Modification of instruction by striking words therefrom held not reversible error, where another instruction covered words stricken.

In action for injuries in automobile collision at street intersection, modification of instruction that contributory negligence of driver of car in which plaintiff rode was imputable to plaintiff, by striking therefrom words "and she cannot recover," *held* not reversible error, where another instruction clearly stated that husband's contributory negligence would require finding for defendants.

6. Appeal and error ⚷1078(1)—Reviewing court will not discuss question not argued in brief.

On appeal in personal injury action, reviewing court will not discuss question which appellant has not argued in briefs.

Department 1.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Emeline A. Bennett, also known as Emeline A. Spafford, against the Chanslor & Lyon Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Ray W. Hays, of Fresno, for appellants.
Butler, Van Dyke & Desmond, of Sacramento, for respondent.

SEAWELL, J. Defendants appeal from a judgment rendered for plaintiff in an action to recover damages for personal injuries received when an automobile in which she was riding, and which was being driven by her husband, was struck by an automobile operated by defendant E. C. Kellogg. Defendant Chanslor & Lyon Company, a corporation, was the owner of the automobile operated by defendant E. C. Kellogg, whom it employed in the capacity of credit manager in the San Joaquin valley district. The jury rendered a verdict for plaintiff against both defendants in the sum of $9,041. Defendants' motion for a new trial was thereafter denied on condition that plaintiff file a remission consenting to the reduction of the damages to $5,000. Plaintiff filed the required remission.

[1] Appellants contend that there is an absence of evidence of any negligence whatsoever on their part, and that the proof shows as a matter of law that the proximate cause of the accident was the negligence of plaintiff's husband, with whom she was riding, which negligence was imputable to her, and bars her right of recovery upon the authority of Basler v. Sacramento Ry., 158 Cal. 514, 111 P. 530, Ann. Cas. 1912A, 642, and decisions following that case. It was there held that the negligence of the husband precluded recovery by the wife, for the reason that any damages recovered would be community property, over which the husband would have the right of management, and to permit recovery for injuries of the wife would be to allow the husband to profit by his own wrong. We are of the opinion that the Basler Case does not rule the instant case, for the reason that the jury presumably obeyed the court's instructions which were to the effect that, if the husband was guilty of contributory negligence, the wife was not entitled to recover. The jury, therefore, impliedly found that the

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

husband was not guilty of negligence proximately contributing to the accident.

The accident occurred between 6:30 and 6:40 p. m. on October 4, 1924, at the intersection of Van Ness avenue and Stanislaus street in the city of Fresno. The sun set at 5:38 on said date. Both streets are busy thoroughfares. The car in which plaintiff was riding, a National touring car, was proceeding westerly on Stanislaus street. Defendant Kellogg was moving in a northerly direction on Van Ness avenue in the automobile owned by defendant Chanslor & Lyon Company, which was a Nash roadster.

Plaintiff's husband stated in his deposition introduced in evidence that he and plaintiff had been visiting friends on Stanislaus street several blocks east of the intersection where the accident occurred; that upon leaving their friends' home he turned on the lights on his car, and proceeded westerly on Stanislaus street to Van Ness avenue at a speed of 10–12 miles an hour. He further stated that when he reached the intersection he looked south, and observed the Nash roadster "about half a block away," or at least 100 yards south of the intersection, and, thinking there was no question of his ability to safely cross, proceeded ahead, and knew nothing further of defendants' car until it violently struck his car at a point west of the center line of Van Ness avenue with such force that the doors of his car flew open, and plaintiff was thrown into the street a distance of 15 to 20 feet. The Nash roadster was not brought to a stop by the impact of the collision, but continued to move in a northwesterly direction, and in its course struck the automobile of Dr. and Mrs. Anderson, witnesses on defendants' behalf, who were driving south on Van Ness avenue, and reached the intersection at approximately the same time as the other two cars.

The plaintiff, as well as her husband, testified that the lights on the car in which she was riding were turned on when she and her husband left their friends' home, and that it was not "real dark" at the time, but "dusk."

Defendants' version of the collision, as given by defendant Kellogg and by Dr. and Mrs. Anderson, differs from the account of plaintiff and her husband. According to Kellogg, he failed to observe the car until it was directly in front of him at a distance of only several feet, because it was dark, and the car was not lighted; it was traveling at a speed of not less than 20 miles an hour, and the speed of his car did not exceed 15 miles an hour. Both Dr. and Mrs. Anderson estimated the speed of the car in which plaintiff was riding as between 25 and 30 miles an hour, and both united in testifying that it was without lights. Kellogg also stated that the collision took place on the easterly side of the street, and not on the westerly, or his left side of the street, as claimed by plaintiff's husband. The testimony of plaintiff's husband was that he turned the lights of his car off immediately after the impact.

[2] The record presents a sharp conflict on material points. As an appellate court, we cannot usurp the function of the jury and the trial court, who finally passed upon the weight, effect, and sufficiency of the evidence and the credibility of witnesses, and determine in place of these arbiters of fact the credibility of witnesses and resolve conflicts in proof. From a consideration of plaintiff's evidence, which is sufficient as a matter of law to sustain the judgment, the jury must have inferred that defendant Kellogg negligently failed to observe the approaching car in time to avoid a collision, or, being aware of the presence of said car, negligently failed to so operate his own car as to avoid striking the car in which plaintiff was riding. The jury was further warranted in concluding that the plaintiff's husband was free from negligence in going forward across the intersection and acted as a person of reasonable prudence in not apprehending a collision with the Nash roadster, which he observed a half a block south, or 100 yards from the intersection.

[3, 4] The defendants' demurrer, urging that the complaint was ambiguous and unintelligible, and failed to state a cause of action, in that it could not be determined therefrom with whom plaintiff was riding as a guest, nor who owned the automobile in which she was riding, was properly overruled. Defendants suffered no injury whatsoever from the omission of said allegations, as the facts were alleged in the answer and fully brought out at the trial. The complaint merely alleged that plaintiff was riding as a guest in a certain National automobile. Imputed negligence, like contributory negligence, is a matter of defense. If the relationship between the driver of the vehicle and the plaintiff was such that his negligence would be imputable to her and bar her recovery, the burden was upon defendants to allege and prove such relationship. Plaintiff was not required to anticipate defenses.

[5] Appellants' contention that the trial court committed reversible error in modifying certain instructions offered by them is without merit. Although the court modified an instruction in which the jury was told that, if plaintiff's husband negligently and carelessly operated his automobile, and his negligence contributed proximately to plaintiff's injury, they should find that his negligence was imputable to her, by striking therefrom the words "and she cannot recover," the jury was clearly told in another instruction that, if negligence of the husband contributed proximately to the injury, they should find for the defendants.

[6] Defendant Chanslor & Lyon Company, in its answer to the complaint, denied that defendant Kellogg was acting as its agent or in the course of his employment when the accident occurred. The jury, in rendering the

verdict against said company under instructions from the court as to the liability of an employer for torts of an employee, impliedly found against said company on the facts and circumstances of the case. We do not discuss said issue herein, for the reason that we find no reversible error, and for the further reason that appellant company has not argued the question in the briefs filed.

This case, like many others of its class, presents a question of conflicting evidence passed upon in the first instance by the jury and finally by the trial court. The verdict of the jury and judgment entered thereon is sufficienctly supported by evidence to be found in the record.

The foregoing disposes of all questions raised by appellants in their opening brief. Judgment affirmed.

We concur: CURTIS, J.; PRESTON, J.

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204 Cal. 88

UNITED STATES FIDELITY & GUARANTY CO. v. INDUSTRIAL ACC. COMMISSION et al. (S. F. 12705.)

Supreme Court of California. April 20, 1928.

1. Master and servant ⚷419—Claim for adjustment, filed more than 6 months after commutation but within 6 months after compensation period, held not barred (Workmen's Compensation Act, §§ 28, 11[c]).

Commutation of weekly payments under Workmen's Compensation Act, § 28 (Deering's Gen. Laws 1923, Act 4749), fixing present value of final 38 weekly payments for permanent partial disability, *held* not to bar application for adjustment of compensation, filed more than 6 months after date to which payments were commuted but within 6 months from end of period over which compensation would have otherwise extended, under section 11(c).

2. Master and servant ⚷419—Commission's approval of commutation agreement for loss of eye held not to prevent subsequent award for total blindness not previously considered (Workmen's Compensation Act, §§ 27, 28).

Prior approval by Industrial Accident Commission of commutation agreement allowing compensation for permanent partial disability, under Workmen's Compensation Act, §§ 27 and 28 (Deering's Gen. Laws 1923, Act 4749), payable in lump sum, even if effective as a judgment, *held* not to prevent commission's subsequent increase of award on basis of total disability, where commission originally overlooked fact that loss of sight of eye left employee totally blind.

In Bank.

Proceedings under the Workmen's Compensation Act by Thomas Frazier, opposed by the United States Fidelity & Guaranty Company. Order of the Industrial Accident Commission awarding compensation for injuries, and insurer brings certiorari. Award affirmed.

H. W. B. Smith, R. P. Wisecarver, and Redman & Alexander, all of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

SEAWELL, J. On November 30, 1923, Thomas Frazier, while engaged as a miner in the employ of Visalia Masonic Mining Company, operating in Mono county, this state, suffered injuries from a blast unintentionally set off, which resulted in the permanent destruction of the sight of his right eye and a 60 per cent. loss of hearing of the right ear. Said Frazier had, about 35 years prior to sustaining the injuries above mentioned, suffered the loss of the sight of his left eye and a slight impairment of the hearing of his left ear. By the accident of November 30, 1923, he was rendered totally blind and his hearing was impaired by the double injuries thus sustained.

Petitioner, insurance carrier of the employer of said Frazier, assumed liability for compensation on the basis of the loss of the sight of one eye and not for total blindness, and for medical attention. Compensation payments were made at the maximum rate for such injuries, to wit, $20.83 per week. The record of the proceedings is meager, due largely to the informality with which such proceedings are conducted. It appears from the record that on February 1, 1924, Dr. Victor d'Ercole, the attending physician of said injured employee, forwarded to the rating department of the commission a report of the injuries which said employee had sustained and a report on his general physical condition. The petitioner alleges that Frazier requested permanent disability rating by the rating department of the commission, and said medical report was filed with his petition or request for said rating. We find no such request in the record, and whether said request was made by him orally or in writing or by his employer is not made certain. Said report was made upon a form blank adopted by the commission. The report filed with the rating department contained the information that said employee had previously suffered the loss of the sight of the left eye, and that the vision of the right eye was probably destroyed.

On December 5, 1924, the injured employee, Frazier, and petitioner, United States Fidelity & Guaranty Company, agreed to a commutation of the compensation under the Workmen's Compensation Act (section 28 [Deering's Gen. Laws 1923, Act 4749]), payable in a lump sum, and requested the approval of the commission of said agreement. The injury was stated to consist of:

"Loss of sight of right eye; 60 per cent. loss of hearing of right ear. Rated 122 weeks. The disability is permanent partial. * * * The present value of the final 38 weekly payments commuted at 6 per cent. as of December 5, 1924, is $748."

No mention was made in the commutation agreement that the latest injury left the employee totally sightless. On the day the agreement was signed by said Frazier and petitioner, W. P. Ratliff, secretary of the commission, certified the approval of said agreement by said commission. The petitioner herein alleges that on April 14, 1924, the final rating of said Frazier's disabilities was made by the rating department of said commission for the loss of sight of the right eye and a 60 per cent. loss of hearing of the right ear, amounting to 122 weeks of disability payments at $20.83 per week. This rating by the department, it is alleged, was advisory merely. Respondent commission and Frazier claim that whatever rating was made by the rating department was informal and was made without consideration of all the facts, and especially the fact that Frazier was rendered totally blind by the latest injury, and that the commission was empowered to make an award commensurate with the injuries actually suffered.

The next proceedings had in the matter consisted of an application made on behalf of Frazier for the adjustment of his claim for compensation. This application was heard, all parties appearing, and the award following it was made July 14, 1927. The commission found that the claim was not barred by the provisions of section 11, Workmen's Compensation Act; that the order made by the commission on December 5, 1924, approving the commutation and payment in a lump sum of the present value of the final 38 installments of disability indemnity due under a permanent disability rating as theretofore made had been informally made; that said agreement was not an agreement of compromise and release, and the order of said commission was not an order approving an agreement of compromise and release as defined and provided in section 27 of the Workmen's Compensation Act; that said order and the payment of the commuted lump sum did not deprive the commission of jurisdiction to render an award in the pending matter. The commission then proceeded to find that said Frazier suffered a permanent disability consisting of the loss of the sight of his right eye, resulting from a previous injury, and constituting total disability. The percentage of permanent disability was rated at 100 per cent., entitling said Frazier to $20.83 per week for 240 weeks and thereafter the weekly sum of $12.82 for the remainder of his life. The petitioner was given credit for the payment of 122 installments of indemnity at the rate of $20.83, a total of $2,541.26. An award $20.83 a week was made commencing December 8, 1923, for 240 weeks, less said credit of $2,541.26, and less $50 attorney's fees. At the expiration of said 240 weeks the allowance was to be reduced to $12.82 and continue at that rate during the remainder of said Frazier's life. All payments awarded were charged, with interest at the rate of 7 per cent. per annum until paid, beginning with the date of the award, etc.

[1] The award of July 14, 1927, which was the first finding or formal award made by the commission in the entire proceeding, is attacked, first, on the ground that the commission, having acted with full knowledge of the facts, cannot change its formal order of December 5, 1924, without a showing that a change of circumstances has arisen since the order determining the amount of permanent disability to which the employee, Frazier, was entitled was made. It is contended that the rating of 122 weeks, although informally made by the permanent disability department, was officially recognized by the commission by its order approving the agreement of commutation entered into by Frazier and petitioner, and said action amounts to an official issuance of said rating by the commission and is binding upon the parties to said agreement. In short, it is claimed that the action of the commission rendered the questions res judicata. It is next insisted that the claim is barred by section 11 (c) of the Workmen's Compensation Act. This contention is based upon the theory that the 38 future weekly payments, dating from December 5, 1924, and of the aggregate value of $748, being commuted on the date last above mentioned in a sort of retroactive manner, shortened the time in which the injured employee might be granted further relief, as provided by the act, from 122 weeks to 84 weeks. In short, it is contended that by said commutation agreement approval the employee, who received no additional compensation that he would not have received that he elected to accept his compensation in installments rather than in a lump sum, barred himself from all other benefits which the act confers upon injured employees generally. This would be a harsh construction to give to an act which the law declares shall be liberally construed with the view of accomplishing its manifest purpose. The bar of the statute invoked here, which is 6 months after the final payment of compensation, or within 6 months of the period for which compensation has been paid, does not defeat the claim. The application for an adjustment of claim was filed September 13, 1926, less than 6 months before the expiration of the 122 weeks' period. It was within 6 months of the *period for which compensation had been paid*. It is absolutely necessary to include the full time in order to have a basis for the computation of the amount found to be due as provided by the

agreement. The payment, by agreement and with the approval of the commission, may be commuted, but other substantial statutory guaranties will continue during the full period of time for which compensation is provided. The payments of compensation, for the purposes of preserving other rights of the employee, are spread throughout the entire period of payment, and the last payment under the agreement must be held to have terminated early in April, 1926, within 6 months of the day application for adjustment of claim was filed by said employee. This view is supported by the following provisions of section 11 (c) of said act:

> "The payment of compensation, or any part thereof, * * * shall have the effect of extending the period within which proceedings for its collection may be commenced, six months from the date of the agreement or last payment of such compensation, or any part thereof, or the expiration of the period covered by any such payment."

Said agreement entered into by the parties seems to recognize that the general rights of the employee were not bargained away by said agreement by accepting a lump sum before the expiration of said 122 weeks, as it expressly provides that:

> "The Industrial Accident Commission may enter its award upon the foregoing agreed statement of facts, upon the request of either party or upon its own motion at any time, subject to the right of the commission to set aside said statement of facts or to reopen said award at any time under its continuing jurisdiction."

[2] The proceedings in this case were largely taken, except the application by the employee for adjustment of claim, prior to the decision in Liptak v. Industrial Accident Commission, 200 Cal. 39, 251 P. 635. It is very apparent that the rating department did not consider the fact that the injury sustained by the loss of the sight of the right eye left the employee totally blind at the time the rating of 122 weeks was made. Respondent commission claims that, while the surgeon's report did contain a notation of the prior loss of the left eye, the report went to the rating department, which made an informal rating, using a blank upon which was printed a notice that said rating was subject to change and correction. The total loss of sight superimposed by the injury last sustained could not have been taken into consideration either by the rating department or by the commission, inasmuch as the rating belies the contention.

The commission never at any time made findings or a formal award in this cause until July 14, 1927. But if it be conceded that the prior act of the commission approving the commutation of compensation be given all the force and effect claimed for it, to wit, the status of a judgment, sufficient cause appears upon the face of the record to affirm the award of the commission. The recent case of Bartlett Hayward Co. et al. v. Industrial Accident Commission (Cal. Sup.) 265 P. 195, fully disposes of the questions of inadvertence on the part of the commission in its permanent disability rating of an employee, by holding that it constitutes good cause for the exercise of the continuing jurisdiction of the commission and its right to increase its award in the absence of any evidence as to change in the physical condition of said employee. We are of the opinion that the case last cited and the Liptak Case, supra, are alone sufficient authority to support the award in the instant case. The major points of the instant case are concluded by those cases.

The award is affirmed.

We concur: RICHARDS, J.; SHENK, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

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204 Cal. 109

PEOPLE v. DOWELL. (Cr. 3061.)★

Supreme Court of California. April 23, 1928.

Rehearing Denied May 21, 1928.

1. Criminal law 🔑593—Denial of postponement for absence of counsel after warning to procure other counsel at time of setting case for trial held not abuse of discretion (Pen. Code, § 1050, as added by St. 1927, p. 1036).

Where, on defendant's plea of not guilty, court set case for trial approximately within 30 days, as was his duty under Pen. Code, § 1050, as added by St. 1927, p. 1036, and instructed defendant to procure other counsel when counsel present indicated he might not be able to be present at time set for trial *held* that on case coming to trial court did not abuse its discretion in denying prayer for postponement because of absence of such counsel.

2. Criminal law 🔑622(1)—Jury 🔑31(11)—Joint trial of defendants held not to deny them proper quota of peremptory challenges or violate their constitutional rights (Pen. Code, §§ 1070, 1098; Const. Cal. art. 1, §§ 7, 13; Const. U. S. Amend. 5, 6).

Joint trial of defendants does not deny either defendant his proper quota of peremptory challenges under Pen. Code, §§ 1070, 1098, nor does it violate defendants' constitutional rights under Const. Cal. art. 1, §§ 7 and 13, or under Const. U. S. Amends. 5 and 6; there being no federal question, constitutional or otherwise, involved.

3. Criminal law 🔑426—Testimony offered by one defendant as to declarations made by him involving codefendant held inadmissible.

On joint trial of defendants, admission of testimony, offered by one of defendants, as to certain declarations made by him involving codefendant, *held* error.

★Rehearing denied.

4. Criminal law ⚷1169(7)—Erroneous admission of declarations of one defendant, involving codefendant, held not prejudicial, where similar testimony was admitted without objection.

Admission of testimony as to declarations of one of defendants, involving codefendant, offered by such other defendant, though error, *held* not prejudicial, where confession of such defendant and his testimony, covering same subject-matter, were admitted without objection by codefendant and jury were admonished that it was not binding on codefendant.

5. Witnesses ⚷395—Testimony as to statement of defendant's witness, offered to rebut inference of fabrication, held properly excluded.

Testimony as to statement made by defendant's witness that she was present at time of shooting of deceased and that defendant was not present, made some 20 days following the crime and offered to rebut inference that testimony of defendant's witness was recent fabrication, *held* properly excluded.

6. Criminal law ⚷814(18)—Where defendant admitted conviction of crime in Washington, instruction that sentence in reform school would not impeach him held without supporting evidence.

Where defendant stated that he had been convicted of a felony, to wit, robbing a person, in Washington, duty shifted from district attorney to defendant to show nature of conviction and law of Washington with respect thereto, and where such showing was not made, instruction that if defendant had merely been sentenced to reform school such fact was not sufficient to impeach him was properly refused.

7. Homicide ⚷18(5)—One killing policeman while fleeing from robbery and retaining object of crime committed murder in perpetration of robbery.

Defendant, who while fleeing from scene of robbery, carrying supposed bag of money of victim, killed policeman who was pursuing him, in order to effect his escape, committed murder in the perpetration of a robbery, the crime of robbery not having been completed at such time.

8. Criminal law ⚷775(3)—Instruction that evidence as to alibi should be considered with other evidence and if sufficient to raise reasonable doubt of defendant's guilt he should be acquitted held proper.

Instruction on defense of alibi that "all the evidence should be carefully considered by you, and if the evidence on this subject, considered with all the other evidence, is sufficient to raise a reasonable doubt as to the guilt of the defendants, you should acquit them," *held* proper.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Mark Dowell was convicted of murder in the first degree, and he appeals. Affirmed.

Nathan C. Coghlan, Austin W. Arnold, and Roland Becsey, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., William F. Cleary, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., and Isidore M. Golden, Deputy Dist. Atty., both of San Francisco, for the People.

PRESTON, J. Defendant and one Eugene Gentile were jointly charged by information with the murder of John J. Driscoll, a police officer of the city and county of San Francisco. A joint trial was had, which resulted in a verdict convicting defendant of murder in the first degree without recommendation. A motion for new trial and also in arrest of judgment was made and denied, and judgment imposing the extreme penalty was pronounced. This appeal is from the judgment and the orders denying said motions. But a brief review of the evidence will be made in view of the fact that its sufficiency to support the verdict is unquestioned.

Testimony adduced on behalf of the prosecution tended to establish the following facts: Appellant and Gentile, having planned to rob one Dine Costi and armed, respectively with a .45 Colt automatic revolver and bludgeon or "blackjack," stationed themselves about 1 o'clock a. m., on June 26, 1927, in the doorway of the home of said Costi on Natoma street in San Francisco, having theretofore observed his habit of returning about that time each evening with the day's earnings from his business. Costi arrived shortly thereafter. Appellant pointed the revolver at him and commanded him to throw up his hands. Instead Costi called for help. Gentile then hit him twice with the blackjack. Appellant grabbed the bag he was carrying and, with Gentile at his side, started to run down Natoma street to Russ, turning over Russ towards Mission and Howard streets. At the corner of Russ and Howard streets Police Officer Driscoll, in uniform and on duty, stood talking to Mrs. Doris Thomas, a colored woman. At the curb Officer Manning with whom he had just been conversing, was endeavoring to start his automobile. As they saw the two parties running down Russ street towards them, Officer Driscoll commanded them to halt, whereupon the party carrying the revolver fired two shots at the officer, one of which caused his death. They both ran on. Officer Manning gave chase in his machine and overtook and arrested Gentile. Appellant escaped temporarily, but was arrested later in the day.

There is a mass of circumstantial evidence identifying appellant as the party who fired the fatal shot. There is the testimony of Costi, whom they undertook to rob, and the testimony of Officer Manning and of Mrs. Thomas, who witnessed the occurrence, in addition to much corroborating testimony by other persons and police officers, including various statements made by appellant and Gentile, in which each intimates guilt on the part of the other. Both appellant and Gentile testified upon the trial. Appellant, in defense, attempted to establish an alibi through testimony given by his wife, brother-in-law, and his sister, who claimed that in men's clothes she accompanied Gentile on the fatal expedition and shortly after the murder met appellant, who was searching for her in that vicinity. However, so shaken was this testimony by statements of witnesses in rebuttal that apparently little credence was given to it by the jury.

[1] The crime was committed June 26, 1927. On July 20th following the defendants entered their pleas of not guilty, and on the same day the case was set for trial on August 22d. Mr. Nathan C. Coghlan appeared as the attorney for appellant and was present when appellant's plea was entered and the cause set for trial. He said that he "feared" he would be engaged in the trial of another case on the day set, whereupon the court said:

> "The defendant is present, and I notify him to procure other counsel. The prosecution will be prepared and the defendant must be prepared to go to trial on the 22d of August. That is ample time. This is the 20th day of July, and you have more than 30 days in which to prepare for trial."

Mr. Coghlan then made the following statement:

> "I make no complaint as to the shortness of time. I think, so far as the procurement of witnesses is concerned and the preparation of the case, that thirty days is ample time in the ordinary case, even in a murder case."

Whereupon the court replied:

> "The order of the court is that the cause be set for trial Monday, August 22d, at 10 a. m."

Nothing further was done until August 22d, when the case was called, whereupon two attorneys appeared and filed affidavit of appellant setting up the fact that Mr. Coghlan was then engaged in the trial of a criminal case in another department of the court and suggesting that the trial court might consume its time in the trial of other criminal cases, mentioning some known to be on the calendar. The affidavit concluded with a prayer for postponement until September 1st. This motion was promptly denied.

We can discover no merit whatsoever in the contention of appellant that the court in this ruling abused its discretion. A little more than 30 days was allowed appellant for the preparation of his defense, and he had prompt and specific notice that other counsel should be procured if his first choice could not be realized. It is manifest that the courts cannot in every case await the convenience of some attorney before they can function. Reduced to its lowest terms, this would allow a popular attorney to have the courts marking time to serve his convenience. See People v. Goldenson, 76 Cal. 328, 341, 19 P. 161, and People v. Fredericks, 106 Cal. 554, 556, 39 P. 944. The discretion exercised by the court in setting the cause approximately within thirty days after the plea is now made a duty under the statute. Section 1050, Pen. Code (as added by St. 1927, p. 1036). Trial of the cause was begun on the 22d of August; 2½ days were consumed in the selection of the jury, and Mr. Coghlan appeared as one of appellant's attorneys for the afternoon session of August 26th, and remained as the attorney for appellant throughout the remainder of the trial. No incident injuriously affecting the substantial rights of appellant is noted as having occurred due to the absence of Mr. Coghlan.

[2] After appellant's motion for postponement had been denied one of the said two counsel arose and asked the court to grant a separate trial to appellant, in which motion the attorney for the other defendant also joined. This oral motion was based upon the ground that he understood that a confession had been made by the codefendant to the public authorities; that appellant's defense and that of his codefendant would therefore be antagonistic, and hence appellant would suffer great injury if a separate trial were not had. No affidavit or other evidence was offered in support of this motion and it was denied. The defendants were thereafter tried together and the written statement or confession made by defendant Gentile was introduced in evidence.

Complaint is also made that by reason of the joint trial appellant was denied his proper quota of peremptory challenges under sections 1070 and 1098 of the Penal Code. It is also urged that his constitutional rights under sections 7 and 13 of article 1 of the State Constitution were violated, as were also the rights guaranteed him under the fifth and sixth amendments to the Constitution of the United States.

There is no merit whatsoever in these contentions. Prior to 1921 separate trials were provided for by statute. At said time section 1098 of the Penal Code was amended (St. 1921, p. 90) to provide that two or more defendants when jointly charged with any public offense must be tried jointly unless the court ordered separate trials. This amendment, in effect, adopted the common-law rule upon this subject. There is no federal question, constitutional or otherwise, involved. It has always been the rule in the federal courts that defendants jointly indicted for the same offense must be tried together unless the court for some reason orders a separate trial for one or more of them. All the questions raised by appellant as grounds for a separate trial have been thoroughly considered by this court in the case of People

v. Perry, 195 Cal. 623, 234 P. 890. We have re-examined the question and are satisfied with the ruling made in that case. Several similar rulings have been made. People v. Erno, 195 Cal. 272, 232 P. 710; People v. Wilson, 76 Cal. App. 688, 693, 245 P. 781; People v. Walsh (Cal. App.) 260 P. 303; People v. Anderson, 59 Cal. App. 408, 211 P. 254; People v. Ford (Cal. App.) 253 P. 966.

[3] The attorney for codefendant Gentile placed upon the witness stand one Dullea, a police officer, who testified as to certain declarations involving appellant made by Gentile to him. The court in admitting said testimony gave the jury the following admonition:

> "Members of the jury, you are instructed that any statement made by the defendant Gentile not in the presence and hearing of the defendant Dowell, implicating the defendant Dowell, must not be considered against the defendant Dowell. In other words, certain statements are admissible against the defendant Gentile but must be disregarded, as to the defendant Dowell."

In asking these questions, counsel for Gentile stated to the court:

> "The purpose of this evidence is to show that the defendant Gentile had nothing to hide from the very beginning, and he was telling the truth from the very beginning."

The answers made by the witness were to the effect that the codefendant stated to him that he had aided appellant in the commission of the crime, and that he had had a long acquaintance with appellant. The witness testified that he and other police officers had accompanied the codefendant to Natoma street where the crime was committed, and there said codefendant told him how he had carried the gun awhile and then handed it to appellant, and made other like statements.

We cannot come to any other conclusion than that the introduction of this testimony was error. It was not testimony offered by the opposing party and introduced as an admission made against interest. The people did not put this testimony in the record, but the codefendant himself did it. Under the rule laid down in the following cases we must hold that this evidence was inadmissible. People v. Prather, 120 Cal. 660, 53 P. 259; People v. Chin Hane, 108 Cal. 597, 41 P. 697, and People v. Hill, 116 Cal. 562, 48 P. 711.

[4] Whether or not it was prejudicial error in this case is quite a different question. In the first place the codefendant Gentile gave a statement, which was written and signed, covering the same subject-matter, and this statement was received in evidence without objection by appellant. Later Gentile became a witness in the case and testified in great detail as to all the occurrences previous to, during and subsequent to the commission of the crime, and covered all ground covered by all said statements made to the police officers. It was also in evidence that said written statement was in his presence and in the presence of Gentile read to them, and to the many incriminating statements therein appellant made no reply. At another period the two defendants questioned each other at length concerning the written statement by Gentile and covered many incriminating recitals found therein. Certainly then, under such circumstances, no prejudicial error could have resulted to the cause of appellant from the admission of this evidence, especially in view of the repeated careful admonitions given the jury by the court to the effect that the testimony of this witness was not to be held binding upon appellant.

[5] It is next contended that the witness Thos. J. Davis was not allowed to testify for the appellant to a statement made to him by the witness Mrs. Francis Edison to the effect that she was present at the time of the shooting of deceased, and that appellant was not present at said time, in order to rebut the inference that her testimony on the trial was a recent fabrication, invoking the rule stated in People v. Billings, 34 Cal. App. 554, 168 P. 396, and other cases. There was no error in this ruling under the facts here shown. This witness had admittedly made declarations inconsistent with her testimony, but the declaration sought to be proved, consistent therewith, was one made on or about July 15, 1927, some 20 days following the crime and at a time when the motive to fabricate might well have existed to the same degree as when the witness gave her testimony on the trial.

[6] The court refused to give the following requested instruction:

> "The court instructs the jury that the only provisions made by the laws of the state of California for the impeachment of a witness are to be found in the Code of Civil Procedure of this state; and it is there provided that a witness may be impeached either by his confession upon the witness stand that he has been previously convicted of a felony or by the production of the record thereof. The defendant and witness, Mark Dowell, in this case has put in issue here by his replies the question of whether in the sense contemplated by law he has been convicted previously of felony. If you believe by the testimony herein that he merely served a sentence in a reform school, then you are instructed that such fact is not sufficient to impeach him."

The question asked appellant was: "Mr. Dowell, have you ever been convicted of a felony?" and he answered, "Yes, sir." An effort was made to have the court strike out the witness' answer on the ground that he had merely been incarcerated in a reformatory in the state of Washington, but not in the penitentiary. Neither the exact nature of the crime committed nor the effect of a conviction in Washington and sentence to the reformatory were in evidence. The court refused to strike out the answer of the witness, whereupon the district attorney asked appellant of what crime he had been convicted to which he replied: "I was convicted of robbing some Japs." The record of conviction was neither offered by appellant nor by the prosecution. It would seem, in view of the witness' answers, that the duty shifted from the district attorney to the defendant to show the nature of the conviction and the law of Washington with respect thereto. In this state of the record there can be no error predicated upon the failure to give this instruction.

[7] Appellant next complained that the court gave an instruction to the jury that all murder perpetrated in the commission of robbery is murder in the first degree, and further instructed said jury as follows:

> "Where the killing is done in the perpetration, or attempt to perpetrate, some one of the felonies enumerated in the statute, here the occasion is made conclusive evidence of premeditation. Where the case comes within either of these classes, the test question, 'Is the killing wilful, deliberate and premeditated?' is answered by the statute itself, and the jury have no option but to find the prisoner guilty in the first degree. Hence, so far as these two cases are concerned, all difficulty as to the question of degree is removed by the statute."

This is only a part of the instruction. The complete instruction has been approved in People v. Nichol, 34 Cal. 211, and perhaps in other cases, and is legally correct. The objection is that the instruction was inappropriate and prejudicial because, it is said, at the time the police officer was shot and killed the robbery had been fully consummated and for that reason the murder was not committed in an attempt to perpetrate said crime. As above noted, appellant was fleeing from the scene of the robbery, carrying what he thought was the bag and money of the victim, when, being pursued by the officer of the law, appellant fired upon him in order to effect his escape while retaining the object of the crime. We are satisfied that the crime of robbery had not been completed in any sense at the time of the unlawful shooting, but on the contrary the murder was committed in the perpetration of such crime.

[8] Fault is also found with the following instruction:

> "All the evidence should be carefully considered by you, and if the evidence on this subject (alibi), considered with all the other evidence, is sufficient to raise a reasonable doubt as to the guilt of the defendant, you should acquit him."

This instruction was approved in People v. Lang, 142 Cal. 482, 487, 76 P. 232, 234, and People v. Winters, 125 Cal. 325, 57 P. 1067. There is no other assignment of error requiring notice. The jury was properly instructed as to the forms of verdict applicable to the case, and under the verdict rendered the law imposes the death penalty. Appellant was accurately and expeditiously, but fairly, tried, and we can find no instance where his legal rights were seriously or at all invaded.

Judgment affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; SHENK, J.; RICHARDS, J.

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91 Cal. App. 73

CROTTS v. BROWN et al. (Civ. 5112.)

District Court of Appeal, Second District, Division 2, California. April 16, 1928.

1. Contracts ⚷355—Court, finding that plaintiff's assignor drew plans and superintended construction for percentage of cost, erred in crediting wages as foreman.

Court, having found that plaintiff's assignor drew plans and specifications for and superintended construction of house for 10 per cent. of cost, erred in crediting money paid him for foreman's work and awarding plaintiff judgment for difference.

2. Assignments ⚷34, 43—Assignment of claim for performing specific service, not for wages or salary, need not be in writing nor signed by assignor's wife (Civ. Code, § 955).

Assignment of claim resting in contract for performance of specified service in drawing plans and specifications for and superintending construction of house, not for wages or salary earned, need not be in writing, nor signed by assignor's wife, under Civ. Code, § 955.

3. Costs ⚷60—Court awarding plaintiff judgment for difference between contract price and wages as foreman erred in ordering each party to pay own costs.

Court, having found that plaintiff's assignor drew plans and specifications for and superintended construction of house for 10 per cent. of cost, as contended by plaintiff, and awarded latter judgment for difference between such amount and amount paid him for work as foreman, erred in ordering each party to pay his own costs.

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Action by George W. Crotts against Mabel G. Brown and another. From a judgment for plaintiff in less than the amount prayed for, he appeals. Reversed.

Frank G. Tyrrell and C. W. Stahl, both of Los Angeles, for appellant.

Euler & Subith, of Los Angeles, for respondents.

STEPHENS, Justice pro tem. This case was tried by the court sitting without a jury, and judgment went in favor of plaintiff for the sum of $76, the prayer of the complaint being for the sum of $865. Plaintiff made a motion for new trial, which was denied, and thereafter appealed.

Evidence was introduced by plaintiff at the trial without objection to the effect that plaintiff's assignor and defendants entered into an oral agreement whereby the former was to prepare plans and superintend the construction of a building for 10 per cent. of the cost thereof. A difference arose between the parties. Appellant contends that this difference was absolved by an agreement that the 10 per cent. arrangement should remain unchanged, but that in addition appellant's assignor was to act as foreman working on the job, for which he was to receive $1 per hour. Respondents contend that the $1 per hour as foreman was to be the sole compensation moving to appellant's assignor. The latter acted as foreman throughout the construction, and actually received the full compensation of $1 per hour, excepting a balance of some $15.

The first paragraph of the court's findings is to the effect that the original contract was that respondents promised to pay plaintiff's assignor, for preparing and furnishing plans and specifications and for superintending the construction of the building, 10 per cent. of the total cost thereof; the fourth paragraph is a finding that the claim was duly assigned to plaintiff. In the third paragraph the court finds:

> "That the total cost of said buildings was the sum of $8,300. It is not true that, at the end of the first week or at any other time or at all, plaintiff's assignor, Robert A. Brown, agreed with the defendants that instead of working on a basis of 10 per cent. of the cost of said buildings, he would work on the basis of $1 per hour or $8 per day, as compensation, in lieu of the commission of 10 per cent. of the cost of said buildings, nor has he been paid in full for all services rendered to defendants, nor do the defendants hold vouchers showing such full payment to plaintiff's assignor, Robert A. Brown, and it is not true that defendants are not indebted to plaintiff's assignor, nor to the plaintiff for any sum whatsoever."

And in the fifth paragraph the court finds that the sum of $754 has been paid on the claim, leaving a balance due of $76.

The court, in substance, found that the services for drawing plans and supervising construction was contracted for at 10 per cent. of the cost, which would amount to $830. It then credited the money paid to plaintiff's assignor for foreman's work at $1 per hour (and there is no conflict in the testimony on this point), amounting to $754, on the contract sum of $830, and awarded judgment for the difference, $76.

[1] In short, the case is tried on the basis of the plaintiff's assignor attempting to prove that he had drawn plans and specifications for and had superintended the construction of the house for 10 per cent. of the cost, and the defendants attempting to prove that the compensation of $1 per hour covered not only this, but his labor as foreman as well. The court decided that plaintiff's assignor was right in his contention and that the defendants were wrong in theirs, but awarded judgment exactly as though it had found the defendants right and plaintiff's assignor wrong. If the latter performed services on a basis of 10 per cent. of the cost, the court had no basis whatever for discharging the obligation to pay the 10 per cent. by crediting thereon the money paid him for other services which all agree were performed. In principle it is exactly the same as where a holder of two promissory notes from the payor discharged one of them upon receipt of payment but was also arbitrarily made to discharge the other note for the same payment.

[2] Although respondents do not appeal, they urge a reversal of the judgment on the ground that there is no evidence to sustain the findings that the claim was legally assigned. Whether or not we should consider this point with the question in mind of its possible effect upon the right of plaintiff's assignor to further maintain the action, we need not decide. The whole contention is that the evidence does not show that the assignment was in writing and signed by the wife of plaintiff's assignor, under the requirements of section 955 of the Civil Code. But the findings are that the claim rests in a contract for the performance of a certain specified service, and is not for wages or salary earned.

[3] In its judgment the trial court ordered each party to pay their own costs. This obviously was error.

Judgment reversed.

We concur: WORKS, P. J.; CRAIG, J.

90 Cal. App. 683

PEOPLE v. MAGGIO. (Cr. 1596.)

District Court of Appeal, Second District, Division 2, California. April 6, 1928.

1. Automobiles 🔑355(8)—Evidence held to support conviction for failure to stop and render assistance after automobile collision (Pen. Code, § 367c).

In prosecution under Pen. Code, § 367c, for failing to stop and render assistance after automobile collision, evidence, which was uncertain as to exact date of accident but showed that defendant was directing another in operating truck and admitted having had accident, *held* to support conviction.

2. Automobiles 🔑336—One controlling truck driver and knowing collision occurred is criminally liable for failure to stop and render assistance (Pen. Code, § 367c).

One having control over driver of truck and knowing that collision had occurred is criminally liable under Pen. Code, § 367c, if he fails to cause truck to stop and to render aid to those who might possibly have been injured, regardless of whether he was negligent in causing collision.

3. Criminal law 🔑824(1)—In prosecution for failure to stop after automobile collision, omission of instruction requiring joint act and intent or negligence, not requested, held not error (Pen. Code, §§ 20, 367c).

In prosecution under Pen. Code, § 367c, for failure to stop and render assistance after automobile collision, it was not error to omit from instructions Pen. Code, § 20, requiring joint operation of act and intent or crimnal negligence, where such instruction was not requested, since only intent which need be proved is that involved in knowledge of facts requiring that vehicle be stopped and that aid be rendered.

4. Criminal law 🔑775(4)—Where evidence was uncertain whether offense was committed August 22 or 23, and defendant set up alibi for 23d, instruction that exact date was immaterial held not error (Pen. Code, § 367c).

Where evidence in prosecution under Pen. Code, § 367c, for failure to stop and render assistance after automobile collision was uncertain as to whether accident occurred on August 22 or 23, and defendant set up alibi as to 23d, instruction that exact date was immaterial *held* not error as against contention that only August 23 should be considered, in view of prosecution's attempt to fix such date as date of accident, where information alleged accident occurred "on or about August 23."

5. Criminal law 🔑1174(2)—Jurors held not guilty of misconduct warranting reversal of conviction as against contention they were informed through newspaper of facts concerning offense and discussed credibility of witnesses before submission of case (Pen. Code, § 367c).

Jurors *held* not guilty of misconduct warranting setting aside of conviction under Pen. Code, § 367c, for failure to stop and render assistance after automobile collision, as against contention that they were informed through newspaper of facts concerning collision and that they discussed credibility of witnesses before case was submitted.

6. Criminal law 🔑1134(2)—Juror's affidavit must be disregarded in determining whether misconduct warrants setting aside conviction.

Juror's affidavit must be disregarded in determining whether misconduct warrants reversal of conviction, since jurors are not permitted to impeach their own verdict.

7. Criminal law 🔑1128(2)—Juror's testimony, mentioned in briefs but not appearing in record on appeal, cannot be considered in considering misconduct.

In determining whether misconduct of jurors warrants setting aside of conviction, testimony of juror mentioned in briefs but not appearing in record on appeal cannot be considered.

8. Criminal law 🔑925(1), 1156(5)—Denying new trial for misconduct of jurors is discretionary and will not be disturbed save for manifest abuse.

Question of juror's misconduct when submitted to trial court on motion for new trial is addressed to sound legal discretion of that tribunal, and appellate court will not disturb order denying such motion unless there is manifestly clear and unmistakable abuse of discretion.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Salvadore Maggio was convicted of failing to stop and render assistance after an automobile collision, and he appeals. Affirmed.

R. B. Whitelaw and Ernest R. Utley, both of El Centro, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., Elmer W. Heald, Dist. Atty. of Imperial County, and Edward B. Patterson, Deputy Dist. Atty., both of El Centro, for the People.

CRAIG, J. The appellant was charged by information, and found guilty by a jury, of having, on or about August 23, 1927, violated section 367c of the Penal Code, which said section provides in part that:

> "Whenever an automobile, * * * strikes any person, or collides with any vehicle containing a person, the driver of, and all persons in, such automobile, * * * who have or assume authority over such driver, shall immediately cause such automobile, * * * to stop, and shall render to the person struck, or to the occupants of the vehicle collided with, all necessary assistance including the carrying of such person or occupant to a physician or surgeon for medical or surgical treatment, * * * and * * * shall further give to the occupants of such vehicle or person struck, the number of such automobile, * * * together with the name and address of the driver of such automobile, * * * also the name of the owner thereof and the name of the passenger. * * *"

This is an appeal from the judgment, and from an order denying a motion for new trial.

It appears that at about 2:30 or 3 o'clock a. m., on August 22 or 23, 1927, the exact date being questioned by the parties, W. B. Oswell and Estelle Oswell, his wife, left Yuma, Ariz., in a coupé driving in a westerly direction toward El Centro, Cal., which is about 62 miles distant from Yuma, at the rate of 30 or 35 miles per hour; that when they had proceeded about 37 miles on their journey their automobile collided with a truck which was traveling easterly at about the same rate of speed; that at the point of contact the Oswell car was traveling at about 4 or 5 miles per hour. As a result of the collision the coupé was thrown across the thoroughfare, the left front wheel was bent under the machine, and its running board and fender were torn off. Mrs. Oswell was thrown to the pavement and was injured. The truck proceeded easterly toward Yuma, and, although Oswell attempted to obtain its number or other marks of identification, the darkness of the early hour rendered this impossible.

On the morning of August 22, 1927, Maggio Bros., Incorporated, an El Centro produce company, employed one A. Pecararo as a truck driver. The latter had not theretofore been in Yuma, and did not know the way from El Centro, nor the location of his employer's customers. At 3:30 or 4 o'clock a. m. of the date last mentioned, Pecararo left El Centro with a Fageol truck loaded with fruit belonging to the corporation, which was driven over the same route as that followed by the Oswells, and arrived at the Yuma quarantine station at about 7 or 7:30 a. m. of that day. It is apparent, and is not denied, that upon this occasion appellant accompanied Pecararo to Yuma, under the direction and authority of Maggio Bros., "in order that he might point out the places of business of the corporation's customers."

[1] It is contended by appellant that the truck did not collide with any automobile on the morning of August 22, 1927, and that on the 23d, the date on which the offense is charged by the information, he drove a Chevrolet coupé to Yuma, and that Pecararo drove the Fageol truck to Calexico, in company with another man. That appellant was in Yuma on both dates we think is conclusively established by the evidence. It is urged from the foregoing that since his truck encountered no accident on August 22d, and was not driven upon the highway in question on August 23d, the evidence does not support the verdict and judgment. The respondent contends that all of the evidence tends to show that, regardless of the date, appellant was with the truck at the time of the accident, that he admitted having collided with another machine on his way toward Yuma, and that witnesses who attempted to fix the date were not positive that the accident occurred on August 23d.

W. B. Oswell, the complaining witness, testified on direct examination: "On the 23d, the way I've got it;" on cross-examination, "On or about that date, that is what I say, yes, sir;" and on redirect examination, "I can say it was on the 23d, I will have to say on the 23d, the morning of the 23d." Mrs. Oswell testified, "I think it was the morning of the 23d; there has been so much happened since that, I think it was that morning that we left." T. J. Hart, the quarantine inspector at Yuma, testifying about a conversation with appellant, in which he admitted he had been in an accident on the day of the conversation, swore that the conversation was on or about the 23d, and when asked to be positive by counsel for the defendant, he replied: "I am not absolutely certain, I think it was on the 23d, but probably it could have been on the 22d. * * * I could not swear it was on the 23d." The jury were instructed that the exact time of the commission of an alleged offense charged in the information is not material, "but any time if proven, on or about August 23, 1927, the time alleged in the information, would be sufficient as to the time thereof, but you cannot convict at all except for specific acts charged in the information, as committed on or about August 23, 1927." We think it obvious that under this instruction, and from further evidence, which we shall next consider, the jury may well have concluded that all of the witnesses were uncertain as to whether the offense was committed on August 22, 1927, when appellant was in charge of the truck and its driver, or on the following morning, but that in fact it was committed on the former date, and as charged in the information.

The witness Hart further testified that two other automobiles drove in behind appellant's truck at the quarantine station during the inspection, and that having overheard the occupants of the rear machines talking of an accident, the witness asked appellant:

> "'Did you have an accident this morning?' and he replied he did have one, and I asked him where it happened, and he said it was just on the east side of Holtville, and I asked him if he stopped after he had the accident, and he said he did not."

D. E. Hunt, who conducted a filling station between Yuma and Holtville, on said highway leading to El Centro, testified that:

> "On or about the 23d" of August, 1927, he had learned of a collision caused by appellant's truck earlier in the day, and that when appellant and Pecararo "came back that afternoon, I was kidding him about some one hitting a truck, and he has the only truck of that description on the road, and Maggio denied it, * * * and afterward admitted it after I showed him the dent in the rear wheel. * * * I asked him why he did not take the dent out, and he said it couldn't blow the tire out anyway.

* * * He said a woman was driving the car out in the middle of the road, and 'I wasn't going to drive my car out in the sand for any one.' * * * We were looking at the marks. * * * It was the flange on the demountable rim holding the tire that was dented some 4 or 5 inches long, bent down until you could look where it had hit on the rim, the outside projected out, and it bent it down, and you could see the grip holding to his tube in under; it was bent down some 5 or 6 inches long."

This witness also averred that the defendant at that time said:

> "'Do you think they will do anything to me?' and I said, 'They sure will;' and Mrs. Maggio said, 'What would you do now about it?' and I said, 'If I was doing it I would take it up with the tourist now.' He didn't know who he hit or anything about it, and Mr. Maggio told me then he wasn't driving the car, that he was breaking in a new driver."

It is significant that although appellant denied, as a witness in his own behalf, that he was operating the truck on the morning of August 22, 1927, he was not asked upon the stand, and did not testify under oath that he had no accident, or that he did not have the conversations above quoted. We think the evidence in support of the charge was ample, and that the jury were warranted in returning the verdict upon which the judgment is based.

It is insisted by appellant that the evidence was insufficient to show that Maggio at any time had or assumed authority over the truck or its driver. Various witnesses testified that he had supervision of the Yuma district, and of the truck when it delivered in that vicinity, and frequently drove it himself. It affirmatively appears that appellant accompanied Pecararo for the sole purpose of directing him to places of business of customers of the corporation, and the route traveled upon this occasion was the usual course over which its truck was driven for like purposes at least three times each week. Further, Pecararo had never before been over the road in question, nor had he made any previous trip across the desert. We think the jury were justified in believing, as they doubtless did, that Pecararo operated the truck as and where directed by the defendant. Appellant's statement, referred to above, that "he was breaking in a new driver," is alone very significant. Authorities cited by appellant involving merely the rule as to imputation of negligence of drivers to their passengers or guests, do not apply to the instant case. This is obvious from the following cases which also are cited by appellant: People v. Fodera, 33 Cal. App. 8, 14, 164 P. 22, in holding the Motor Vehicle Act (St. 1915, p. 397) constitutional, states in effect that the application of the act is not limited to persons who knowingly cause their vehicles to collide with those occupied by others, but requires that they stop and render aid to those who may possibly have suffered injury. In People v. Kaufman, 49 Cal. App. 570, 193 P. 953, it was said:

> "It was designed to prohibit, under pain of severe punishment, negligent or wanton drivers of motor cars from seeking to evade civil or criminal prosecution by escape before their identity could be established, and similarly to prohibit all drivers, whether negligent or not, from leaving persons injured in collisions with cars driven by them, in distress and danger for want of proper medical or surgical treatment."

[2] The statute expressly provides that any motor vehicle which strikes another must stop, and embraces with the driver of such vehicle persons occupying the same "who have or assume authority over such driver." Hence it is apparent that appellant, whether negligent or not, having control over the driver and knowing that a collision had occurred and having failed to cause the automobile to stop and to render aid to those who might possibly have been injured, was criminally liable under the provisions of section 367c of the Penal Code. We think the evidence was sufficient in this respect to support the verdict and judgment.

[3] Nor was it prejudicial error for the trial court to omit from its instructions to the jury section 20 of the Penal Code. That section requires that in every crime or public offense there must exist a joint operation of act and intent, or criminal negligence. Such an instruction was not requested, and no error was committed by its omission. Moreover, the only intent which need be proved is that involved in the knowledge of the facts requiring that the vehicle stop and that aid be rendered as provided by section 367c.

[4] Appellant next contends that the trial court erred to his prejudice in refusing to instruct the jury that, the prosecution having fixed August 23, 1923, and the defendant having set up an "alibi," it was the duty of the people to prove beyond a reasonable doubt that the defendant was there at the time, and was in supervision of the truck, and that no other time should be considered.

The court instructed the jury that the defense in this case was what is known as an "alibi," and that if after a full and fair consideration of all the facts and circumstances in evidence they entertained a reasonable doubt as to whether or not the defendant was present at the time and place of the commission of the offense charged in the information, if such offense was committed, it would be their duty to acquit him; and the jury were also told in part that if they believed beyond a reasonable doubt that the defendant then and there had or assumed authority over said vehicle (therein reviewing the evidence, and defining reasonable doubt), that the defendant would be guilty as charged in the information. All of the substantial positive evidence tended to show that the collision did occur on August 22, 1927, and that it could not have occurred on the 23d. We have carefully reviewed the testimony of the witnesses and the documentary evidence, from all of which we are convinced that an instruction confining the consideration of the jury to August 23d would have been misleading. We think it was not error to tell them that the exact date as charged was immaterial, and that "on or about August 23d, 1927, the time alleged in the information, would be sufficient as to the time thereof, but you cannot convict at all except for specific acts charged in the information, as committed on or about August 23d, 1927."

The refusal of the trial court to give five of the instructions offered by the defendant is also assigned as error. These instructions were refused upon the ground, as noted by the court, that each was "covered by other instructions given." We think it unnecessary to quote them. One such proposed instruction pertaining to the date of the offense would have been misleading, as we have already observed. In the light of the evidence as we view it, the others were properly covered, though couched in different language.

[5-8] Finally, it is contended that certain of the jurors were guilty of misconduct warranting the setting aside of their verdict, in that they were informed through a newspaper of certain facts concerning the collision, and that members of the jury discussed the credibility of certain witnesses in the case before it was submitted to them for deliberation. An affidavit of the publisher of the newspaper recites that the jurors mentioned by appellant were on the subscribers' list, and received their paper each evening, but there is no attempt to show that either of the jurors read of the incident. The discussion of witnesses by jurors appears by four affidavits filed on behalf of the defendant herein upon motion for new trial to have occurred on the courthouse steps during the trial, but before the court had convened. It appears therefrom that Pecararo, the driver of the truck, had theretofore been tried for the offense here charged and that the witnesses in the instant case had appeared and testified in People v. Pecararo; that between 10 and 20 of the whole venire were present at the time the conversations are alleged to have taken place; and that one juror, who participated in the trial of the case at bar, remarked that "they get up there and lie, and lie, and lie, and it shouldn't be permitted." The affidavit of Juror Williams, one of the 12 jurors who rendered the verdict in the present case, is included in the record, but since it is a familiar rule that jurors are not permitted to impeach their own verdict, this affidavit must be disregarded upon that ground. People v. Wong Loung, 159 Cal. 520, 114 P. 829; People v. Holmes, 118 Cal. 444, 50 P. 675. The remark quoted appears in the affidavit of one of appellant's counsel, who also avers that "he did not at said time, nor does he now, know what matter said jurors were discussing." The remaining affidavits deal in generalities, and it does not appear therefrom that any improper statement was made concerning the pending case or that a juror of the panel participated in the discussion. Certain testimony of another juror, A. R. Tagg, is mentioned in the briefs, but it does not appear in the record on appeal, and hence cannot be considered. There is no merit to this point. Besides, the question of misconduct having been submitted to the trial court upon motion for new trial, it was addressed to the sound legal discretion of that tribunal, and an appellate court will not disturb an order denying such a motion unless there is manifestly a clear and unmistakable abuse of discretion. People v. Canfield, 173 Cal. 309, 159 P. 1046. We do not think the record presents a ground for reversal in this instance.

The judgment and order denying motion for new trial are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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91 Cal. App. 141

DICKENSON v. KALLUSCH et al.
(Civ. 5801.)

District Court of Appeal, Second District, Division 1, California. April 19, 1928.

1. Appeal and error ⟹162(1)—Plaintiff's acceptance of money decreed to be paid as condition to establishment of defendants' title held to preclude appeal by plaintiff from judgment.

Plaintiff, having accepted sum of money which court required to be paid for plaintiff's benefit as condition to defendants' ownership of property claimed to have been fraudulently conveyed, was not in position to appeal from judgment.

2. Appeal and error ⟹544(1)—Alleged error in omitting findings will not be considered, where appeal is presented on judgment roll alone.

Where case came up on judgment roll only, and no evidence taken at trial was before reviewing court, failure of trial court to make findings on particular matters could not be considered.

Appeals from Superior Court, San Diego County; W. P. Cary, Judge.

Action by Martha Kallusch against Frederick W. Kallusch, Max Brown, and others, in which E. W. Dickenson, as administrator, was substituted on plaintiff's death. From the decree, plaintiff and defendant first named appeal. Affirmed.

Stephen Connell, of San Diego, for appellant Dickenson.

Edward J. Kelly, of San Diego, for appellant Frederick W. Kallusch.

Frank J. Macomber, of San Diego, for respondents Brown.

YORK, J. This action was commenced by Martha Kallusch, wife of Frederick W. Kallusch, to have declared null and void a deed executed by Frederick W. Kallusch to the defendants Brown, conveying certain real property belonging to said Frederick W. Kallusch. Prior to the execution of said deed, Mrs. Kallusch commenced a divorce action against her husband, and obtained an order requiring the defendant husband to pay to her the sum of $115 for attorney's fees and costs. Within two months from the commencement of said divorce action, Mrs. Kallusch died. This action to set aside the deed was continued in the name of the administrator of her estate. In the present action the court entered a decree to the effect that if within a stated time defendants Brown should pay into court for the benefit of plaintiff said sum of $115, defendants Brown should be decreed to be the owners of the real property in question; but that if such payment be not made, a decree would be entered setting aside the deed. The money was paid, and final decree entered, from which decree both plaintiff and Kallusch appeal.

[1] The plaintiff and appellant, as such administrator, having received and drawn down a deposit of said sum of $115, which was the amount that the trial court found that he was entitled to as such administrator under the order for payment of attorney's fees and suit money in the divorce action, which amount was paid into court in this action by the defendants Max Brown and Mally Brown, the respondents herein, in accordance with the interlocutory decree filed herein, such appellant is precluded, after receiving this money, from proceeding with this appeal. Preluzsky v. Pacific, etc., Co., 195 Cal. 290, 232 P. 970.

[2] This case comes up on the judgment roll only and no evidence taken at the trial is before this court; therefore, we cannot pass upon any objection that may be made by the appellants, or either of them, as to the failure of the trial court in making any particular finding on any matter on which they claim a finding should be made. Himmelman v. Henry et al., 84 Cal. 104, 23 P. 1098; Cutting Co., etc., v. Canty, 141 Cal. 692, 75 P. 564.

The findings made are sufficient to support the judgment. It is true that one of the findings objected to is probably a conclusion of law, but there are sufficient findings of fact fully covering the point raised.

The objection of defendant and appellant Frederick W. Kallusch that the trial court did not find that he was drunk and old and feeble when he made the conveyance cannot be raised by him on this record. No evidence is shown to have been introduced to support such or any conclusion in the judgment roll presented herein. Preluzsky v. Pacific, etc., Co., supra, p. 295 (232 P. 970).

The judgment is therefore affirmed.

We concur: CONREY, P. J.; HOUSER, J.

90 Cal. App. 675

DONIAN v. DANIELIAN. (Civ. 4971.)

District Court of Appeal, Second District, Division 2, California. April 6, 1928.

1. Judgment 🔑938—Complaint on foreign judgment held to state cause of action (Code Civ. Proc. § 456).

Complaint on foreign judgment alleging that proceedings were had in court, and that final judgment was rendered for plaintiff, which has not been paid, *held* sufficient allegation to state cause of action under Code Civ. Proc. § 456, providing that facts conferring jurisdiction need not be alleged in pleading judgment.

2. Pleading 🔑237(8)—Amendment to complaint on foreign judgment changing date of original action to conform to proof held not to change cause of action.

Where complaint on foreign judgment alleged that plaintiff commenced action in foreign court on certain date, interlineation changing date of commencement of action resulting in judgment sued on, to conform to proof, *held* not such matter of substance as to change cause of action.

3. Pleading 🔑237(8)—Complaint may be amended to conform to proof, if cause of action is not changed.

Amendment to complaint to conform to proof may always be made, providing cause of action is not thereby changed.

4. Time 🔑9(2)—Action filed November 16, 1922, on foreign judgment dated November 16, 1917, held brought within five-year limitation (Code Civ. Proc. § 336).

Where foreign judgment sued on was dated November 16, 1917, and original complaint on such judgment was filed November 16, 1922, by excluding first date, and including last, action was brought within five years, as required by Code Civ. Proc. § 336.

5. Limitation of actions 🔑127(2)—Amendment to complaint on foreign judgment changing date, not stating new cause of action related back to original complaint as respects limitations (Code Civ. Proc. § 336).

Where complaint on foreign judgment was amended by interlineation changing date when action resulting in foreign judgment was commenced to conform to proof which amendment did not operate to state new cause of action, amendment related back to filing of original complaint as respects running of statute of

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

limitations, Code Civ. Proc. § 336, and, where original complaint was brought within time limit, statute had not run.

6. Pleading ⚷237(8)—Amendment to complaint on foreign judgment correcting date conforming to proof, but not changing cause of action, held properly allowed without affording opportunity to plead thereto.

In action on foreign judgment, amended by way of interlineation correcting error in date when foreign action was commenced in accordance with proof, ground of demurrer which had been urged against original pleading was in no way affected by amendment, which did not state new cause of action, and hence granting of leave to amend without service of copy or opportunity for defendant to plead thereto, which he might have desired by way of special demurrer and plea of statute of limitations, was not error.

7. Appeal and error ⚷232(2)—Objection that book from which foreign statutes were read was incompetent cannot be considered for first time on appeal, where statutes alone were thus objected to at trial.

Where defendant, sued on foreign judgment, objected to introduction of foreign statute on ground that statutes were incompetent, irrelevant, and immaterial, appellate court could not consider for first time on appeal contention that books from which foreign statutes were quoted and read into evidence were incompetent.

8. Evidence ⚷35—Allegation of foreign court's general jurisdiction could be denied for want of information and belief prior to act empowering court to take judicial cognizance of foreign laws (Code Civ. Proc. § 1875, subd. 3, as amended by St. 1927, p. 110).

In action on foreign judgment under verified complaint, alleging that foreign court was court of general jurisdiction, contention that defendant could not deny such allegation for lack of knowledge or information, since law creating foreign court was matter of public record, *held* without merit, as applied to foreign record prior to Code Civ. Proc. § 1875, subd. 3, as amended by St. 1927, p. 110, empowering court to take judicial cognizance of the laws of sister state.

9. Appeal and error ⚷761—Alleged error in refusing nonsuit and new trial, not supported by separate argument and covered by other points, need not be considered.

Contentions that court erred in refusing to grant nonsuit and denying motion for new trial, not supported by separate argument or authority, but merely submitted on record, and presenting nothing not covered by other points, need not be considered on appeal.

10. Judgment ⚷822(1)—Evidence to show plaintiff supposed case had been dismissed held properly excluded as collaterally impeaching foreign judgment sued on.

In action on foreign judgment, evidence offered to prove that plaintiff and defendant arranged to settle obligations between them, and that defendant, after turning over certain property, supposed case had been dismissed, and had no knowledge of further proceedings after leaving state, *held* properly excluded as an attempt to collaterally impeach judgment.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Samuel Donian against George H. Danielian. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. Lantz, W. P. Hyatt, and F. C. Huber, all of Los Angeles, for appellant.

Bicksler, Smith & Parke, of Los Angeles, for respondent.

VALENTINE, Justice pro tem. This is an appeal from a judgment rendered in an action to recover upon a judgment of the county court of Cook county, Ill. Appellant, among other things, contends that the demurrer to the complaint should have been sustained because the complaint did not allege that any pleadings had ever been filed on which a judgment could be based, or that the judgment there alleged was supported by any pleading, nor that the law of Illinois dispensed with such pleading, nor did the complaint allege the issuance or service of any summons.

Section 456 of the Code of Civil Procedure provides:

> "In pleading a judgment or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction."

[1] The complaint alleges:

> "That thereupon such proceedings were had therein in said court; that, on the 16th day of November, 1917, a judgment for the sum of four hundred sixty-three and 75/100 dollars ($463.75) was duly given and made by said court in favor of the plaintiff and against the defendant; and said judgment is now a final judgment, and the same, or any part thereof, has not been paid."

This was a sufficient allegation to state a cause of action under section 456.

[2, 3] Appellant contends that an amendment to the complaint by interlineation allowed by the court changed the cause of action. The complaint alleged: "That on or about the 1st day of January, 1917, the plaintiff commenced action in said court"—county court of Cook county, Ill. The court allowed this date to be changed to the 5th day of December, 1916, by interlineation to conform to the proof. An amendment to conform to the proof may always be made, provided the cause of action is not thereby changed. Hancock v. Board of Education, 140 Cal. 554, 74 P. 44. It would seem obvious

that the amendment as to when the action was commenced was not such a matter of substance as to change the cause of action. This question of the amendment is further considered in this opinion.

[4, 5] Appellant contends that the cause of action set out in the amended complaint was barred by section 336 of the Code of Civil Procedure, limiting the time within which this action might be brought to five years. It appears from the record that the date of the judgment of the county court of Cook county was November 16, 1917, and that the original complaint in this action was filed November 16, 1922. Excluding the first date, and including the last, it appears that this action was brought within the five years. It further appears, from a marginal note on this complaint made and initialed by the trial judge, that the same was amended, as stated above, on July 8, 1924. Appellant argues that this was equivalent to the filing of an amended complaint on July 8, 1924, setting forth a different cause of action which was barred by the statute. As appears above, the result of the amendment was not to state a new cause of action, and the amendment related back to the filing of the original complaint. As the latter was filed within the five years, the statute of limitations had not run. If the amendment be one which merely corrects a defective or erroneous pleading of the same cause of action, the amendment will relate back to the filing of the original complaint. Redington v. Cornwell, 90 Cal. 49, 27 P. 40; Union Lumber Co. v. J. W. Schonten & Co., 25 Cal. App. 80, 142 P. 910.

Respondent contends that it is presumed, in the absence of any showing to the contrary, that the law of Illinois is the same as the law of California as to the time when the judgment became final, and that, applying this rule, the judgment became final on January 8, 1918, and that appellant admits this; but, in any event, it appears from the record, as stated above, that the complaint in the case at bar was filed within five years from the date the judgment was rendered. It is too well settled to require extended discussion that the court has the authority to permit such an amendment, and that, unless the amendment changes the cause of action, it relates back to the filing of the original complaint. The cause of action in the case at bar was not barred by the statute of limitations. In the case of Koch v. Wilcoxon, 30 Cal. App. 517, 520, 158 P. 1048, 1049, the court says:

> "Amendments under our practice are liberally allowed, and in the main that matter rests within the discretion of the trial court. Such amendments may be made to a complaint either during the trial or after the evidence is all in. (Lee v. Murphy, 119 Cal. 365, 51 P. 549, 955; Brown v. Hurst, 1 Cal. App. 752, 82 P. 1056.) An amendment to conform to the proof may always be made, provided the cause of action is not thereby changed."

See, also, Lee v. Murphy, 119 Cal. 366, 367, 51 P. 549, 955.

The authorities cited by appellant relate to cases where the cause of action had been changed by the amendment, and do not apply here.

[6] Appellant specifies error on the part of the trial court in granting leave to amend without service of copy or opportunity for defendant to plead thereto, and argues that because defendant only interposed a general demurrer to the first complaint, it is no reason for assuming that he would not have desired to and would not have interposed several special demurrers to the amended complaint and pleaded the statute of limitations to the amended complaint. Again, appellant's arguments and authorities cited assume an amendment to the complaint changing the subject-matter so as to state a new or different cause of action, which is not the situation in the case at bar. In Flood v. Templeton, 148 Cal. 374, at page 376, 83 P. 148, 149, cited by respondent, the court said:

> "There were merely brief amendments by way of interlineations made to the original complaint, and those amendments in no way relieved from, nor even affected, the grounds of demurrer which had been urged against the pleading. In such cases it is well settled that not only is a new demurrer unnecessary, but that it is not error for the court to refuse, upon application, to permit a new demurrer to be presented. (6 Ency. of Plead. & Prac. p. 381; Stanton v. Kenrick, 135 Ind. 382, 35 N. E. 19; Hawthorne v. Siegel, 88 Cal. 159, 25 P. 1114, 22 Am. St. Rep. 291.) Moreover, and finally, it may be said upon this point that the demurrer is a general one, and charges a failure in the complaint to state facts constituting a cause of action; and this may be urged at any time without demurrer. Code Civ. Proc. § 434; Ryan v. Holliday, 110 Cal. 335, 42 P. 891."

And, in Stohlman v. Martin, 28 Cal. App. 338, 347, 152 P. 319:

> "We cannot say that the court was not warranted in allowing the complaint to be amended in the particulars mentioned. Of course, it is a well-established and no uncommon practice to order pleadings to be so amended as to conform to the proofs during the trial of the cause and even after the trial. Code Civ. Proc. § 432; Daly v. Ruddell, 137 Cal. 671, 676, 70 P. 784."

In the case at bar the cause of action stated in the original complaint was upon a judgment rendered in the county court of Cook county, Ill. The amendment allowed did not in any way affect or change this cause of action; it was merely "a brief amendment by way of interlineation" correcting an error in the statement of the date when the action was begun in accordance with the proof, and in no way affected the grounds of demurrer which had been urged against the pleading.

[7] Appellant specifies that the court erred in admitting evidence of the statutes of Illinois, creating the county court of Cook county, in which the judgment sued on was rendered, over appellant's objection. On this subject the record discloses the following:

> "Thereupon plaintiff quoted and read into evidence chapter 37, page 198, Illinois Revised Statutes by Cahill, chapter 79, pages 21 and 32, same statute, and sections 187 and 204 of said Revised Statutes. Defendant objected to the introduction of said statutes on the ground that they are incompetent, irrelevant, and immaterial, the court overruled said objection, to which the defendant then and there excepted."

From this it appears that the only objection urged at the trial was that the Illinois Revised Statutes were incompetent, irrelevant, and immaterial. It is to be especially noted that there was no objection that the book offered was incompetent to prove the statutes of Illinois. Appellant now for the first time argues that the volumes from which sections were quoted and read into evidence were compiled by one Cahill, and that it was not shown that Cahill was any authority on the subject. This argument we cannot consider here, as the only objection made in the trial court was to the introduction of said statutes on the ground that they (said statutes of Illinois) were incompetent, irrelevant, and immaterial. French v. Atlas Milling Co., 17 Cal. App. 226, 119 P. 203.

[8] Respondent argues that the complaint was verified, and alleged that the court wherein the judgment was rendered was a court of general jurisdiction; that the defendant answered by saying he had no knowledge or information sufficient to enable him to answer said allegation of plaintiff's complaint and on that ground denied said allegation; and that the law creating said court in which said judgment was rendered is a public record, and cannot be put in issue by a denial based on want of information and belief—citing Art Metal Constr. Co. v. A. F. Anderson, 182 Cal. 29, 33, 186 P. 776; William Wilson Co. v. Trainor, 27 Cal. App. 43, 148 P. 954; Mulcahy v. Buckley, 100 Cal. 484, 35 P. 144; and Brinkley-Douglas Fruit Co. v. Silman, 33 Cal. App. 643, 166 P. 371. We think there is no merit in this argument of respondent. While the case of Mulcahy v. Buckley, and some of the others, might justify the application of the rule of accessibility of the record to the pleader, we find no authority justifying the application of the rule to a case of a foreign record or the public record of another state. We recognize that now the court may take judicial cognizance of the laws of a sister state. Section 1875, Code Civ. Proc. subd. 3, as amended, 1927 (St. 1927, p. 110). But this was not the case, until long after the present action was appealed.

[9] Appellant's contentions that the court erred in refusing to grant a nonsuit and in denying the motion for new trial are not supported by separate argument or authority, being merely submitted on the record, and presenting nothing which is not covered by other points disposed of elsewhere in this opinion. We think they do not require further consideration here. People v. Zarate, 54 Cal. App. 372, 374, 201 P. 955.

Appellant's contention as to a fatal variance between the allegations of the original complaint and the proof relates to the date of the beginning of the action, and was cured by the amendment above referred to.

[10] Finally, appellant specifies as error the trial court's sustaining objections to a certain conversation and in denying defendant's tender of certain evidence, as follows:

> "Mr. Hyatt: We offer to prove by the defendant and Mrs. Danielian, his wife, and Mr. Barsumian, his nephew, that they were present at the home of the defendant when he and the plaintiff entered into an arrangement and settled all obligations between them. The defendant turned over certain property and credits that he had then, and the defendant was discharged from any obligation to the plaintiff, and supposed the case had been dismissed, as it was agreed to be dismissed in that settlement; about two days later he came to California, and has not been back to Illinois since, had no knowledge of any further proceedings by the plaintiff until this action was started five years later."

Respondent contends, and we think correctly, that this is an attempt to collaterally impeach the judgment, a method of attack not open to appellant, and cites 34 C. J. 511; Crouch v. Shafer, 177 Cal. 154, 169 P. 1019; Wood v. Jordan, 125 Cal. 261, 57 P. 997; Brush v. Smith, 141 Cal. 466, 75 P. 55; and Crane v. Cummings, 137 Cal. 201, 69 P. 984. The objections were properly sustained.

We believe the above disposes of all appellant's material contentions and specifications of error.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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JONES v. MOERS. (Civ. 6164.)★

District Court of Appeal, First District, Division 2, California. April 16, 1928.

Hearing Denied by Supreme Court June 14, 1928.

1. Judgment ⚷153(2)—Statute affords no relief from default judgment, where more than 6 months elapse (Code Civ. Proc. § 473).

Where more than 6 months have elapsed after entry of default judgment before application is made for relief, Code Civ. Proc. § 473, affords no remedy.

2. Judgment ⚷443(1)—Equity will grant relief independent of statute from default judgment to one not guilty of laches who is prevented by extrinsic fraud from presenting valid defense (Code Civ. Proc. § 473).

Where one who is not guilty of laches is prevented by means of extrinsic fraud from enjoining his day in court or presenting valid defense to action, equity will grant relief independently of provisions of Code Civ. Proc. § 473.

3. Appeal and error ⚷1024(4)—Appellate court will not disturb order refusing relief from default judgment, where affidavits of parties are in direct conflict.

Where application was made for relief from default judgment and affidavit made by defendant alleged that attorney for plaintiff had promised not to take default judgment against him, while affidavit of attorney for plaintiff was to opposite effect, *held*, that order denying relief would not be disturbed on appeal, since affidavit of attorney for plaintiff furnished ample evidence to support court's implied finding of absence of fraud.

4. Judgment ⚷113—Right of defendant, failing to answer amended complaint within 10 days, to participate in litigation is terminated upon entry of default (Code Civ. Proc. § 432).

Where defendant in action for attorney's fees failed to answer amended complaint within 10 days prescribed by Code Civ. Proc. § 432, and entry of default was made in absence of fraud, right of party to participate in litigation is terminated.

5. Judgment ⚷131—On entry of default in action on contract for recovery of money or damages only, it becomes duty of clerk to enter judgment forthwith (Code Civ. Proc. § 585, subd. 1).

Under Code Civ. Proc. § 585, subd. 1, upon entry of default in action arising upon contract for recovery of money or damages only, it becomes duty of clerk to enter judgment forthwith, which duty is ministerial, and failure to perform is not prejudicial.

6. Judgment ⚷111—Defendant failing to answer amended complaint within 10 days by answering subsequent to entry of default acquired no legal rights (Code Civ. Proc. §§ 432, 585, subd. 1).

Where defendant failed to file answer or demurrer to amended complaint within 10 days as provided by Code Civ. Proc. § 432, in action arising under section 585, subd. 1, but filed answer day after entry of default, *held*, that answer added nothing to legal rights, but upon entry of default defendant was out of court, filing of answer being unauthorized and void.

7. Judgment ⚷111—Default judgment held not affected by fact that employee of attorney representing plaintiff taking default admitted service of answer day after entry of default (Code Civ. Proc. §§ 432, 585, subd. 1).

Where defendant failed to file answer or demurrer to amended complaint within 10 days as provided by Code Civ. Proc. § 432, in action for attorney's fees under section 585, subd. 1, but day after entry of judgment filed answer, which employee in law firm representing plaintiff admitted, *held*, that conclusiveness of default judgment was not affected by admission.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by L. S. Jones against Albert A. Moers, as executor of the estate of Teresa W. Moers, also known as Theresa W. Moers, deceased. From an order denying the motion to set aside a default judgment, defendant appeals. Affirmed.

Hearing denied by Supreme Court: PRESTON, J., voting for a hearing.

Andreani & Haines and John L. Bisher, Jr., all of Los Angeles, for appellant.

Jones, Hoyt & Rifkind, of Los Angeles, for respondent.

THOMPSON, Justice pro tem. This is an appeal from an order denying a motion to set aside a default and judgment. The appellant contends that the judgment was obtained by fraud, and that the clerk was without jurisdiction to enter the default.

November 29, 1924, the plaintiff served and filed his second amended complaint against the defendant, executor of the estate of Teresa W. Moers, deceased. The complaint was based upon an express agreement to pay plaintiff $5,000 for services rendered as an attorney. It was alleged that:

> "During the lifetime of the said Teresa W. Moers * * * he [plaintiff] performed for her, at her special instance and request certain legal services as her attorney at law, for which she promised to pay * * * the sum of $5000."

It was further alleged that a claim for such services was duly presented to the executor of said estate pursuant to section 1496, Code of Civil Procedure, on September 17, 1924, which claim was disallowed. This action was then commenced October 14, 1924. The defendant failed to demur or answer this second amended complaint within the 10 days allowed by section 432, Code of Civil Procedure. On December 10, 1924, upon written demand, the clerk duly entered the default of the defendant. On the following day the defendant served and filed his answer. February 25, 1925, in spite of the answer which

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★Hearing denied by Supreme Court.

was filed subsequent to the entry of default, the clerk entered judgment by default against the defendant for the sum of $5,000. The action then lay dormant until October 14, 1925, when the defendant served and filed his notice of motion to set aside the default and judgment on the grounds of fraud and lack of jurisdiction. The fraud relied upon was set out in an affidavit of John L. Bisher, who was employed in the law firm of Andreani & Haines, which represented the defendant. The affidavit averred that on December 6, 1924, 9 days after the service and filing of the second amended complaint, he met the plaintiff in the courthouse at Los Angeles and told him:

> "He was preparing an answer * * * which he would have ready (to serve and file) in a day or two, * * * but that he might require one or two days in addition to the 10 days allowed by law in which to file the answer; * * * that he intended to demur to the complaint, but would not do so provided he was given additional time in which to file his answer; that the said Jones then stated to affiant that he could have all the time he wanted in which to file his answer; * * * that he (Jones) had never defaulted an attorney, and did not intend to do so."

The counter affidavit of Mr. Jones admitted a conversation with the affiant Bisher on the date mentioned, but it categorically denied that any agreement was made to extend the time to answer; denied that any request was made for such an extension of time, or that the subject of extending the time was ever discussed between the parties. Other affidavits were filed by respective parties. The motion was duly presented, and on October 20, 1925, the court rendered its decision denying the motion to vacate the default and set aside the judgment.

[1, 2] Since more than 6 months elapsed after the entry of the default and judgment before application for relief was made, section 473, Code of Civil Procedure, affords no remedy. But where one who is not guilty of laches is prevented by means of extrinsic fraud from enjoying his day in court or presenting a valid defense to an action, equity will grant relief independently of the provisions of the statute. McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A. L. R. 1110; Estudillo v. Security Loan, etc., Co., 149 Cal. 556, 87 P. 19; Cal. Beet Sugar Co. v. Porter, 68 Cal. 369, 9 P. 313; Lapham v. Campbell, 61 Cal. 296.

[3] With respect to the question as to whether the defendant was deceived by the alleged promise to extend his time to answer, and thereby suffered default, the affidavits of the respective parties are in direct conflict. In denying the motion to set aside the default and judgment, the trial court necessarily passed upon this question adversely to the defendant. Under such circumstances the decision is controlling. The affidavit of Mr. Jones furnishes ample evidence in support of the court's implied findings of an absence of fraud. The rule is well established by numerous authorities to the effect that where the judgment or order of the trial court is supported by substantial evidence, although there may be a serious conflict, it will not be disturbed on appeal. 2 Cal. Jur. 921, § 543, and cases there cited.

[4-7] The second amended complaint is indorsed as follows:

> "Received a copy of the within this 28th day of Nov., 1924. Andreani & Haines, Attorneys for Plft."

A clerical error was evidently made in designating these lawyers as attorneys for the plaintiff. Many documents in the record clearly establish the fact that this firm represented the defendant. The affidavit of Bisher, upon which the defendant relies, averred that "on November 29, 1924, plaintiff *served* and filed his second amended complaint." The record satisfactorily shows adequate service of the complaint.

After 10 days have elapsed subsequent to personal service of a complaint, and no demurrer or answer has been filed by the defendant, on motion of the plaintiff, the default of the defendant must be entered. Section 432, Code of Civil Procedure, provides:

> "If the complaint is amended, * * * a copy of the * * * amended complaint, must be served upon the defendants affected thereby. The defendant must answer the * * * complaint as amended, within ten days after service thereof, * * * and judgment by default may be entered upon failure to answer, as in other cases."

Section 585, Code of Civil Procedure, subd. 1, provides:

> "In an action arising upon contract for the recovery of money or damages only, if the defendant has been personally served and no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount demanded in the complaint. * * *"

Upon the failure of the defendant to answer the complaint within the time allowed by law, and upon the entry of default, in the absence of fraud, the right of the defendant to participate in the litigation is terminated, and the subsequent filing of an answer or demurrer on his part is unauthorized and void, unless upon proceedings duly had, the default is first set aside. Upon the entry of default, where the action arises upon contract for the recovery of money or damages only, it becomes the duty of the clerk to enter judgment forthwith. This is a ministerial duty of the clerk, the failure to perform which may not prejudice the plaintiff. In the present case the filing of an answer in behalf of the defendant after his default had been duly entered, added nothing to his legal rights, nor altered his status in the case. Upon the entry of his default the defendant was out of court, and the filing of his answer was unauthorized and void. Christerson v. French, 180 Cal. 523, 182 P. 27; Title Insurance, etc., Co. v. King, etc., Co., 162 Cal. 44, 120 P. 1066; Marston v. Kochritz (Cal. App.) 251 P. 959; Gray v. Hall (Cal. App.) 254 P. 911. Nor is the conclusiveness of the judgment affected by the fact that an employee of the law firm which represented the plaintiff admitted service of the answer after the entry of the defendant's default.

The defendant relies on the case of Lunnun v. Morris, 7 Cal. App. 710, 95 P. 907, and cites it as conflicting with the rule announced in the case of Christerson v. French, supra. There is no conflict between these authorities. In the Lunnun v. Morris Case the default of the defendant had not been entered at the time the answer was filed. The time allowed by law for answering had expired, but the answer was filed before default was entered. The court there said:

> "* * * Where a party pleads before default entered, though out of time or without leave, if the plea be good in form and substance, his default cannot be entered while the plea stands."

This doctrine does not aid the defendant in the present case.

The order and judgment are affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

HENDERSON et al. v. MIGLIETTA.★
(Civ. 5793.)

District Court of Appeal, Second District, Division 1, California. April 17, 1928.

Hearing Granted by Supreme Court June 14, 1928.

1. Mortgages 🔑369(8)—That some of findings were unsupported by evidence held not to affect judgment for plaintiff, where gravamen of plaintiff's charge against defendant was on another ground.

In action to set aside trust deed and for reconveyance for fraud, even though court's findings that plaintiffs relied on representations of defendant that defendant contended that plaintiffs were executing trust deed and not mortgage, and that plaintiffs believed they were executing mortgage and not trust deed, were not supported by evidence, judgment for plaintiff is not affected thereby, where gravamen of fraud charge was that defendant fraudulently lulled plaintiffs into sense of security with reference to necessity of paying interest, and thereby exercised right to foreclose under trust deed.

2. Evidence 🔑441(5)—Defendant selling property under trust deed, after fraudulently agreeing to defer payment of interest, cannot invoke rule that terms of written contract cannot be varied by parol agreement.

Rule that terms of written contract may not be varied by unexecuted oral agreement, made without consideration, *held* not available to defendant, who fraudulently lulled plaintiffs into sense of security by agreeing to defer payment of interest on notes secured by trust deed, and thereafter sold property under trust deed.

3. Forcible entry and detainer 🔑6(2)—Generally, question of title cannot be determined in action of unlawful detainer.

As a general rule, the question of title cannot be determined in an action of unlawful detainer, the issue being one of possession only.

4. Judgment 🔑747(6)—Judgment in unlawful detainer action cannot be pleaded in bar of subsequent action between same parties to determine title to real property.

Judgment in action in unlawful detainer cannot be successfully pleaded in bar of a subsequent action between the same parties to determine the title to real property involved in the former action.

5. Forcible entry and detainer 🔑12(1)—Counterclaim or cross-complaint is not permissible in unlawful detainer action.

Neither a counterclaim nor a cross-complaint of any kind is permissible in an action in unlawful detainer.

6. Judgment 🔑747(6)—Judgment in unlawful detainer action held not bar to subsequent action to set aside conveyance of such property under deed of trust on ground of fraud.

Judgment in prior action in unlawful detainer, even though tried on theory that title to property was necessarily involved, *held* not bar to subsequent action between same parties seeking to set aside sale of such property under deed of trust and for a reconveyance on ground of fraud.

7. Interest 🔑39(6)—Defendant, in suit to set aside conveyance under trust deed for fraud, held entitled to interest on loan from date of loan to date of tender of amount due.

In action to set aside sale of real estate under trust deed and for reconveyance on ground of fraud, defendant *held* entitled to interest on money loaned from date of loan to date of tender of amount due by plaintiff at rate stated in promissory note evidencing such loan.

Appeal from Superior Court, San Bernardino County; Jesse Olney, Judge.

Action by Robert Walter Henderson and another against N. Miglietta to set aside sale of real property under a deed of trust and for reconveyance. Judgment for plaintiffs, and defendant appeals. Modified and affirmed.

Walter E. Byrne and Emery B. Tyler, both of San Bernardino, for appellant.

★Superseded by opinion of Supreme Court, 273 P. 581.

Isaac Jones, of Ontario, and Albert Sidney Brown, of Los Angeles, for respondents.

HOUSER, J. This is an appeal by defendant from a decree in which it was ordered that a sale of real property made under the provisions of a deed of trust be set aside; a trust declared; and a reconveyance made to plaintiffs of the real property described in the deed of trust.

From the findings of fact made by the trial court, in part it appears that on April 25, 1921, plaintiffs were the owners of the property in question, of the stipulated value of $10,000, which property was held by them subject to a bank mortgage of $2,400, due one year thereafter, and bearing interest at the rate of 8 per cent. per annum; that defendant represented to plaintiffs that he had considerable money to lend, and that, if plaintiffs would borrow money from him and pay off the bank mortgage, he would take a lower rate of interest on the new mortgage, and make the terms of repayment much easier than those provided in the bank mortgage, and that all defendant wished was that his money bring him a fair rate of interest; that no mention was made at such time regarding the form of security to be given by plaintiffs for such loan, but, after consultation with an officer of a bank, defendant directed that the bank procure for him a trust deed from plaintiffs; that thereafter, without time afforded plaintiffs within which to read the instrument, and believing it to be a mortgage, plaintiffs executed a promissory note for the sum of $2,700 bearing interest at 7 per cent. per annum, payable semiannually, together with a trust deed in favor of defendant covering the property in question; that at the time the note and trust deed were executed, by reason of certain arrangements made by defendant in connection therewith, plaintiffs were intentionally and designedly prevented from reading said trust deed; that, when the semiannual interest on said loan became due, defendant requested that plaintiffs pay the same; that at said time the plaintiffs informed defendant they did not have the money with which to pay such interest, but that, if defendant insisted, plaintiffs would obtain such money for defendant; that at said time, in payment of said interest, plaintiffs also offered to sell or assign to defendant a crop of grapes on the property in question; that, although defendant was a dealer in grapes, he refused to accept said crop or to buy it at any price, notwithstanding said crop of grapes was worth more than the amount of the interest then due; that at the same time plaintiffs asked defendant "if it would be all right with him if they let the matter of paying the interest then due to go over until the time for the payment of the second interest installment, and they would arrange to pay both installments of interest at the time when the second installment of interest was due; that at said time, and after said request had been made by the plaintiffs, the defendant told them that that arrangement would be all right with him, and that they would not need pay said first installment of interest until the second installment was due, and they could pay both installments at the same time; * * * that, the plaintiffs relying upon the arrangement to pay the first and second installments of interest at the time the second would become due, and as was represented to them by the defendant as being all right and satisfactory with him, the plaintiffs made no then further effort to obtain the money to pay the first installment of interest, depending and intending to pay both said installments when the second became due; * * * that, had the defendant not stated that it would be all right and satisfactory to him for them to pay the first installment of interest at the time the second installment became due, they (plaintiffs) could have, and would have, obtained the money to have paid, and would have paid, the first installment of interest at or about the time when it became due, but that they relied upon the statement of the defendant and his waiver to his right of immediate payment of the first installment of interest when it became due; * * * that the defendant lulled the plaintiffs into the belief that it was all right and satisfactory with him that they could wait until the second installment of interest was due to pay the first installment of interest, and that he knowingly knew that he had so lulled them into said belief, thereafter and almost immediately started the necessary proceedings to sell their (plaintiffs') property under said trust deed, without in any wise notifying the plaintiffs of any such intention or of any such proceedings, until after said property had been sold"; that thereafter, and in pursuance of the proceedings instituted by defendant, the property of plaintiffs covered by said trust deed was sold—defendant becoming the purchaser at such sale; that the plaintiffs met the defendant and talked with him on several occasions during the time he was proceeding to have said real property sold under said trust deed, and that said defendant on none of said occasions made mention of or discussed with the plaintiffs the matter of the payment of the interest on said trust deed; and on none of said occasions, or at any time, informed or notified the plaintiffs that he had taken steps or proceedings to sell said real property under said trust deed; that prior to and at the time of the sale of said property under said trust deed "the defendant fraudulently and for the purpose of deceiving intending or possible purchasers of said property at said sale, represented to them that the property referred to had little value, and that he would lose money on the property if he himself bid it in, as he knew that no one would pay him the amount which he had loaned thereon for the property; that the property was in a windswept belt, and with no improvements thereon; that the defendant designedly and fraudulently made said statements and representations for the purpose of causing other persons not to make any bid upon said property in order that he might secure same upon his own bid and at the lowest sum possible, and at the time he made said statements and representations he knew that said property was worth more than three times the amount he had loaned thereon, and in excess of the sum of $10,000, and also knew that said property was improved with buildings and for the greater portion thereof with a well-matured vineyard, and that at said time that there was soon to be matured on said vineyard a crop of grapes, which said crop would be reasonably worth the sum of $1,050." Furthermore, that immediately upon receiving notice that said property had been sold under said trust deed plaintiffs offered to defendant the entire sum lent to them by defendant, to wit, the sum of $2,700, and all interest due or unpaid thereon, and all costs incurred by defendant in the sale of said property under said trust deed, and such additional amount as to recompense defendant in full for whatever moneys he had expended in the sale of said property under said trust deed, and in addition thereto the sum of $500, if defendant would release said property from any claim he might have against the same because of said trust deed, and transfer said land to the plaintiffs; but that the defendant then and there refused to release said property or to accept the amounts of money offered to him by the plaintiffs. The trial court also found "that the defendant conceived a fraudulent design in his purpose toward the plaintiffs for the ultimate purpose and object of acquiring said real property of the plaintiffs at a nominal sum."

[1] Appellant contends that certain of the findings by the trial court are not supported by the evidence. In substance, they are as follows: (1) That the plaintiffs, relying upon the statements and representations of said defendant, formally signed and executed said note and deed of trust; (2) that the defendant at said time knew and intended it so to be that the plaintiffs were executing a deed of trust, and not a mortgage, upon said property; (3) that plaintiffs believed, without reading the deed of trust, that they were signing a mortgage.

But it is clear that, even if it could be conclusively shown that before the execution of the note and deed of trust the plaintiffs did not rely upon any representations made to them by defendant, it was defendant's intention that plaintiffs should execute a deed of trust and not a mortgage, and that neither of plaintiffs had any belief as to whether either of them was signing a mortgage or a deed of trust—neither any one of such facts nor all of them together would authorize this court to order a reversal of the judgment. None of those facts, nor all of them combined, constitute the gist of the fraud of defendant which was alleged in the amended complaint of the plaintiffs and which the trial court found to be true. The gravamen of the charge against defendant was that he fraudulently lulled the plaintiffs into a sense of security with reference to the necessity of their payment of the interest due on their promissory note to defendant, and thereafter, while plaintiffs were so deceived, defendant took an unfair and unconscionable advantage of the fact that plaintiffs relied upon his representations of the situation and exercised his assumed right to "foreclose" on the deed of trust. It therefore results that, even though appellant's point in that regard be admitted in its entirety, the judgment of the court cannot be affected thereby.

[2] Appellant has cited many authorities to the effect that the terms of a written contract may not be varied by an unexecuted oral agreement of the parties to the contract made without consideration, from which it is argued that defendant's oral statement to the plaintiffs that it was "all right" for them to defer the payment of the interest until the second installment of interest became due could not avail plaintiffs as against their written agreement to pay on a prior date. Ordinarily speaking, such may be the law; but such a legal principle cannot prevail in the face of positive fraud such as is hereinbefore outlined, practiced by one of the parties to the contract as against the other. Equitable principles cannot be thus subverted. The governing rule is enunciated by the Supreme Court of the United States in the case of Schroeder v. Young, 161 U. S. 342, 16 S. Ct. 516, 40 L. Ed. 721, where it was held that the expiration of the statutory period for redemption from a sale of land under execution did not bar a suit in equity to annul the sale and a deed made thereon, where it appeared that the debtor was lulled into a false security by assurances of permission to redeem irrespective of the statute, although such assurances were not in writing and were made without consideration. In connection with such ruling, the court said in part:

> "Defendant relies mainly upon the fact that the statutory period of redemption was allowed to expire before this bill was filed, but the court below found in this connection that before the time had expired to redeem the property, the plaintiff was told by the defendant Stephens that he would not be pushed, that the statutory time to redeem would not be insisted upon, and that the plaintiff believed and relied upon such assurance. Under such circumstances the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration, upon the ground that the debtor was lulled into a false security. [Citing cases.] In Southard v. Pope's Ex'rs, 9 B. Mon. [Ky.] 261, 264, it is said that 'a refusal by the

purchaser to accept the money and permit the redemption to be made within the time agreed would be a fraud upon the defendant in execution, and authorize an application by him to a court of equity for relief.'"

Bristol v. Hershey, 7 Cal. App. 738, 743, 95 P. 1040, 1041, involved a principle similar to that here under consideration, and the court declared that:

"* * * The oral contract to extend the time for redemption was valid, needed no consideration in its support, if the debtor was lulled into a false security and thereby permitted the time for redemption to expire. * * *"

Perhaps the leading case on the subject is that of McCue v. Bradbury, 149 Cal. 108, 84 P. 993, where the facts resemble those in the instant case. Therein a trust deed with its accompanying promissory note was involved. The obligation was due on October 22, 1904. Prior to that time, the promisor stated to the promisee that at a designated place he would be willing and able to pay the note on said 22d day of October, to which the promisee made no objection; his language being, "All right, but it is not due until the 23d." At the time and place specified the promisor went with the money with which to discharge his obligation, but the promisee failed to appear. The next day was Sunday. On the day following, that is, two days after the promissory note fell due, the promisor in good faith tendered to the promisee the full amount with all charges due on the promissory note, which the promisee refused to accept, but immediately instituted proceedings to sell the property under the provisions of the trust deed. Whereupon the promisor began a suit against the promisee to enjoin such sale, and a permanent injunction was granted. On appeal, it was held in substance that equity would refuse to enforce a forfeiture at the instance of one who had obtained the strictly legal right to it by fraud, deceit, or any other form of oppressive practice; on the other hand, equity would relieve the innocent, where such a forfeiture so secured was sought to be enforced. The following language appears in the opinion of the court:

"Appellants' principal contention upon appeal is that the acts of the McCues looking to the payment of the obligation to Bradbury were entirely insufficient as a legal tender of payment, and that this being so, and plaintiffs being in default under the terms of the trust, Bradbury's trustees were justified in proceeding with the sale of the property to extinguish the McCues' obligation. But in this appellants mistake the gist of the action. The action is not based upon the assumption that the tender actually made was a full and complete legal tender, but upon the contention that the acts of the defendant William B. Bradbury, in assenting to the proposed mode of payment, in failing to make objection in any form to the tender as made, and in doing all this in bad faith, to lull the plaintiffs into a fancied security, with the end in view of declaring a forfeiture and forcing a sale of their property—that these acts and this conduct are sufficient to induce a court of equity to relieve against the forfeiture, and to compel defendant Bradbury to accept, in full satisfaction of his demand, the amount due and payable upon the twenty-fourth day of October, which amount the plaintiffs then and ever since have stood ready, willing, and able to pay. It is based upon the equitable principle, often invoked and as often upheld, that equity will refuse to enforce a forfeiture at the instance of one who has obtained the strictly legal right to it by fraud, deceit, or any other form of oppressive practice; and, upon the other hand, will relieve the innocent when such a forfeiture so secured is sought to be enforced."—Citing cases.

See, also, Webb v. Vercoe (Cal. Sup.) 258 P. 1099.

[3-6] Appellant urges the point that, by reason of a former judgment in an action between the same parties, plaintiffs were estopped, and the instant action was barred. The record herein discloses the fact that shortly after the instant action had been commenced defendant filed an action against plaintiffs. It is conceded by the parties hereto that the allegations contained in the complaint therein were appropriate to either an action for unlawful detainer or in ejectment, or possibly suitable to a suit to quiet title. But, whatever may be the correct classification or name by which the action should be designated, without meaning to imply that in the circumstances an action in unlawful detainer was appropriate, from the fact that by the prayer in the action plaintiffs therein sought the *possession* only of the property described in the complaint, together with the further fact that, in all the proceedings from the service of notice to terminate tenancy to the judgment therein, the various and sundry summary steps peculiar to actions in unlawful detainer only were utilized by the plaintiffs, it is apparent that, so far at least as the plaintiff therein was concerned, the action was one in unlawful detainer. The authorities are numerous to the effect that, in an action of unlawful detainer, as a general rule, the question of title cannot be determined; the issue being one of possession only. 15 Cal. Jur. p. 855. A judgment in such an action cannot be successfully pleaded in bar in a subsequent action between the same parties to determine the title to the real property involved in the former action. Bekins v. Trull, 69 Cal. App. 40, 230 P. 24, and cases there cited. It is also well settled that neither a counterclaim nor a cross-complaint of any kind is permissible in an action in unlawful detainer. 15 Cal. Jur. p. 865; Arnold v. Krigbaum, 169 Cal. 143, 145, 146 P. 423, Ann. Cas. 1916D, 370; Knight v. Black, 19 Cal. App. 518, 527, 126 P. 512. Assuming that the plaintiff in the former action was bound by the procedure adopted by him, as well as by the allegations of his complaint by which the possession of the property was put in issue and

was demanded in the prayer of his complaint, it is at least questionable whether the issue of title to the property could have been litigated or determined in that action, notwithstanding the fact that the issue of title was submitted by defendant and accepted by the plaintiff. If, relative to the title to the property, the trial court would have been powerless to grant affirmative relief to the defendant on the allegations contained in his answer to the complaint, it would seem but reasonable that the same relative situation should prevail with reference to similar relief to the plaintiff, taking into consideration the summary procedure adopted by him under the statutory provisions relating solely to actions in unlawful detainer. In the case of Phillips v. Hagart, 113 Cal. 552, 554, 45 P. 843, 54 Am. St. Rep. 369, it is held (citing authorities) that an allegation of title in himself by defendant in an action in ejectment is but a general denial in an argumentative form. But, if it be admitted that the accepted issues between the parties as finally presented to the court embraced the question of title, and that the action was tried on the theory that the title to the property was necessarily involved, and as a consequence the trial court had jurisdiction to determine such issue, nevertheless it is clear that the nature of that action differs materially from that of the instant action. In the former action, at most, the *legal* ownership of the property only could have been determined; while the relief sought in the instant action is purely equitable in character, and the judgment establishes the equitable rights of the parties to the controversy.

The case of South San Bernardino L. & I. Co. v. San Bernardino National Bank, 127 Cal. 245, 59 P. 699, like the instant action, was brought for the purpose of enforcing a trust and to compel a conveyance. Defendant pleaded in bar a judgment in a suit to quiet title between the same parties. The court said:

> "In an action to quiet title the relief sought in the case at bar could not be obtained. This action, being to enforce a trust and compel a conveyance, proceeds on the theory that the legal title is in the defendant, whereas a suit to quiet title ordinarily proceeds upon a contrary theory, and cannot be maintained against the holder of the legal title. The former judgment is conclusive between the parties only 'when the same thing under the same title' is litigated. Code Civ. Proc. § 1908. We think, therefore, that the findings of the court and conclusions of law should have been for plaintiff on the plea in bar. Plaintiff should not be estopped from maintaining an action for relief that he is entitled to on the facts as they exist because *he previously mistook his remedy and tried to maintain an action that he never was entitled to.* The foregoing views find support in the following cases: Von Drachenfels v. Doolittle, 77 Cal. 295 [19 P. 518]; O'Connor v. Irvine, 74 Cal. 435 [16 P. 236]; Harrigan v. Mowry, 84 Cal. 457 [22 P. 658, 24 P. 48]; Shanahan v. Crampton, 92 Cal. 9 [28 P. 50]."

An action to quiet title is concededly of equitable origin, which is more than may be said of either unlawful detainer or ejectment. If a decree in a suit to quiet title may not be pleaded in bar of a suit to declare a trust, how much less available to a defendant in such action would be a judgment in another action for unlawful detainer, or ejectment! In opposition to such suggestion, however, see the dissenting opinion in Oakland v. Oakland W. F. Co., 118 Cal. 160, 220, 50 P. 277. See, also, Shively v. Eureka T. G. M. Co., 5 Cal. App. 236, 242, 89 P. 1073, and cases there cited.

In the case of O'Connor v. Irvine, 74 Cal. 435, 16 P. 236, the rule is announced that a judgment in an action in ejectment is not a bar to a subsequent action to establish a trust. In the course of the opinion the following language occurs:

> "* * * An action of ejectment and an action to declare a trust are essentially different. To prevail in the former, the plaintiff must, as against the defendant, be the holder of the legal title, whether such legal title be evidenced by a deraignment from the paramount source of title, or simply by prior possession; but in the latter the whole case depends upon the theory that the legal title is in the defendant. The rule as expressed in the Code (Code Civ. Proc., sec. 1908, subd. 2) is to the effect that a judgment is conclusive between the parties in respect to the matter directly adjudged; and section 1911 provides that 'that only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein, or necessary thereto.' Equitable rights are not necessarily included in an action of ejectment, and their determination, when not pleaded, is not necessary to a determination of the issues in such action."

A part of the syllabus in Hills v. Sherwood, 48 Cal. 386, is:

> "A judgment at law against the defendant in ejectment is not a bar to a bill in equity addressed by the defendants in the ejectment to the equity side of the court, if the relief sought is purely of equitable cognizance."

That fraud was practiced by defendant on plaintiffs, if not conceded, is not seriously questioned. Justice demands that so far as possible the wrong should be righted. While many general authorities may be found in support of a doctrine at variance with the principle announced in the cases to which reference has been had, it is thought that, inasmuch as the latter authorities bear directly on the point at issue, they should control; from which conclusion it follows that the judgment in the former action between the parties was no bar to the instant action.

[7] Appellant complains that the trial court refused to allow the defendant interest on the $2,700 borrowed by plaintiffs from defendant. The promissory note evidencing such indebtedness provided for interest at the rate of 7 per cent. per annum, and this court can per-

ceive no reason why interest on the loan at the agreed rate should not be awarded to defendant from the date of the loan, to wit, April 21, 1921, to the date of the tender of the amount due, to wit, May 6, 1923, which amounts to the sum of $196.88.

Attention is also directed to inaccuracies with reference to the accounting by defendant for certain crops of grapes harvested by him on the property in question. It is undisputed that, according to the evidence, defendant should have received, but was not given, credit for picking 75 tons of grapes at $3 per ton, making a total of $225. Other claims for errors in computation on the part of appellant are offset by errors in his favor. As it appears that the judgment should be modified, it is ordered that all that part thereof beginning with the words "Now, therefore," and ending with the words "transferring the legal title to said real property to the plaintiffs" be, and the same is, stricken out; and in the place and stead thereof the following be inserted as a part of said judgment, to wit:

> "Now, therefore, by virtue of the premises, it is ordered, adjudged, and decreed that the defendant, N. Miglietta, holds the legal title to the west one-half of the northwest quarter (N.W.¼) of the northwest quarter (N.W.¼) of section 12, township 2 south, range 7 west, San Bernardino base and meridian, in the county of San Bernardino, state of California, according to government survey, as a trustee only, for the use and benefit of the plaintiffs, Robert Walter Henderson and Ama Blanche Henderson; that the defendant be, and he is hereby, required to account to the plaintiffs for the value of the grape crops on said land for the years 1922, 1923, and 1924, in the sum of $2,300, and for the value of the grape crop hereafter upon said land so long as the defendant detains the possession of said land from the plaintiffs; that the plaintiffs are required to pay to the defendant the sum of $2,700, the amount of the money loaned by the defendant to the plaintiffs, with interest thereon, amounting to the sum of $196.88, together with the sum of $575 expended by the defendant in the production of the grape crops for the years 1922, 1923, and 1924, or a total sum of $3,471.88, less the item of $2,300 required to be accounted for by the defendant to them, being the sum of $1,171.88. It is further ordered, adjudged, and decreed that the defendant be, and he is hereby, required, directed, and ordered to convey to said plaintiffs the legal title to the west one-half of the northwest quarter (N.W. ¼) of the northwest quarter (N.W.¼) of section 12, township 2 south, range 7 west, San Bernardino base and meridian, in the county of San Bernardino, state of California, according to government survey, upon payment to the defendant of the sum of $1,171.88, and, upon failure of the defendant to make such conveyance upon said payment being made, or tendered, by the plaintiffs to him, the clerk of this court is hereby authorized and directed to act as a commissioner, to execute a conveyance transferring the legal title of said real property to the plaintiffs herein, and the plaintiffs are authorized to pay said sum of $1,171.88 to the clerk of this court, in such event, for the use and benefit of the defendant, and the clerk of this court, in his capacity as such commissioner, is then authorized and directed to execute said conveyance transferring the legal title of said real property to the plaintiffs."

As so modified, it is ordered that the judgment be, and it is, affirmed; each party to bear his own costs of the appeal.

We concur: CONREY, P. J.; YORK, J.

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91 Cal. App. 119

CRUTCHER v. PACIFIC-SOUTHWEST TRUST & SAVINGS BANK.

(Civ. 6020.)

District Court of Appeal, Second District, Division 2, California. April 18, 1928.

1. Appeal and error 🔑628(1)—Eight months' delay in filing transcript held to require dismissal of appeal, notwithstanding injury which incapacitated appellant, where it did not appear transcript was requested (Rules of Supreme Court, Rule 2, § 1; Code Civ. Proc. § 953a).

Where it did not appear that appellant, who was prevented from attending to business affairs by injury suffered in accident, had ever requested preparation of transcript in trial court or made application for relief from default, filing of transcript eight months after notice of appeal was too late, requiring dismissal of appeal under Rules of Supreme Court, Rule 2, § 1; Code Civ. Proc. § 953a.

2. Appeal and error 🔑792—Jurisdiction to dismiss appeal on court's own motion held not affected by alleged discontinuance of respondent corporation and alleged disqualification of its attorney.

On appeal by former guardian from order settling account and appointing new guardian, alleged nonexistence of respondent corporation on account of merger with another corporation and alleged disqualification of its attorney did not deprive court of jurisdiction to dismiss on its own motion appeal for delay in filing transcript.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Account and petition for settlement and allowance of fees by Elizabeth Ann Crutcher, guardian of the estate of Dewey H. Crutcher, an incompetent, opposed by the Pacific-Southwest Trust & Savings Bank, which filed petition for appointment as guardian. From an order settling the account and appointing the defendant guardian, the original guardian appeals. Appeal dismissed.

I. W. Bane, of Los Angeles, for appellant.
C. W. Byrer, of Los Angeles, for respondent.

CRAIG, J. On June 16, 1926, the appellant, as guardian of the person and estate of Dewey H. Crutcher, an incompetent person, filed her fourth and final account, and petition for settlement and allowance of fees, and the same was set down for hearing in the superior court on July 14, 1926. On the date last mentioned the respondent filed its petition for appointment as guardian of said estate, in the place and stead of Elizabeth Ann Crutcher, which was thereafter granted. On April 28, 1927, the court below made an order settling said account, disallowing certain items thereof, which were ordered paid to respondent, and authorizing the latter, upon receipt of the amounts specified, to release certain mortgage liens then of record against the property of the ward. On June 22, 1927, Elizabeth Ann Crutcher appealed from the "order, decree, judgment and rulings of the court" and filed a "notice to the clerk, request for transcript duly certified."

The respondent on March 1, 1928, filed in this court a motion to dismiss said appeal, "upon the grounds that said appellant has wholly failed to serve and file the transcript of said cause within the time and as prescribed by rule II of the Rules of the Supreme Court of the state of California, and has wholly failed to serve or file appellant's points and authorities within the time and as prescribed by rule II of said rules."

[1] The motion to dismiss is opposed by notice, affidavit of Mrs. Crutcher, and a physician's certificate, wherein it is stated that owing to injuries resulting from an accident suffered by the guardian on September 18, 1927, she was unable to attend to her business affairs, and that she relied upon her son to furnish the necessary funds and to file her transcript, but that he failed to do so, and that as soon as she was sufficiently recovered, and on March 12, 1928, she paid the required fees and filed her transcript; and, further, it is asserted that this court is without jurisdiction to entertain the motion to dismiss for the reasons (1) that the respondent is not the legal guardian of said estate "because it does not exist but has heretofore merged and is known as the Los Angeles-First National Trust & Savings Bank," and (2) that respondent's attorney is disqualified to act in this proceeding.

It at once appears that on March 1, 1928—or for a period of more than eight months—when the motion to dismiss the appeal was filed, appellant had not filed her transcript. Admittedly she had filed no transcript at the time of her unfortunate injury, or nearly three months after the filing of the notice of appeal.

Rule II, section 1, of the Rules of the Supreme Court, requires that a printed transcript must be filed within 40 days after an appeal is perfected, or, if the transcript be prepared under the provisions of section 953a of the Code of Civil Procedure, and notice is filed by the appellant requesting the transcript, that the time shall not begin to run until such transcript is approved and certified as required by law. This appeal was instituted under the latter method. It does not appear from the record before us that appellant ever requested the preparation of a transcript in the court below, and no application was made for relief from the default.

From what has been said, it is apparent that since there is no showing as to when the time began to run, a filing eight months after notice of appeal, and not until this motion to dismiss had been made, does not present such evidence of diligence as to warrant the assumption that appellant at any time intended to comply with the rule or that she did not abandon her appeal.

[2] If it were true that respondent were no longer guardian of the estate, and that counsel were disqualified, as claimed by appellant, these facts would in no way deprive this court of jurisdiction to dismiss the appeal of its own motion upon a mere suggestion of the facts above stated, which require such action.

The appeal is dismissed.

We concur: WORKS, P. J.; THOMPSON, J.

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91 Cal. App. 165

HARVEY v. BERGER. (Civ. 5157.)

District Court of Appeal, Second District,
Division 1, California. April 20,
1928.

1. Brokers 🔑54—Broker held entitled to commission where owner authorized sale in writing and broker procured purchasers ready and able and owner approved sale over telephone.

Broker *held* entitled to recover commission for sale of real estate, where he had written authorization from owner for sale of property in which she agreed to pay him commission therefor, and broker procured purchasers ready, able, and willing to purchase on terms conforming to authorization and obtained from purchasers signed written contract to buy on such terms, and owner approved sale over telephone when contract was read to her.

2. Brokers 🔑65(1)—Broker's telling purchasers to take possession without waiting for consummation of transaction held not misconduct forfeiting compensation.

Where broker, after purchasers had signed written contract for purchase of property, through subagent, told them to take possession of property without waiting for consummation of transaction, which they did, such act, while in excess of broker's authority, not being in violation of positive instructions, *held* not such gross misconduct as to forfeit right to compensation.

3. Appeal and error ⚷1011(1)—Trial court's finding on conflicting evidence that there was no abandonment of broker's contract for commission was binding on appellate court.

In action for real estate broker's commissions, trial court's finding, on conflicting evidence, that there was no abandonment of contract whereby defendant agreed to pay plaintiff commissions, was binding on appellate court.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action for real estate broker's commissions by Walter Harvey against Margaret E. Berger. From a judgment for plaintiff, defendant appeals. Affirmed.

H. T. Morrow and A. R. T. Truex, both of Los Angeles, for appellant.

Robert E. Austin and John N. Helmick, both of Los Angeles, for respondent.

SHAW, Justice pro tem. [1] The plaintiff, who was a licensed real estate broker, brought this action to recover a commission alleged to be due him on a sale of real estate made for the defendant. Judgment was given in favor of the plaintiff, from which the defendant appeals. The plaintiff showed that he had a written authorization from the defendant for the sale of the property, in which she agreed to pay him a commission therefor; that he procured purchasers ready, able, and willing to purchase the property on terms conforming to this authorization; that he obtained from said purchasers a signed written contract to buy on the said terms; and that he notified the defendant of the contract and read it to her over the telephone, including the buyers' signatures, and was told by the defendant that she approved thereof. These facts are sufficient to entitle plaintiff to recover, unless there is something in the showing made by the defendant to countervail their effect. Defendant's contentions on this appeal are in substance two: First, that plaintiff was guilty of misconduct of such gross character as to forfeit his right to commissions; and, second, that the agency contract was in effect abandoned by both parties and was therefore no longer in force when plaintiff made the sale.

[2] After the purchasers had signed the written contract for the purchase of the property, the plaintiff, through a subagent, told them to take possession of the property without waiting for the consummation of the transaction, which they at once did. This was in excess of the plaintiff's authority, which was merely an ordinary real estate broker's contract authorizing him to procure a purchaser, but it was not in violation of any express instructions upon the subject. Defendant, upon learning that the purchasers had taken possession, demanded that they at once vacate the premises, and declined to consummate the deal unless they should comply with this demand. They failed to do so, whereupon defendant employed an attorney and brought an action of ejectment against them, and a considerable number of days elapsed before they finally surrendered the possession. The contention of the defendant on her first point is that by thus exceeding his authority the plaintiff forfeited all right to his commission. The law on this subject is thus stated in 1 Mechem on Agency (2d Ed.) p. 1194:

> "The same result of forfeiture will, as has been seen, flow from such willful and persistent disobedience of lawful and reasonable instructions as shows a complete disregard of the fundamental obligations of the relation, and a practical disloyalty to the principal's interests. Less than this, and the agent's negligence, will be ground for damages, or, perhaps, for a discharge, but will not ordinarily work a total forfeiture of the agent's right to compensation."

In 2 Corpus Juris, 761, the law on this point is stated as follows:

> "If an agent in transacting the agency is guilty of unfaithfulness, treachery, or dishonesty, or gross misconduct, gross mismanagement, gross unskillfulness, or of a failure to follow his instructions, he generally forfeits his right to compensation. Where an agent has been guilty of such gross negligence in the transaction of her principal's business as to render his services worthless, he can recover no compensation whatever. But mere errors of judgment on the part of the agent, or omissions which do not amount to misconduct or culpable negligence, do not work a forfeiture of his right to compensation, although the principal is entitled to deduct from the agent's compensation whatever damages he has suffered through the negligence of the agent in the transaction of the business."

Appellant has cited no cases which state the law more strongly in her favor than the two authorities just quoted, nor have we been able to find any. She relies largely upon the numerous cases holding that an agent who has an interest adverse to his principal, or who attempts to act for both parties in the transaction without their knowledge, forfeits his right to a commission. These authorities do not apply to the present case. The plaintiff did not undertake to act for the purchasers, but for the seller, in telling the former that they might take possession. While his act in so doing was in excess of his authority, it was not a violation of any positive instructions, nor do we think under the circumstances of this case it was misconduct of such a gross character as to forfeit his right to compensation. It merely gave rise to a cause of action in the defendant for such damages as she may have suffered by reason of his unauthorized acts, which cause of action she might have asserted as a counterclaim in this action, or perhaps by an independent action. There was no counterclaim in the present ac-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tion, the answer merely denying the existence of the agency contract and the performance thereof by plaintiff. We do not think the acts complained of are available to defendant in support of these denials.

[3] On the second point defendant cites authorities to the effect that a written contract may be mutually abandoned and the parties released from further obligations on account thereof by parol. It is unnecessary to pass upon this proposition of law, because the facts to which defendant claims it is applicable are shown only by her witnesses. The plaintiff, on the other hand, testified that there was no abandonment of the contract, and since his version of the matter was accepted by the court, it is binding upon us. Plaintiff's written authority fixed no time for its own duration, but provided that defendant should give the plaintiff written notice of withdrawal; and no such notice was shown.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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91 Cal. App. 136

RYAN v. ANDRIANO et al. (Civ. 5895.) ★

District Court of Appeal, First District, Division 2, California. April 19, 1928.

Hearing Denied by Supreme Court June 18, 1928.

1. Livery stable keepers 🔑4½—Board of supervisors held without power to refuse permit to continue stable without showing it was insanitary and failure to remove objection; "discretion."

Under city ordinance providing that board of supervisors shall not refuse permit for maintenance of a stable in building now maintained as such except on satisfactory evidence that stable is conducted in insanitary manner and failure to remove the objection within time prescribed, board had no power to refuse permit for continued maintenance of existing stable unless conditions specified in ordinance existed; "discretion" of board as to refusing and revoking permits being a discretion to be exercised under terms and procedure of ordinance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Discretion.]

2. Livery stable keepers 🔑4½—Charter authorizing local police laws held not to authorize exercise of police power without predetermining rules nor special legislation respecting stable permit.

Provision of city charter giving board of supervisors power to make and enforce all necessary local police, sanitary, and other laws and regulations did not authorize board to exercise all powers which may be legitimately exercised under the police power without appropriate legislation predetermining the rules of conduct by which such police power will be exercised, nor permit board to specially legislate respecting granting or refusing of permit for maintenance of stable.

3. Livery stable keepers 🔑4½—Zoning ordinance held not to deprive applicant for stable permit of right to maintain existing stable in residence district.

Zoning ordinance held not to affect adversely applicant's right to permit to maintain in residence district stable which was operating prior to adoption of ordinance.

Appeal from Superior Court, City and County of San Francisco; F. M. Jamison, Judge.

Action for mandamus by James J. Ryan against Sylvester Andriano and others, as the Board of Supervisors of the City of San Francisco, to compel the issuance of a permit to conduct and maintain a livery stable. From a judgment denying the writ, plaintiff appeals. Reversed.

John J. Taaffe and Joseph L. Taaffe, both of San Francisco, for appellant.

John J. O'Toole, City Atty., and Thomas P. Slevin, Asst. City Atty., both of San Francisco, for respondents.

PER CURIAM. Plaintiff appeals from the judgment of the superior court denying a writ of mandamus by which appellant sought to compel the respondent board of supervisors to grant a permit to conduct and maintain a stable for horses at No. 817 Thirty-Sixth avenue, San Francisco.

[1] This stable had been in continuous operation for a period of twenty years prior to the date of the trial, April 5, 1926. Appellant, as a tenant, maintained the stable from 1914 to 1918. In 1918 appellant intended and desired to purchase the stable from the then owner, Mrs. Marie Gommet. As his purchase was contingent upon obtaining a permit, application for the same was made in the name of Mrs. Gommet. The respondents required appellant to make extensive sanitary improvements within certain time limits. These improvements were made, and the permit issued. Appellant purchased the stable and continued to operate it. In 1922 appellant applied for permission to make additional improvements, and, it then being noticed that the permit was not in his own name, he was instructed first to procure such a permit. Application being made for this permit protests were received by the respondent board of supervisors against the granting of the same. The matter was deferred from time to time until December, 1924, when the application for a permit was denied. During this two-year pendency of the application the respondents did not specify objectionable features to the stable and did not fix a time within which appellant should be required to remove such objections. The respondents' denial of the application for a permit seems to be based

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★Hearing denied by Supreme Court.

upon the conclusion that the said stable is not in the interests of the welfare of the inhabitants in the vicinity of its location.

The stable ordinance, No. 2639, New Series, approved February 26, 1914, is substantially as follows:

> Section 1 prohibits the maintenance of a stable without a permit.
>
> Section 2 provides that those conducting stables at the time of the passage of the ordinance must obtain a permit within not to exceed six months.
>
> "Section 3. No permit shall be granted for a stable hereafter to be constructed and maintained, or for the future maintenance as a stable of a building not used as such, except on the report of the board of health, or other satisfactory evidence, that the proposed place of construction or maintenance of such stable is unobjectionable from the point of view of sanitation and of the health and physical welfare of the inhabitants of the immediate neighborhood of its location.
>
> "Section 4. The board of supervisors shall not refuse a permit for the maintenance of a stable in a building now constructed and maintained as a stable except upon satisfactory evidence that such stable is conducted in an insanitary manner and the failure to remove the objection to the manner of its maintenance within a time to be prescribed by the board of supervisors.
>
> "Section 5. A permit granted hereunder is subject to revocation by the board of supervisors.
>
> "Section 6. No permit shall be refused or revoked by the board of supervisors except after a full hearing, and then only in the exercise of a sound and reasonable discretion by said board."

Appellant's contention is that, whatever may be the rule to be followed by the board in granting or refusing permits for new stables as defined in section 3 above, nevertheless, in the case of an application for a permit for a stable in a building which was constructed and maintained as a stable at the time of the passage of the ordinance, the board has no power to refuse such permit except where there exist two things which are specified in section 4 of the ordinance, to wit: (1) That the stable is conducted in an insanitary manner; and (2) that the applicant shall fail to remove such objection in a time to be prescribed by a board of supervisors.

The terms of the ordinance uphold the contention of appellant. Section 3 provides for new stables and section 4 provides for stables in buildings theretofore used as stables. The method of treating the application for permits is distinctly different in each class. Section 6 must be construed with section 4. Both must be given effect, and therefore the discretion mentioned in section 6 is a discretion to be exercised under the terms and procedure of section 4, in case of a pre-existing stable, and the discretion mentioned in section 3 is confined to new stables.

[2] The provisions of the city charter (article II, c. 2, § 1), giving the board power to ordain, make and enforce all necessary local police, sanitary and other laws and regulations, cannot be held to authorize the board to exercise all the powers which may be legitimately exercised under the police power without appropriate legislation predetermining the rules of conduct by which such police power will be exercised. To hold otherwise would do away with the necessity of general legislation and would not be due process of law. This charter provision does not permit the board to specially legislate upon each stable separately.

At the trial it was stipulated between counsel that the block in which this stable is situated is zoned under the terms of the city zoning ordinance as for second residential purposes. The zoning ordinance was not in the record, and, upon suggestion of this court, the parties stipulated that said ordinance might become a part of this record and considered upon the determination of this appeal. The said ordinance has been filed with the record in this case. The parties were also given an opportunity to file any additional points and authorities made pertinent by the consideration of this ordinance, but neither one had done so.

[3] It is provided in section 4 of said zoning ordinance that in a second residential district no building or premises shall be used for any purpose other than for certain specified purposes which are enumerated in the ordinance, but among which stables are not included. Section 9 of the zoning ordinance provides:

> "Any nonconforming use existing at the time of the passage of this ordinance may be continued and any existing building designed, arranged, intended or devoted to a nonconforming use may be reconstructed or structurally altered and the nonconforming use therein changed subject to the following regulations," etc.

In section 21 it is provided, among other things, as follows:

> "It is not intended by this ordinance to repeal, abrogate, annul or in any way to impair or interfere with any existing provision of law or ordinance or any rules, regulations or permits previously adopted or issued or which shall be adopted or issued pursuant to the law relating to the use of buildings or premises."

By virtue of these provisions we find that the zoning ordinance does not adversely affect the petitioner's application for a permit because the stable was operating prior to the adoption of both ordinances.

We conclude, therefore, that petitioner's application for a stable permit could not be denied without opportunity being first given him to remove objections to be specified by the board within a time to be specified by the board, as described in section 4 of the stable ordinance.

For these reasons, the judgment appealed from is reversed.

91 Cal. App. 101

CHARLES T. POWNER CO. v. SMITH.
(Civ. 6145.)

District Court of Appeal, First District, Division 2, California. April 18, 1928.

Master and servant ⚷81—Evidence supported finding that employee's sale of new law codes was not in competition with employer's business of selling secondhand editions.

In action by owner of book store against employee for accounting, evidence *held* to sustain court's finding that defendant's sale of new law codes through field salesmen in his spare time was not in competition with employer's business of selling secondhand editions.

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action for an accounting and damages by the Charles T. Powner Company against Olin W. Smith. From the judgment, plaintiff appeals. Affirmed.

Dryer, Castle & Hartke, of Los Angeles, for appellant.

Hewitt, Ford & Crump and Pierce Works, all of Los Angeles, for respondent.

KOFORD, P. J. Plaintiff, who is appellant here, is the owner of a bookstore in Los Angeles. Defendant, who is respondent here, was the employee and manager of said bookstore working for wages paid weekly. His work of running the store kept him in the store from opening to closing time with the exception of an hour off for lunch. Appellant brought this action for damages and accounting, charging that the respondent, in violation of his duties and obligations as an employee, engaged in buying and selling books on his own account in competition with and to the neglect and damage of the business and profits of appellant.

The judgment was in general favorable to respondent. It allowed appellant $88, which represented respondent's profit on the sale of four new Penal Codes and one secondhand set of Encyclopedia Britannica, which were bought and sold by respondent under circumstances which meant that he had used his employer's time and facilities in these deals. Respondent had also made a profit of about $851 in working as sales manager for a book concern which through field salesmen sold new editions of California codes. The court refused to allow this amount to the appellant, finding that respondent engaged in this work outside of the hours which belonged to the appellant and that the business was of a nature that did not compete with the employer's business nor conflict with respondent's duty to his employer.

There seems to be no dispute between counsel with respect to any proposition of law applicable to the facts in this case. They both acknowledge that it was respondent's duty to faithfully serve his employer during his working hours and not to engage in a competing business even outside of his working hours. The appeal represents only an attack upon the findings.

To the small extent that respondent was shown to have used the time and facilities of appellant in effecting sales on his own account, he was required by the judgment to account for all profits. The evidence also supports the court's finding that the sale of new law codes through field salesmen was not in competition with the business of appellant's store. The store dealt only in secondhand editions and never in new codes. The law book concern, which put out the codes which respondent and his salesmen sold, was unwilling to sell through a bookstore, but insisted upon a policy of direct solicitation of customers. These facts, together with other evidence printed from the record by respondent, sustain the trial court's findings. The evidence and arguments printed by appellant present at most only a conflict in the evidence.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

PARSONS v. ROBINSON et al. (Civ. 3404.)★

District Court of Appeal, Third District, California. April 19, 1928.

Hearing Granted by Supreme Court June 18, 1928.

1. Judgment ⚷792—Evidence held to sustain finding that judgment debtor's husband executed deed to her solely to qualify her as surety on his bail bond.

In action to subject certain realty to lien of judgment, evidence *held* to sustain finding that judgment debtor's husband executed deed of such realty to her for sole purpose of qualifying her to become surety on his bail bond, on exoneration of which property was to be reconveyed to him.

2. Judgment ⚷780(5)—Wife, to whom husband executed deed solely to qualify her as surety on his bail bond, had no title to which lien of judgment could attach.

Wife, to whom husband executed deed of realty for sole purpose of qualifying her to become surety on his bail bond, on exoneration of which property was to be reconveyed to him, had no title to which lien of judgment against her could attach; her title being that of trustee merely.

3. Judgment ⚷780(5)—Lien of judgment attaches only to judgment debtor's actual, transferable interest in land, not to naked legal title.

The lien of a judgment attaches only to the precise interest or estate which the judgment debtor has actually and effectively in the

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★Superseded by opinion of Supreme Court, 274 P. 528.

land, and cannot be made effectual to bind or convey any greater or other estate than debtor himself could voluntarily have transferred or alienated; naked legal title being insufficient.

4. Judgment ⚷787—Judgment creditor is not purchaser for value entitled to lien on land conveyed to judgment debtor in trust.

A judgment creditor is not a purchaser for value, so as to entitle him to lien on land conveyed to judgment debtor in trust.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by S. J. Parsons against Annie Dell Robinson and others. Judgment for plaintiff, and defendants appeal. Reversed.

Hilton & Christensen, of San Francisco, for appellants.

Sidney J. Parsons, of Los Angeles, for respondent.

PULLEN, Justice pro tem. On or about September 1, 1916, the defendant Annie Dell Robinson, who before her marriage to Harry T. Robinson, also a defendant herein, was Annie Dell Segno, was indebted to the plaintiff and respondent herein. In 1919 respondent obtained a judgment in the superior court of the county of Los Angeles for certain moneys against said Annie Dell Segno, now Annie Dell Robinson; said judgment was regularly docketed so as to become a lien upon any and all real property owned by said judgment debtor at that time, and upon any property of which she might become the owner in the county of Los Angeles during the life of said judgment. It further appears that said judgment has never been paid, and that at the commencement of this action the whole thereof remained unpaid and unsatisfied; that Annie Dell Segno intermarried with defendant Harry T. Robinson, and they were at the commencement of this action husband and wife.

In 1923 Harry T. Robinson was indicted by the grand jury of the District Court of the United States in and for the Southern District of California and charged with conspiracy to violate certain laws of the United States. He was arrested upon a bench warrant issued out of said court and taken into custody; bail was fixed in the sum of $25,000; and, in order to secure his release, he procured one R. E. Fitzgerald and Olive S. Fitzgerald, his wife, to become sureties upon said bail bond in the sum of $25,000, and, another surety being required to execute said bail with the said R. E. and Olive S. Fitzgerald, in the sum of $25,000, it was arranged that said Harry T. Robinson should qualify his wife, the said A. D. Robinson, so as to enable her to become a surety, by deeding to her certain real property in the county of Los Angeles; thereupon, the said Harry T. Robinson conveyed to said A. D. Robinson, his wife, certain real property, worth in excess of $25,000; that before the execution of said deed by said Harry T. Robinson to his wife, A. D. Robinson, the said A. D. Robinson had no property of her own, and could not have qualified as surety on said bail bond; that upon receiving the deed to said property A. D. Robinson signed the bail bond as surety and made oath that she was a householder in the Southern District of California, and that she was worth the sum of $25,000, over and above all her just debts and liabilities, exclusive of property exempt from execution. Specific instructions were given by Harry T. Robinson that the deed should not be placed of record, but, contrary to such instructions, the deed was placed of record in the office of the county recorder of Los Angeles county.

It is the contention of the respondent that the judgment which he had secured in 1919 against Annie Dell Segno, now Annie Dell Robinson, or A. D. Robinson, as she is sometimes referred to herein, the wife of Harry T. Robinson, attached to and became a lien upon the real property which was conveyed to her by Harry T. Robinson in order to enable her to qualify on the bail bond in the federal court. In other words, that the grant deed before referred to vested the legal and equitable title in Annie Dell Robinson, and therefore the property became subject to the judgment lien.

Appellants claim that the deed executed by Harry T. Robinson to his wife did not vest the legal or equitable title in her, for the reason that the property was conveyed without consideration and without any intention on the part of the grantor to give the property to his wife, or that she should have the vested legal title to it, but that she should hold it only in trust for him while as bondsman, and therefore the grant either became a trust, or at most a mortgage to secure the payment of any loss that might be occasioned under the bail bond.

Judgment was rendered in the trial court against the contentions of appellants, and, from the judgment holding that the property became subject to the lien of said judgment, this appeal is taken.

[1, 2] The question to be determined is whether Harry T. Robinson, as grantor in the instrument in question intended thereby to convey the title to A. D. Robinson, and, if he did so intend thereby to convey the title to the property in question, is it an executed instrument?

Robinson, one of the appellants, testified upon the trial as follows:

"Q. Explain how you came to give that deed—the circumstances. A. I needed a bond, and Mr. Fitzgerald had sent a man by the name of Derth.

"Q. By the Court: Were you under arrest at the time? A. I was under arrest at the time. To be exact, I was in the county jail in the evening, and this was the following morning. Mr. Fitzgerald sent Mr. Derth to me and advised me he was willing and would be glad to qualify on the bond, but I would have to get another bondsman. He asked me who I could get, and I suggested a couple of parties, and also said that Mr. Fitzgerald had suggested a transfer of my property to Mrs. Robinson, and that would enable her to qualify as a bondsman. I told him at the time I didn't think it was the proper thing to do because I didn't want to lay myself liable for a judgment that was pending against Mrs. Robinson before we were married. Mr. Derth advised me that he would arrange so that the bond would not be recorded.

"Q. By Mr. Christensen: The deed, you mean? A. The deed; yes. I told him under those conditions I could deed it to her for the present to get quick action on the bond, but under those conditions only. The deed was not to be recorded.

"Q. Did you make the deed then? A. Yes, sir; at his suggestion and under those conditions.

"Q. Were you then released on bond? A. Yes, sir. * * *

"(Continuing) Q. By Mr. Christensen: Now, Mr. Robinson, did you ever part with the actual title to that property? A. No, sir.

"Q. You gave it for the purpose that you have indicated? A. For that purpose only; yes, sir."

The court in finding No. IV found:

> "The court further finds that the said Harry T. Robinson executed the said deed described as Exhibit D in plaintiff's complaint, to the said A. D. Robinson, for the sole purpose of qualifying the said A. D. Robinson to become a surety upon the said bail bond aforesaid; that no other consideration passed from the said A. D. Robinson to the said Harry T. Robinson for the said real property at the time of the conveyance of the said real property, except as set forth in finding III above, it being understood and agreed at that time between the said Harry T. Robinson and the said Annie Dell Robinson, otherwise known as A. D. Robinson, that upon the exoneration of the bail bond aforesaid, the said real property should be reconveyed by the said A. D. Robinson to the said Harry T. Robinson, and it was further agreed that the said deed to said A. D. Robinson should not be recorded. However, the said deed was intrusted to an attorney at law, who represented the said Harry T. Robinson before the United States commissioner at Los Angeles, Cal., and who without authority either from said Harry T. Robinson, or the said A. D. Robinson, filed the said deed for record with the county recorder of Los Angeles county on the said 19th day of October, 1923, and the said deed was recorded in Book 2884 at page 61 of the official records of Los Angeles county, Cal."

The trial court having found, and that finding being based upon ample evidence in the case, that "Harry T. Robinson executed the said deed * * * to said A. D. Robinson for the sole purpose of qualifying the said A. D. Robinson to become surety, * * * that no other consideration passed, * * * that upon the exoneration of the bond * * * the property should be reconveyed, * * *" it follows that A. D. Robinson had no title to which the lien of the judgment of plaintiff could attach; her title being that of trustee merely.

[3] The rule is clearly expressed in 34 Corpus Juris, p. 591, par. 903:

> "The lien of a judgment attaches to the precise interest or estate which the judgment debtor has actually and effectively in the land, and only to such interest; the lien cannot be made effectual to bind or to convey any greater or other estate than the debtor himself, in the exercise of his rights, could voluntarily have transferred or alienated."

Under the circumstances of this case, it is apparent that if A. D. Robinson had refused to execute the bond, or had attempted to convey the property to one familiar with the facts or had refused to reconvey to Harry T. Robinson, upon the exoneration of the bond, he could have enforced performance upon her part by appropriate proceedings; she held the naked legal title to which a judgment lien does not attach. A judgment lien attaches only to the interest which the debtor has in real property, and, if he has no actual interest, though possessing the legal title, then no lien attaches. 15 R. C. L. 807.

[4] Whether or not plaintiff would have occupied any different position if he had been an innocent purchaser for value need not here concern us, for a judgment creditor is not a purchaser for value. The reason for the rule is well expressed in First State Bank v. Jones, 107 Tex. 623, 183 S. W. 874:

> "A judgment lienholder is not in the same attitude as an innocent purchaser for value without notice. The latter has expended his money in good faith to the amount of the purchase price of the land, and is justly entitled to be held harmless. It is right that the loss under such circumstances should be visited upon the landowner whose negligence, in failing to give notice through the deed records of his ownership, occasioned the loss, rather than that it should fall upon the innocent purchaser who was without fault. The judgment lienholder is in a different attitude. He is not in any sense an innocent purchaser. If his lien fails to attach, he loses nothing. His judgment still remains unimpaired in its full amount. In such a case, even though the owner of the land has been negligent in failing to provide a correct record notice of his title, still his negligence has not resulted in injury to the judgment creditor. Under such circumstances, there can be no good reason for any other rule than that his lien attaches to no more than the interest actually owned in the land by the judgment debtor. This was the common-law rule, and it has been consistently followed by this court."

The judgment is reversed.

We concur: FINCH, P. J.; HART, J.

91 Cal. App. 88

BANK OF COTTONWOOD v. HENRIQUES et al. (HENRIQUES, Intervener).★ (Civ. 3451.)

District Court of Appeal, Third District, California. April 17, 1928.

Hearing Denied by Supreme Court June 14, 1928.

1. Trusts 🔑81(4)—Where father, purchasing land and paying consideration, had son take title, resulting trust immediately arose (Civ. Code, § 853).

Where father purchased land and paid consideration, and son took title, resulting trust immediately arose in favor of father, and son became trustee under Civ. Code, § 853.

2. Trusts 🔑77—Party claiming trust in land purchased in another's name must show money was paid by him at or before execution of conveyance (Civ. Code, § 853).

Party setting up trust in land purchased with his money in name of another under Civ. Code, § 853, must show money was paid by him at or before execution of conveyance.

3. Fraudulent conveyances 🔑49(1)—Whether one holding title to land in trust was insolvent when executing deed to sister was immaterial.

Whether one holding title to land in trust for his father was insolvent when he executed deed of trust property to his sister was immaterial on question of fraudulent conveyance, since he had no interest in lands to which creditor's judgment could attach.

4. Trusts 🔑136½—Owner held not estopped to assert title to land to which son held title in trust as against son's creditor loaning to son on other security.

Owner of land, to which son held title in trust, *held* not estopped to assert title as against creditor of son because he voluntarily placed title of record in name of son, where owner did not know anything about son's representations to creditor regarding ownership of land, and was in possession, receiving rents and profits and paying taxes, and creditor made no examination of record or land, and, in making loan to son, creditor relied solely on security of chattel mortgage on cattle.

5. Fraudulent conveyances 🔑299(11)—Evidence held not to show deed from one holding title in trust to sister was made to defraud creditor.

In action to set aside deed, evidence *held* not to show that deed from one holding title to land in trust for his father to his sister was made to hinder, delay, or defraud his creditor.

6. Trusts 🔑136½—Creditor of one holding title in trust could not claim benefit under statute relating to unrecorded conveyances, where it did not obtain judgment affecting title before conveyance to sister (Civ. Code, § 1214).

Creditor of son holding title to land in trust for his father, being neither a bona fide purchaser or mortgagee could not claim any benefit under Civ. Code, § 1214, relating to unrecorded conveyances, where creditor had not obtained judgment affecting title to property in question before son's conveyance to sister.

7. Judgment 🔑788(1)—Judgment against W. was not "judgment affecting title" to property previously conveyed by W. to sister, within statute relating to unrecorded conveyances (Civ. Code, § 1214).

Filing of suit against W. to foreclose chattel mortgage, after conveyance by W. of land which he held in trust for his father to sister, and attempted attachment of land then standing of record in name of sister, and obtaining of money judgment against W., was not obtaining of "judgment affecting title" to property in question within meaning of Civ. Code, § 1214, relating to unrecorded conveyances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judgment (In law).]

8. Estoppel 🔑72—Statute regarding innocent persons suffering by another's act held inapplicable, where one lending did not rely on representation borrower owned land held in trust for father (Civ. Code, § 3543).

Son, holding title to land in trust for father, made financial statement to bank some time before loan in which he represented that he owned land. After plaintiff bank made loan to son secured by chattel mortgage on cattle, son conveyed land to sister. In action by plaintiff bank to set aside deed on ground it was made to defraud creditors, father intervened, claiming title to land. *Held*, that Civ. Code, § 3543, providing that, where one of two innocent persons must suffer by act of third, he by whose negligence it happened must be the sufferer, is inapplicable, since plaintiff bank did not act on financial statement, made by son that he was owner of land, in making loan.

Appeal from Superior Court, Tehama County; James W. Bartlett, Judge.

Action by the Bank of Cottonwood against William R. Henriques, also known as Willie Henriques, and another, to set aside a deed, in which Frank R. Henriques intervened. From a judgment in favor of the intervener, plaintiff appeals. Affirmed.

Carter & Smith, of Redding, for appellant.

Chenoweth & Leininger, of Redding, for respondent.

PRESTON, Justice pro tem. Plaintiff, Bank of Cottonwood, a banking corporation, brought this action to set aside a deed made by defendant William R. Henriques to his sister, Marie E. Henriques, on December 28, 1921, on the ground that said deed was made and executed for the purpose of hindering, delaying, and defrauding the creditors of the said defendant William R. Henriques.

Frank R. Henriques, the father of defendants William R. Henriques and Marie E. Henriques, intervened in this action, and claimed that he was the owner of the 600 acres of land in Tehama county described in said deed from William R. Henriques to Marie E. Henriques, and that said property was held in trust for him by Marie E. Henriques.

★Hearing denied by Supreme Court.

The case, being one in equity, was tried by the court sitting without a jury, and judgment was rendered in favor of the intervener, Frank R. Henriques, from which judgment the plaintiff, Bank of Cottonwood, prosecutes this appeal.

Most of the material facts are without substantial conflict, and can be thus briefly stated: The plaintiff is a banking corporation organized under and by virtue of the laws of the state of California and having its principal place of business in the town of Cottonwood, Shasta county, Cal. Defendant William R. Henriques was engaged in the stock business, and had from time to time borrowed small sums of money from the appellant on his unsecured note. On December 15, 1919, William R. Henriques owed the appellant for money theretofore borrowed on two unsecured notes, $660. He had never given appellant any statement of his financial condition. On December 15, 1919, he visited the bank, and the cashier explained to him that the state banking department required from all debtors, when the loan reached the sum of $500 or more, a statement of the debtor's financial condition, and requested him to furnish such a statement to the bank. Thereupon the cashier produced a blank form of financial statement, and assisted Mr. Henriques in filling it out, the cashier asking the questions and inserting Mr. Henriques' answers thereto, and, when this statement was completed, it was signed by William R. Henriques, and filed with the bank. This statement, as far as the land in question is concerned, is as follows:

Description of Real Estate.

Location.	Improvements.	In Whose Name is Title Held.	Value of Land and Improvements.	Amount of Mortgages or Liens.
Tehama Co.	Fenced	Self	$4,200.00	No

It must be remembered that, at the time this statement was signed on December 15, 1919, William R. Henriques was not borrowing, or attempting to borrow, any further moneys from appellant. Thereafter, and on the 23d of July, 1920, William R. Henriques applied to appellant for a further loan of $3,500 on 110 head of cattle. These cattle were appraised by appellant at $55 per head, and the loan was made, and a chattel mortgage on the cattle was taken to secure the same. At the time this $3,500 loan was made no further financial statement was made or requested of William R. Henriques. The evidence is conflicting as to whether or not the old financial statement was considered; the cashier claimed that it was referred to and discussed, and it was because of such statement as to ownership of the land, made by William R. Henriques, that the loan of $3,500 was made. William R. Henriques, on the other hand, claims that the statement was not mentioned or referred to in any way in connection with the $3,500 loan, and that this loan was made solely upon the chattel mortgage on the cattle. However, the court found upon this conflicting testimony "that said loan of $3,500 was made to the defendant William R. Henriques solely upon and by reason of the security of the cattle. * * * It is not true that on or about the 23d day of July, 1920, said defendant William R. Henriques represented to plaintiff that he was the owner in fee of the land described in the deed." (The land in dispute.)

Out of the $3,500 loan, the bank deducted the two unsecured notes, and paid William R. Henriques the balance, so at that time the entire indebtedness to the bank was $3,500.

William R. Henriques did not pay said note of $3,500, and some of the cattle covered by the chattel mortgage died, and others were lost, and on the 8th of September, 1924, the bank brought an action to foreclose said mortgage, and judgment was obtained, and all of the cattle that could be found were sold, and a deficiency judgment was docketed against William R. Henriques for $4,275.65, which remains unsatisfied.

The appellant never had any description of the land other than that stated in the financial statement, and never examined the records until some time in July, 1924, at which time it discovered that William R. Henriques had executed a deed on December 28, 1921, to Marie E. Henriques for 600 acres of land, which appellant claims was the land listed in the financial statement given by William R. Henriques to it on December 15, 1919. After discovering this deed of record, the appellant bank commenced this present action on March 31, 1925, to have it set aside on the ground that the same was made to defraud the creditors of William R. Henriques.

On November 16, 1925, the day set for the trial of this action, Frank R. Henriques was permitted by the court to intervene, and filed what is termed an "Answer of Intervener," in which he alleges, among other things, "that he now is, and ever since the 17th day of November, 1917, has been, the owner of said lands and premises described in the said deed from William R. Henriques to Marie E. Henriques, and between the 17th day of November, 1917, and the 28th day of December, 1921, said property stood in the name of said defendant William R. Henriques, but said William R. Henriques had no right, title, or interest in or to said premises other than as trustee for intervener, and he never at any time authorized or empowered said William R. Henriques to represent in any manner whatsoever that said William R. Henriques was the owner or the owner in fee of said premises."

The evidence introduced on behalf of the intervener, Frank R. Henriques, shows without conflict that on November 17, 1917, Frank R. Henriques purchased from one M. B. Connell the 600 acres of land involved in this action for the sum of $2,700. The entire purchase price was paid by Frank R. Henriques, and nothing was paid, or agreed to be paid, by William R. Henriques. The deed was made by Mr. Connell to William R. Henriques at the request of Frank R. Henriques upon the oral understanding and agreement that William R. Henriques would take and hold the title to the property as trustee for Frank R. Henriques, and that William R. Henriques would have no title in or to said property other than as trustee for the said Frank R. Henriques. The deed was, immediately upon its execution, recorded in the office of the county recorder of Tehama county, and immediately after the transaction was completed the intervener, Frank R. Henriques, entered into possession of said lands, and he has ever since November 17, 1917, had the exclusive possession and control of said lands, and has paid all taxes levied or assessed against the same, received for his own use and benefit all rents and profits derived from the property, and at no time since November 17, 1917, has William R. Henriques or Marie E. Henriques had any possession or control over the property, and neither of them has received any rent or income from said property.

There is nothing in the evidence to show that Frank R. Henriques did anything to show or indicate that William R. Henriques had anything to do with the lands or had any ownership therein, except what might be shown by the deed itself, which was a simple bargain and sale deed, and did not on its face disclose any trusteeship in relation to the said lands.

At the time this deed was made, Frank R. Henriques owned, and was in possession of, a considerable tract of land adjoining the land in question, and William R. Henriques was in no wise connected in business with his father, and not on the property, but was at the time engaged in the stock business in another part of the country, at a place known as "Gas Point" in Shasta county. The land in question is situated about 14 miles from the town of Cottonwood, but none of the officials of the bank ascertained the description or exact location of said lands, or visited the lands, or made any inquiry as to the character or condition or use of the lands, or who was in possession of the same, or who was receiving the rents, issues, and profits therefrom. Any inspection of the land, or any inquiry concerning the same, would no doubt have shown that the lands were under the exclusive possession and control of the intervener, Frank R. Henriques. The lands had been leased by Henriques several times to persons who did business in, and were known in, Cottonwood.

William R. Henriques conveyed the land on December 28, 1921, to Marie E. Henriques at the request of the intervener, Frank R. Henriques, because of the illness of William R. Henriques. There was no consideration for the conveyance.

Frank R. Henriques did not know that William R. Henriques had listed the lands with the bank, or had attempted to secure any credit on account of the property standing in his name.

From all these facts the court, as above stated, found in favor of the intervener, Frank R. Henriques, and made very full and complete findings upon all the issues in the case.

[1-3] Appellant first contends that the deed from William R. Henriques to Marie E. Henriques was void as against the creditors of William R. Henriques, because of the insolvency of William R. Henriques. We are unable to agree with this contention, for two reasons: First, the court found upon substantial evidence that William R. Henriques *was not insolvent on December 28, 1921, when he made the deed to his sister Marie E. Henriques, and that said deed was not executed for the purpose of hindering, delaying, or defrauding the creditors of William R. Henriques.* It is true, as contended by appellant, that the court found that William R. Henriques was, at the time of the commencement of this action, insolvent, and that appellant was unable to satisfy its deficiency judgment against him. This deficiency judgment, however, was not entered until March, 1925, over three years after he made the deed to his sister. A person's financial condition could, and often does, materially change in three years. If a man is insolvent in March, 1925, that is no proof that he was also insolvent in December, 1921, three years before. Second, the facts are undisputed, and the court found, that, when the property was purchased on November 17, 1917, the intervener, Frank R. Henriques, paid the whole purchase price, and that the conveyance by the seller, M. B. Connell, to William R. Henriques, was made at the request of Frank R. Henriques upon the understanding and agreement that William R. Henriques would take title to the property as trustee, for the use and benefit of Frank R. Henriques, and William R. Henriques would have no title or interest in said property other than as trustee.

The rule is well settled that, when land is purchased, for which one party pays the consideration and another party takes the title, a resulting trust immediately arises in favor of the party paying the consideration, and the other party becomes the trustee. It is equally well settled that the party setting up the trust must show the money was paid by him at or before the execution of the convey-

ance. Section 853, Civ. Code; Murphy v. Clayton, 113 Cal. 153, 45 P. 267; Case v. Codding, 38 Cal. 193; Breeze v. Brooks, 71 Cal. 169, 9 P. 670, 11 P. 885; South San Bernardino Land & Investment Co. v. San Bernardino National Bank, 127 Cal. 245, 59 P. 699; Polk v. Boggs, 122 Cal. 114, 54 P. 536; Moultrie v. Wright, 154 Cal. 520, 98 P. 257; Lincoln v. Chamberlain, 61 Cal. App. 399, 214 P. 1013; Pomeroy's Equity Jurisprudence, § 1033; Brown v. Spencer, 163 Cal. 589, 126 P. 493; Webb v. Vercoe (Cal. Sup.) 258 P. 1099.

It follows, therefore, that William R. Henriques *was not the owner* of the property in question, but was only the trustee for Frank R. Henriques, the real owner, and that William R. Henriques had no interest in the lands in question, to which the lien of appellant's judgment could attach.

The law is also well settled that a bankrupt may continue to discharge his duties as a trustee, and trust property in his possession does not go to his assignee or to his creditors. Hayford v. Wallace, 5 Cal. Unrep. 476, 46 P. 293; Perry on Trusts, § 346.

Therefore, William R. Henriques having no interest in the lands to which appellant's judgment could attach, it is wholly immaterial whether he was solvent or insolvent, or contemplated insolvency, when he made the deed of the trust property to his sister, Marie E. Henriques.

[4, 5] It is next contended by appellant that the intervener, Frank R. Henriques, is estopped from asserting title to the property in question, for the reason that he voluntarily placed the title of record in the name of William R. Henriques. There is no merit in this contention. The intervener did absolutely nothing other than to permit his property to stand of record in the name of William R. Henriques. There is nothing in the record to show that the intervener knew anything about any representations made by William R. Henriques to appellant regarding the ownership of the land. From the time the land was purchased, intervener was in possession thereof, receiving all rents and profits, and paying all taxes assessed thereon. Appellant made no examination of the record or the land to ascertain who was in possession of the same. Furthermore, the findings negative the idea that the bank, in making the loan of $3,500 to William R. Henriques, relied on the financial statement of William R. Henriques that he owned the land. Indeed, the court found upon sufficient evidence that the bank loaned the $3,500 *solely and alone upon the security of the chattel mortgage upon the cattle.*

It was necessary for the appellant, in order for it to prevail in this action, to show that Frank R. Henriques was in some way privy to William R. Henriques' obtaining credit from the bank, or that, in gaining such credit, the bank relied upon some affirmative statement or act of Frank R. Henriques, other than his permitting the title to stand of record in the name of William R. Henriques, and the mere fact that Frank R. Henriques allowed the title to the land to stand of record in the name of William R. Henriques is unavailing to appellant, unless it established to the satisfaction of the court that they relied thereon as an inducement to give credit to William R. Henriques (Breeze v. Brooks, 97 Cal. 75, 31 P. 742, 22 L. R. A. 257; Murphy v. Clayton, supra), but, as we have seen, the findings of the trial court negative any such contention.

It does not appear that the deed from William R. Henriques to Marie E. Henriques was made to hinder, delay, or defraud the bank; on the contrary, it was made simply to *transfer the bare legal title* to the land from William R. Henriques to Marie E. Henriques.

[6, 7] Appellant further contends that the facts of the case at bar bring it within the provisions of section 1214 of the Civil Code. We find no merit in this contention. Section 1214 deals exclusively with *bona fide purchasers and mortgagees, and appellant is neither a purchaser nor a mortgagee of the land in question.* Approximately three years before the action to foreclose the chattel mortgage was commenced and the property attached, it had been conveyed to Marie E. Henriques.

If the property had stood of record in the name of William R. Henriques at the time of the commencement of the foreclosure suit, and sold under execution and purchased by appellant, then, and in that case, section 1214, Civil Code, would apply, and the intervener would have been foreclosed of all interest in the property, provided, of course, appellant had no notice of the claim of the intervener. The appellant, being neither a bona fide purchaser or mortgagee, *must have obtained a judgment affecting the title to property in question* in order to claim any benefit under section 1214 of the Civil Code. See Riley v. Martinelli, 97 Cal. 575, 32 P. 579, 21 L. R. A. 33, 33 Am. St. Rep. 209; Murphy v. Clayton, supra.

It seems too clear to admit of argument that the filing of the suit to foreclose the chattel mortgage on September 8, 1924, and the attempted attachment of the land, then standing of record in the name of Marie E. Henriques, and the obtaining of a money judgment against William R. Henriques, *is not the obtaining of a judgment affecting the title to the property in question within the meaning of section 1214, Civil Code.*

While the facts in the case of Moore v. Schneider, 196 Cal. 393, 238 P. 85, relied upon by appellant, are entirely different from those in the case at bar, still the court in that case, speaking of the purpose of section 1214, Civil Code, used the following language, which is particularly appropriate here:

"Its purpose is to prevent fraud through the withholding of notice of transactions affecting titles, to the detriment of subsequent purchasers in good faith and for a valuable consideration, and those who may seek to confirm their claims to real property by judgments affecting the title."

[8] Lastly, appellant contends that it should be protected by applying the provisions of section 3543 of the Civil Code "that where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Under the facts of this case, this section has no application. In the first place, this is an action to set aside a deed upon the ground that *it is made to defraud creditors;* secondly, the court found that the appellant *did not act upon the financial statement made by William R. Henriques that he was the owner of the land in making the loan.*

Appellant's whole contention, in its last analysis, is that intervener, Frank R. Henriques, is estopped from claiming the land in question by reason of the fact that he permitted the title to stand of record in the name of his son, William R. Henriques. A complete answer to this contention is the finding of the trial court that appellant *never acted upon the representations made to it by William R. Henriques that he was the owner of the property, but, on the contrary, the loan was made to William R. Henriques solely on the security of the cattle.*

After a careful review of the entire record, we are of the opinion that the trial court's conclusions were correct, and that the judgment should be affirmed, and it is so ordered.

We concur: HART, Acting P. J.; PLUMMER, J.

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91 Cal. App. 56

BOWMAN v. CARROLL. (Civ. 6168.)

District Court of Appeal, First District, Division 1, California. April 14, 1928.

1. Trusts ⇨105—That defendant utilized property in which plaintiff had half interest to raise purchase price for other property vested in plaintiff interest in latter property.

In action to compel accounting and establish trust, fact that defendant utilized property in which she conceded plaintiff had one-half interest, to raise substantial part of purchase price paid for other property, *held* to operate to vest in plaintiff interest in latter property.

2. Account ⇨18—Evidence held to show plaintiff entitled to accounting as to land transactions with defendant which were handled at profit.

Evidence *held* to show that plaintiff was entitled to accounting as to transactions with defendant in which property selected by plaintiff had been purchased and handled at profit, where evidence was conflicting as to what share of purchase money had been furnished by plaintiff.

3. Account ⇨8—Plaintiff may obtain equitable relief under unterminated contract for acquisition of properties, though he did not furnish agreed amount.

Plaintiff suing to compel accounting under contract with defendant and to establish trust may obtain equitable relief, though he did not furnish half of cost of acquisition of properties as agreed, where agreement was not terminated and parties continued to operate thereunder.

4. Account ⇨18—In action for accounting as to land transactions, evidence held insufficient to support finding as to net sale price of certain lot.

In action for accounting, based on transactions for acquisition of land, evidence *held* insufficient to support court's finding as to net sale price of certain lot, in view of conflict between defendant's testimony on which finding was based and other testimony given by defendant.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by William J. Bowman against Evelyn Carroll to compel an accounting and to establish a trust. Judgment for defendant, and plaintiff appeals. Reversed.

Porter & Sutton, of Los Angeles, for appellant.

Guy Eddie, of Los Angeles, for respondent.

KNIGHT, J. Plaintiff appeals from a judgment rendered in an action to compel an accounting under a partnership agreement entered into between the plaintiff and defendant for the purchase and sale of real estate; also to impress a trust upon a parcel of land acquired pursuant to said agreement and standing in defendant's name. Insufficiency of the evidence to sustain the findings and the judgment constitutes the main ground of appeal.

The complaint alleged that under the terms of said agreement plaintiff was to select the property to be purchased and that title thereto was to be taken in defendant's name; that each party was to furnish one-half of the cost of the acquisition of the property, and, when sold or otherwise disposed of, the proceeds derived therefrom should be equally divided. The court found that said agreement had been made as alleged, and that pursuant thereto plaintiff selected and there was purchased at various times five parcels of land situate in Los Angeles, four of which were afterwards sold at a profit, and a bungalow court was erected on the fifth parcel, with reference to which the court found as follows: That the parties "agreed that they would erect a bungalow court upon said property, plaintiff at said time offering, and suggesting that he secure a loan on certain individual personal property belonging to him in order to defray his half of the cost of said venture; that defendant, however, stating to the plaintiff that it was not necessary for him to do so, and that she would advance the money necessary from funds she then had on hand, and it was then and there so agreed by the parties; that, pursuant to said arrangement and understanding, there was constructed upon said lot a seven-unit bungalow court, the defendant advancing to the plaintiff during the construction of said court the sum of approximately $8,000, for the payment of the cost thereof, and which said moneys were used in the construction of said building." The court further found that defendant afterwards received the sum of $3,831.82 as rentals from said bungalow court, but refused to account to plaintiff for any part thereof or for any of the profits derived from the sale of the other properties. The vital finding upon which the decision in the case turned, however, was that "plaintiff did not furnish one-half of the cost of the acquisition of the properties" above mentioned, except his half of the purchase price of the first parcel purchased, which the court found was subsequently sold for $3,388.64 net; and therefore the court concluded that plaintiff was not entitled to an accounting as to any of the properties acquired pursuant to said agreement, but should be given judgment for the sum of $1,694.34, representing one-half of the sale price of the parcel last mentioned. Judgment was entered accordingly.

[1] The evidence shows: That all of the property acquired was purchased at various times in the order following: First, a lot on the corner of Seventy-Seventh and Main streets; second, a lot on the corner of Ninety-First street and Moneta avenue; third, a corner lot at Seventy-Eighth and San Pedro streets; fourth, a corner lot at Seventy-Fifth and San Pedro streets; and, lastly, lot No. 33 of tract No. 1889, upon which the bungalow court was erected. That the entire purchase price of the first piece purchased, on the corner of Seventy-Seventh and Main streets, was advanced by plaintiff, and afterwards defendant reimbursed him for her half thereof, and that the last piece of property acquired, the bungalow court property, was purchased prior to the sale of the lot on Seventy-Seventh and Main streets, for a consideration of approximately $3,000, of which sum $1,969.93 had been paid by defendant at the time the bungalow court was completed. But, according to defendant's own testimony, $1,000 of the purchase price paid for the latter property was obtained by her through the medium of a loan made on the security of the lot at Seventy-Seventh and Main streets in which plaintiff admittedly owned a one-half interest. Her testimony in this respect was as follows:

"Mr. Eddie (Attorney for Defendant): Q. What did you do to raise that money? A. Had to go to the bank and raise money. Sold Liberty bonds and made loans on other pieces of property, and I got the Bank of America to loan me one thousand on the Seventy-Seventh street and Main lot to help pay for it."

Therefore, and aside from any disputed claim of plaintiff's that he paid other sums toward the purchase of the bungalow court property, the fact that defendant utilized the property in which she at all times conceded plaintiff a one-half interest, to raise a substantial part of the purchase price paid for the bungalow court property, manifestly operated to vest in plaintiff an interest in the latter property.

The evidence further shows without conflict that during the operation of the partnership agreement plaintiff paid to defendant various sums of money, but the purpose of most of these payments is in dispute; plaintiff claiming that many of them were to be applied toward his share of the cost of the acquisition of said properties, and defendant claiming that all of them were made in settlement or partial settlement of accounts existing between them foreign to their real estate enterprises. In this regard the evidence shows that prior to the making of said agreement, and while the parties were operating thereunder, they entertained toward each other a friendly and social relationship which plaintiff asserted had culminated into an engagement to marry; but the existence of such an engagement was denied by the defendant. Be that as it may, it was clearly established that the real estate agreement grew out of the social relationship, and that during the times mentioned plaintiff manifested implicit confidence in defendant and personally attended to many business matters for her in connection with other enterprises in which she was interested, and that, incidental thereto, he collected moneys due her, and she advanced him money for expenses and reimbursed him for expenditures made in her behalf. As a result of these outside transactions, the parties were frequently adjusting accounts and passing money back and forth.

Two of the payments made by plaintiff to defendant during the period mentioned were evidenced by checks—one dated November 7, 1921, for the sum of $200, and the other dated November 15, 1921, for the sum of $1,306. The real purpose of these two payments is not clear. Plaintiff testified that $400 of the total sum thus paid constituted part payment of his share of the purchase price of the second parcel of land purchased, situate on the corner of Ninety-First street and Moneta avenue, which the evidence shows was selected by plaintiff, bought by defendant for a consideration of $2,000, one-half of which was paid by defendant at the time of its acquisition, and that said property was afterwards sold for a consideration of $10,000, of which $2,500 had been paid at the time of the trial of this action. Defendant at one time in her testimony claimed that said checks were given in payment of plaintiff's share of the purchase price of the lot on the corner of Seventy-Seventh and Main streets, which was the first piece of property acquired under the agreement, but the record clearly proves that this statement was not true, because in another part of her testimony defendant admitted, and the evidence shows beyond question, that plaintiff advanced the entire purchase price of $1,500 for the acquisition of said lot and was afterwards reimbursed by defendant by check for her half thereof, and still in another part of her testimony defendant claimed that said checks were given in payment of amounts due from plaintiff on other accounts. In the absence of an accounting, however, there is nothing in the record to prove that plaintiff was at that time indebted to her in the amount represented by the checks or in any other amount.

With reference to the purchase of the third lot, on the corner of Seventy-Eighth and San Pedro streets, defendant testified that the property was selected by plaintiff and purchased by her for $1,800; that she made a down payment thereon of $560, and afterwards paid the balance; that she therefore claimed that plaintiff had no interest in said lot. After the breach between the parties occurred, however, and before suit was commenced, defendant prepared and submitted to plaintiff a statement of their accounts wherein she conceded to plaintiff one-half of the net sale price of the property last mentioned; but, in explanation thereof, she testified that plaintiff was entitled to such one-half "provided he would pay up his half which he agreed to do."

As to the fourth piece of property purchased, on the corner of Seventy-Fifth and San Pedro streets, the evidence shows without conflict that plaintiff selected said lot and made the initial payment thereon of $50, and that defendant paid the balance of the down payment, amounting to $950. Defendant claimed, however, that the $50 paid by plaintiff was in liquidation of a like amount which plaintiff owed her on another account.

[2] It would appear, therefore, first, from the trial court's findings, that, notwithstanding plaintiff failed to furnish his full quota of the purchase price of the four parcels last acquired, there was no termination of the agreement, but the parties continued to operate thereunder and to acquire property in defendant's name; and, secondly, from the uncontradicted evidence, it appears that the first parcel of land acquired in which plaintiff admittedly owned a one-half interest was used in the acquisition of another parcel, that a small part payment was made by plaintiff on the purchase price of a third parcel, and that larger payments were made to defendant which he claims should have been applied toward his share of the cost of the acquisition of the remaining properties. Under such circumstances we think plaintiff was clearly entitled to an accounting, for it would seem that, in view of the other transactions had between them, in no other manner could the nature and extent of his rights in the property thus acquired be fully and fairly adjudicated.

[3] Evidently the trial court's decision denying plaintiff any equitable relief was based upon the theory that plaintiff had not furnished the full one-half of the cost of said properties, for there was no finding to the effect that plaintiff did not furnish any portion of the cost of the acquisition of said properties, and, in view of the foregoing evidence, there could not be. As supporting the trial court's decision, defendant in her brief quotes a rule of law set forth in the note appended to the case of McDonough v. Saunders, 201 Ala. 321, 78 So. 160, as reported in 11 A. L. R. at page 432, which in part reads as follows:

> "The rule seems to be that failure of a party to a joint adventure to contribute his share of the expenses is ground for abandonment of the enterprise by his coadventurers, and his exclusion from further operations by them, *provided*," the note continues, "they take definite steps to effect that result. They cannot, however, continue the enterprise, using what he has contributed, or failing to notify him of the dissolution, and then exclude him from a share of the resulting profits. On the other hand, his failure may, in some instances, preclude his securing relief in a court of equity." (Italics ours.)

The author of the note then proceeds to discuss and quote from cases arising in various jurisdictions wherein equitable relief had been denied, among them being Miller v. Butterfield, 79 Cal. 62, 21 P. 543. But it will be found that in most, if not all, of the cases cited, such relief was denied because the defaulting parties wholly failed to contribute any part of the consideration for the purchase of the property. Such was the case of Miller v. Butterfield, supra.

In the present case, however, the trial court's findings show, as already pointed out, that, although plaintiff did not furnish the full one-half of the cost of the acquisition of the properties as agreed, the agreement was not terminated upon that or any other ground, but remained in full force and effect and the parties continued to operate thereunder from the time it was made until after the bungalow court was erected. Under its terms, all of the property in question here was acquired, and the bungalow court was constructed, plaintiff having superintended the building thereof and paid practically all of the bills, with about $8,000 advanced to him by defendant for that purpose. At no time did defendant attempt to abandon or cancel the agreement, but, on the contrary, continued to accept the benefits of plaintiff's services in selecting the property which she acquired in her name, and whatever money he may have contributed toward the purchase thereof, and afterwards sold or operated said properties at large profits. Therefore, under the authorities cited, it was not essential, as the findings imply, for plaintiff to establish that he furnished the full amount of money agreed in order to obtain equitable relief. It was sufficient for him to prove a substantial compliance with the terms of said agreement or a waiver thereof by the defendant.

[4] Furthermore, we find no evidence in the record to support the trial court's finding that the net sale price of the lot on Seventy-Seventh and Main streets was only $3,388.82. The evidence on this point was furnished by the defendant. She testified that the lot sold for $5,000; and, in the statement prepared by her prior to the commencement of the action, she set forth the amount of plaintiff's one-half share thereof as being $2,473.50, indicating that the net sale price was $4,947. Assuming that the difference of $53 was deducted from the gross sale price as given in her testimony for the payment of taxes and expenses incidental to the sale, there would still be a balance of approximately $1,558.18 unaccounted for. In this connection the record shows that at the conclusion of the evidence the trial court called defendant to the witness stand, and the following proceedings took place:

> "The Court: How much do you admit the plaintiff is entitled to, according to your figures, in the one house, in which you admit he has an interest, namely, Seventy-Seventh and Main? * * *
>
> "Q. All I want to know is the sum total, what you admit he is entitled to—half of the net profit? A. Half of — $3,388.75.
>
> "Q. $1,694.37; is that correct?
>
> "Mr. Eddie: That is correct.
>
> "The Court: Is that what you get?
>
> "Mr. Eddie: $1,694.37; yes; that would be correct.
>
> "The Court: Plaintiff may have judgment for that amount."

Apparently from the foregoing proceedings defendant and her attorney were allowed to fix the amount which was awarded to plaintiff as his one-half of the net sale price of said property, but how they arrived at the sum of $3,388.75 as being the net sale price, instead of $4,947, as stated by defendant in her testimony, is not disclosed. It may be fairly inferred, however, from other testimony given by defendant, that she charged plaintiff with certain items claimed to be due on accounts foreign to the sale of that particular lot, which, in the absence of a full accounting, was obviously unfair to plaintiff.

For the reasons hereinabove stated, the judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.

SMURDA et al. v. SUPERIOR COURT OF STATE OF CALIFORNIA, IN AND FOR LOS ANGELES COUNTY. (Civ. 5975.)★

District Court of Appeal, Second District, Division 2, California. April 17, 1928.

Hearing Granted by Supreme Court June 14, 1928.

1. Husband and wife 🔑270(1)—Action to establish trust in which husband and wife are beneficiaries is one affecting community property.

An action to establish a trust in property in which husband and wife are beneficiaries is one affecting community property.

2. Dismissal and nonsuit 🔑7(1)—Dismissal may be had at any time before final submission.

An action may be dismissed at any time before its final submission.

3. Dismissal and nonsuit 🔑7(2)—Suit in equity requiring proof cannot be finally submitted until evidence is taken, even though default of defendants is regularly entered.

A suit in equity, requiring proof, cannot be finally submitted until evidence is taken, even though defendants defaulted, and their defaults are regularly entered.

4. Dismissal and nonsuit 🔑42—Where no affirmative relief is sought in answer, dismissal ipso facto terminates case, and ousts court of jurisdiction (Code Civ. Proc. § 581, subd. 1).

Where answer seeks no affirmative relief, the effect of a dismissal made under the provisions of Code Civ. Proc. § 581, subd. 1, is ipso facto to terminate the case and oust court of jurisdiction to proceed.

5. Dismissal and nonsuit 🔑42—Judgment and other steps taken by court subsequent to dismissal held void for want of jurisdiction (Code Civ. Proc. § 581, subd. 1).

On dismissal of suit involving community property by plaintiff husband and his attorney, under Code Civ. Proc. § 581, subd. 1, court completely lost jurisdiction, and judgment rendered and all other steps taken subsequently to such dismissal are void for want of jurisdiction.

6. Prohibition 🔑10(1)—On court losing jurisdiction by dismissal by plaintiff, prohibition will be granted to restrain further unauthorized action.

Where court has lost jurisdiction as result of a dismissal by plaintiff and his attorney, prohibition will be granted to restrain further illegal and unauthorized action about to be taken.

★Hearing granted by Supreme Court.

7. Prohibition ⟹13—Prohibition will not issue to annul proceedings already had.

A writ of prohibition will not issue to secure the annulment of proceedings already had.

8. Prohibition ⟹10(2)—That receiver, appointed on entry of unauthorized judgment after dismissal by plaintiff, threatens to take possession, held to warrant issuance of writ of prohibition (Code Civ. Proc. § 581, subd. 1).

Where suit involving community property was dismissed by husband and his attorneys under Code Civ. Proc. § 581, subd. 1, thus ousting court of jurisdiction, *held* that, on subsequent entry of judgment and appointment of receiver, court will grant prohibition, where it is shown that receiver threatens to take possession of the property.

9. Prohibition ⟹28—Remedy by writ of review will be given, though prohibition only was petitioned for, where it appears on complete record that petitioner is entitled to remedy afforded by writ of review.

Where a complete record of case as affecting points in dispute is presented, and it appears that petitioner is entitled to remedy afforded by writ of review, that relief will be granted, though petitioner has asked only for prohibition.

Application for writ of prohibition by Mary Calista Flynn Smurda and another to be directed to the Superior Court of Los Angeles County to restrain further proceedings in an action to establish a trust. Writ granted.

Dockweiler & Dockweiler & Finch, of Los Angeles, for petitioners.

D. Joseph Coyne, of Los Angeles, for respondent.

CRAIG, J. In this proceeding the petitioners pray for a writ of prohibition to restrain the superior court from further proceeding in an action begun on November 19, 1926, by Thomas Flynn and Martha C. Flynn, his wife, against the petitioners and certain other defendants designated by fictitious names. By that suit the relief sought was to have certain property declared to be held in trust and the trustees thereof constructive trustees for the plaintiffs in said action, and to secure a decree requiring the reconveyance of said property to the plaintiff Thomas Flynn. On December 27, 1926, Thomas Flynn entered a dismissal of the action; previously, on the same date, counsel for Martha C. Flynn ordered a default of the petitioners herein, and the clerk entered it. Thereafter such steps were taken that Thomas Flynn was served with summons as one of the fictitious defendants, and filed an answer which admitted the truth of the allegations of the complaint, and asked that the relief prayed in the complaint be granted. On April 8, 1927, judgment was entered in favor of Thomas Flynn against the defendants in said action.

The petition in this proceeding alleges all of the above facts, and that the petitioners had no knowledge of any of them which transpired since December 26, 1927; that, after judgment was entered upon the petition of Mary C. Flynn, Thomas Flynn was adjudged incompetent, and the Security Trust & Savings Bank was appointed guardian of his estate; also that on November 7, 1927, M. W. Purcell was appointed guardian ad litem for Thomas Flynn in said suit. It is represented that the superior court is proceeding and threatening to proceed, with the enforcement against the petitioners of said judgment. The court has appointed Robert E. Allen receiver of the real and personal property involved, which petitioners allege is owned by Mary C. Flynn.

However, the judgment purports to quiet the title of Thomas Flynn to said property and to perpetually enjoin petitioners from claiming the same or any interest therein, and declares that petitioners hold said property as trustees for Thomas Flynn and Mary C. Flynn, and commands petitioners to convey the property to Thomas Flynn. It also provides that, should need arise upon application therefor, a receiver be appointed to carry out the judgment. Such an application was made and a receiver was appointed.

[1] It seems to be contended by respondent that the beneficial interest in a trust is community property, and that an action to establish a trust in which two persons, husband and wife, are beneficiaries, is not one affecting community property. We cannot follow this reasoning, and no authorities are cited to uphold this theory. It seems conclusive that, if the property involved is community property, a suit in equity to protect the community title of husband and wife is one affecting the community as much as would be an action for unlawful detainer or for damages, involving the same property. Here, it is recited in the complaint of Thomas Flynn and Martha C. Flynn, and the answer of Thomas Flynn, and is found by the court's findings to be a fact, and is declared in the judgment, that the property in which a trust was asked to be, and was attempted to be, established, was community property of Thomas and Mary C. Flynn. However, in this proceeding we need not decide the question principally argued by counsel as to whether or not a wife who is a party to an action affecting community property has authority to direct the entry of default of a defendant. Even if the wife here had that right, the suit was thereafter dismissed by the husband, Thomas Flynn, and his attorneys of record, under subdivision 1 of section 581 of the Code of Civil Procedure.

[2-4] An action may be dismissed at any time before its final submission. McDermot v. Grant, 181 Cal. 332, 334, 184 P. 396, and cases there cited, in which it is said:

"A case is submitted after the court, trying the case without a jury, has taken the case under advisement, at the close of the evidence and argument."

This case was not finally submitted until the conclusion of the hearing, which occurred on April 6, 1927, nor could the suit have been finally submitted until evidence was taken, even if the defendants had defaulted and their defaults had been regularly entered, for it was one in equity requiring proof. Of course, the effect of a dismissal, where the answer seeks no affirmative relief, and which is made under the provisions of the Code, as was done in this case, is ipso facto to terminate the case and oust the court of jurisdiction to proceed. Huntington Park Imp. Co. v. Superior Court, 17 Cal. App. 692, 121 P. 701; Hopkins v. Superior Court, 136 Cal. 552, 69 P. 299; Kaufman v. Superior Court, 115 Cal. 152, 46 P. 904.

[5] It follows that, although the court had previously possessed jurisdiction over the persons and the subject-matter of the suit in question, such jurisdiction had been completely lost. Hence the judgment rendered and all other steps taken subsequently to the dismissal of the action are void for want of jurisdiction.

[6] Where the court has lost jurisdiction as a result of a dismissal by the plaintiff and his attorneys, prohibition will be granted to restrain further illegal and unauthorized action about to be taken. Hopkins v. Superior Court, supra.

[7, 8] But it is contended that prohibition issues only to prevent the commission of a future act, and not to undo an act already performed, and that in this instance the receiver appointed by the court has performed all of the acts required of him to carry the judgment into effect, that not only has the judgment itself been rendered, but full compliance has been made with its provisions. If this were the fact, it would be an insuperable objection to the issuance of the writ of prohibition. Valentine v. Police Court, 141 Cal. 615, 75 P. 336. A writ of prohibition will not issue to secure the annulment of proceedings already had.

But the petition asserts that Mary Calista Flynn Smurda is in possession of the property in question. In its return the respondent court nowhere denies this allegation. True, it is said that the receiver has executed a grant deed to Thomas Flynn, and the assignments of the mortgages in conformity with the court's order, and generally that the receiver has performed the duties incumbent upon him to be performed. This falls short of putting in issue the direct statement in the petition above mentioned, which is admitted to be true by lack of denial. There is, then, something to be done, namely, the taking of possession by the receiver of the property, real and personal, which the petition avers that the receiver threatens to do, and will do, unless restrained by this court.

[9] Aside from this warrant for the exercise of jurisdiction by this court, where, as here, a complete record of the case as affecting the points in dispute is presented, and it appears that petitioner is entitled to the remedy afforded by writ of review, that relief will be given, though the petitioner has asked only for prohibition. Havemeyer v. Superior Court, 84 Cal. 327, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; Traffic Truck Sales Co. v. Justice Court, 192 Cal. 377, 220 P. 306; Finn v. Butler, 195 Cal. 759, 235 P. 992.

It is therefore ordered that the judgment dated April 6, 1927, in favor of Thomas Flynn and against petitioners herein, as well as the order appointing a receiver, be, and they are, annulled, and the respondent court and the receiver are prohibited from further proceeding in said action.

We concur: WORKS, P. J.; THOMPSON, J.

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91 Cal. App. 168

TORSON et al. v. FLEMING, Director of Public Service of City of Long Beach. (Civ. 6002.)★

District Court of Appeal, Second District, Division 2, California. April 20, 1928.

Hearing Denied by Supreme Court June 18, 1928.

1. Statutes 🔑109—Title of act must be read, not as limitation or sufficient definition of power conferred, but as reference to or skeleton of contents.

Title of act must be read, not as a limitation on the authority conferred thereby or as sufficiently defining power to be given by it, but as a reference to or skeleton of that which will be found in its body.

2. Statutes 🔑105(1)—Constitutional provision requiring expression of subject in title of act must be liberally construed.

The constitutional provision requiring the subject of an act to be expressed in its title must be liberally construed.

3. Statutes 🔑109—Title suggesting field of legislation occupied will not be construed to restrict operation of act.

Where the title of an act is sufficient to suggest to the mind the field of legislation to be occupied, it will not be construed to restrict the act in its operation.

4. Municipal corporations 🔑277—Statute held not to limit council to construction of sewers in streets forming or extending across exterior boundaries of city (City Boundary Line Act, §§ 1, 19, 36, and § 2 as amended by St. 1927, p. 1414).

Grant of power to city council by City Boundary Line Act (Deering's Gen. Laws 1923,

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★Hearing denied by Supreme Court.

Act 8200, and Consol. Supp. 1925–1927, Act 8200) § 2, as amended by St. 1927, p. 1414, to include any of kinds of improvement work mentioned therein on any number of streets, avenues, etc., "whether contiguous or directly connected, or otherwise, in one proceeding," is not limited to construction of sewers in streets forming or extending across exterior boundaries of city by title, or section 1 or 36 of such act, especially in view of section 19.

5. Statutes ⚷181(1)—Court should give effect to legislative intent in construing statute.

In construing a statute, the court should give effect to the legislative intent.

Original proceeding in mandamus by C. M. Torson and another, copartners doing business under the firm name and style of the Torson Construction Company, against Walter R. Fleming, as Director of Public Service of the City of Long Beach. Peremptory writ granted.

Clock, McWhinney & Clock, of Long Beach, for petitioners.

C. A. Windham, of Long Beach, for respondent.

THOMPSON, J. This original proceeding in mandamus is brought for the purpose of securing the peremptory writ commanding the respondent, as director of public service of the city of Long Beach, to execute a contract with petitioners for the construction of a sanitary sewer system in certain territory lying partly within the boundaries of the city of Long Beach and partly within the boundaries of the city of Los Angeles. The system proposed is a comprehensive plan for supplying sewer facilities to the inhabitants on either side of the line. On the Los Angeles side it consists of approximately 2,400 feet to be laid on a street crossing the boundary and connecting with approximately 1,300 feet on a street running at right angles to the first-mentioned street, and then connecting on another street running at right angles with the last-mentioned street for a distance of approximately 2,800 feet, and there connecting with 2,620 feet of sewer already constructed. All of these streets cross the boundary, but the proposed system itself crosses only on the street first mentioned. On the Long Beach side of the invisible line, the system runs along the line of the street first mentioned which crosses the boundary for a distance of some 400 or 500 feet, then along a right of way, and connects with several thousand feet of laterals and branches in that city.

It appears from the petition and return that all of the preliminary steps, including a consent to the proceedings by the council of the city of Los Angeles, were taken as required by the provisions of the act which has been termed the City Boundary Line Act (Deering, Gen. Laws, 1923, p. 3376, and Deering, Cons. Supp. 1925–1927, p. 1995), up to the point where the city council of the city of Long Beach awarded the contract to the petitioners, and they had complied with everything to be done by them prior to the signing of the contract by the respondent. When the contract properly executed by petitioners was tendered to the respondent, together with the necesary bonds, he declined to sign. In order to understand the objection raised by the respondent to the contract, it is necessary to call attention to the further fact that the only street affected which extends across the exterior boundary of the two municipalities is one which it is proposed shall carry the main trunk line of the sewer system, and that by far the greater portion of the system lies within the boundaries of the city of Long Beach.

The respondent asserts that the Boundary Line Act was never intended to cover the improvement of streets or the construction therein of sewers other than those forming or extending across the exterior boundaries. He points to the title and to sections 1, 2, and 36 of the act, and argues that they indicate a legislative intent to so limit the authority of the municipality exercising jurisdiction. That portion of the title which would seem to bear such construction reads:

> "An act to provide for the establishment and change of grade of public streets, avenues, lanes, alleys, courts, places and rights of way, forming the exterior boundaries of any municipality, whether partly or wholly within or without said boundaries, or extending into the territory of two or more municipalities, or extending into the territory of one or more municipalities, and unincorporated territory, and providing for work upon and the improvement thereof, and providing for the construction of sanitary and storm sewers, drains and drainage systems, together with any and all appurtenances and appurtenant work in connection with any of such work or improvements. * * *"

Section 1, which declares that certain streets, alleys, and rights of way shall be deemed and held to be open public streets, uses the exact phraseology of the title, except that there is inserted the words "or crossing" after the word "forming," so that it reads, "forming or crossing the exterior boundaries," Section 36 reads:

> "The provisions of this act shall apply to and authorize the improvement of any street or right of way extending along the boundary line between two municipalities * * * or extending from or through one or more municipalities into or through unincorporated territory. * * *"

Section 2, as amended in 1927 (Stats. 1927, p. 1414), is set forth in full as follows:

> "Whenever the public interest and convenience may require, and whenever the city council or other legislative body of each of the municipalities and the board of supervisors of the county, having jurisdiction over any portion of

the territory proposed to be included in an assessment district to be formed under this act, shall by resolution consent to the formation of such assessment district and the commencement of a proceeding under this act for the construction of any public work or improvement, the city council of any municipality and the board of supervisors of the county in which said municipality is situated, are hereby severally authorized and empowered to establish, change or modify the grade of, and to order the whole or any portion or portions either in length or width, of any one or more of the streets, avenues, lanes, alleys, courts, places or rights of way forming or crossing the exterior boundary or boundaries of any municipality or municipalities of this state, whether partly or wholly within or without said boundaries, or extending into or through the territory of two or more municipalities or extending into or through the territory of one or more municipalities and unincorporated territory, graded or regraded to the existing or proposed official grade, paved or repaved, macadamized or remacadamized, graveled or regraveled, oiled or reoiled, and to order the construction, reconstruction or repair therein of sidewalks, culverts, bridges, gutters and curbs; and to order the construction, reconstruction or repair therein or in any property or right of way owned by any such municipality or county, of sanitary sewers, storm sewers, drains and drainage systems, ditches and conduits of any kind or character, for sanitary or drainage purposes, and all structures, plants and appurtenances and appurtenant work of any kind or character necessary or convenient in connection therewith; and to order the construction, reconstruction or repair therein or in any property or right of way owned by such municipality or county, or wells, pumps, drains, reservoirs, storage tanks, channels, tunnels, pipes, hydrants, meters or other appurtenances for supplying or distributing a domestic water supply; and to order any other work to be done which shall be deemed necessary to improve the whole or any portion of such streets, avenues, lanes, alleys, courts, places or rights of way. The council or board of supervisors may include any of the different kinds of work mentioned in this section, and may include such work on any number of streets, avenues, lanes, alleys, courts, places or rights of way, or any portions thereof, whether contiguous or directly connected, or otherwise. in one proceeding, or one contract, or both and may except therefrom any of said work already done to the official grade and which may be in good condition and repair."

It is worthy of note that the words, "and to order the construction, reconstruction or repair therein or in any property or right of way owned by such municipality or county, of wells, pumps, drains, reservoirs, storage tanks, channels, tunnels, pipes, hydrants, meters or other appurtenances for supplying or distributing a domestic water supply," were added by the amendment of 1927. It is also to be observed that the Legislature at its last session, with the evident purpose of making the act more available and workable and to conform to the procedure extensively employed by municipalities in improvement work, adopted verbatim, by way of amendment, those portions of the Street Improvement Act of 1911 (Deering, Gen. Laws, 1923, p. 3328) largely containing the procedure to be followed.

So far as we have been able to discern, the only case which has passed upon the legislative intent of the act under consideration is that of Gadd v. McGuire, 69 Cal. App. 347, 231 P. 754, wherein it was said:

"The conditions which the City Boundary Line Act is designed to remedy extend beyond the boundaries of any one municipality. Where the evil to be remedied reaches beyond the boundaries and jurisdiction of any one municipality—whether such extra-municipal ill be due to an unimproved roadway extending into one or more other municipalities, or to unsanitary conditions due to the lack of a suitable regional sanitary sewer system, or to a widespread overflow of rain waters—a proceeding to correct the evil by a single comprehensive scheme of improvement on lands in an improvement district which embraces a portion of all of the municipalities affected by the evil conditions is, as we have shown, more than a mere municipal affair."

And again the court, after speaking of the advantages to accrue by having a city street and connecting highway in connecting contiguous unincorporated territory improved in one comprehensive scheme, and a like community of interest which the inhabitants of two or more municipalities or of a municipality and unincorporated territory may have in the construction of a storm sewer system by a similarly inclusive plan of improvement, says:

"In the same way we can readily imagine a case where it would be equally vital that there should be a common sanitary sewer system, serving the lands on either side of the invisible boundary line. If the city should construct a sanitary sewer system and none should be constructed in the thickly settled community occupying the contiguous unincorporated territory, it is more than likely that there would be unsanitary conditions, threatening the health and welfare of the near-by city dwellers as well as those living just outside of the city, in spite of the city's enterprise."

[1-3] A portion of the language of section 2 of the act so perfectly coincides with the part of the opinion just quoted that we feel the necessity of repeating it for the sake of calling attention directly to it. It reads:

"The council or board of supervisors may include any of the different kinds of work mentioned in this section, and may include such work on any number of streets, avenues, lanes, alleys, courts, places or rights of way, or any portions thereof, whether contiguous or directly connected, or otherwise in one proceeding, or one contract, or both, and may except therefrom any of said work already done to the official grade and which may be in good condition and repair."

[4, 5] It would seem that this grant of power would be ample in its scope to permit the

construction of a sanitary sewer system extending beyond the boundaries of the municipality, and not necessarily confined to streets forming or crossing the exterior boundaries. It is argued, however, that this language is limited by the title, section 1 and section 36, which we have already quoted. The title must be read not as a limitation upon the authority conferred or as sufficiently defining the power to be given by the act, but as a reference to or skeleton of that which will be found in its body. It will be noted, of course, that the title includes reference to sanitary sewer systems "together with any and all appurtenances and appurtenant work" in connection therewith. It would be most illogical to say that a sanitary sewer *system* could consist of a main trunk line without laterals or branches. It is a familiar rule that the constitutional provision requiring the subject of an act to be expressed in its title must be liberally construed, for which we only need to cite Estate of Wellings, 192 Cal. 506, 221 P. 628. It is also established that, where the title is sufficient to suggest to the mind the field of legislation to be occupied, the title will not be construed to restrict the act in its operation. People v. Jordan, 172 Cal. 391, 156 P. 451; Hunt v. Manning, 24 Cal. App. 44, 140 P. 39. We think the reference in the title to sewer systems and appurtenant work is ample reference to authorize the subsequent language of the act and the obvious purpose of the Legislature. Neither can section 1 be considered as limiting the authority conferred in section 2, but rather as a declaration on the part of the Legislature that the streets, avenues, lanes, etc., therein mentioned are public streets and that the improvements anticipated in the section are for the public weal. It is apparent, from the wording of section 36 of the act and from the fact that no mention is made therein of the construction of sanitary or storm sewers or drainage systems, or of sidewalks or culverts or waterworks, or the establishment or change of grade, that it was not intended to limit the powers of the body acquiring jurisdiction, but rather to make it clear beyond controversy that the improvement of the streets was authorized, as well as the establishment of or change of grade. It cannot be seriously doubted that such was the legislative intent to which we should give effect. To say that section 36 had the effect of limiting the authority conferred by section 2 would be to say that the municipalities would have no authority under the act (excluding for the moment the provisions of section 19) to install a sanitary sewer system even when laid below the surface of streets forming or crossing the exterior boundaries, for the very patent reason that the installation of a sewer system is not an improvement of the streets. And yet it cannot be successfully argued that the Legislature was less desirous of protecting the health of its citizens from unsanitary conditions than of providing improved streets for its motorists. That it was the intent of the Legislature to provide for the construction of regional sewer systems is further evident from the provisions of section 19 of the act, which reads as follows:

> "The council, or board, shall have full power and authority to construct sewers, gutters, and manholes and provide for the cleaning of the same, and culverts or cesspools, or crosswalks or sidewalks, or any portion of any sidewalk upon or in any of such streets, avenues, lanes, alleys, courts or places, and also for drainage purposes over or through any right of way obtained or granted for such purposes, with necessary and proper outlet or outlets to the same, of such materials, in such a manner, and upon such terms as it may be deemed proper."

It will be noted that this language is quite comprehensive when it uses the expression, "over or through any right of way obtained or granted for such purposes," and is in keeping with the portion of section 2 which we have already emphasized.

As has already been suggested, it would be manifestly unfair to the citizens of a municipality as well as the citizens of adjoining territory to subject them to the contamination of unsanitary conditions of adjoining territory by reason of lack of authority to comprehend a logical district in one proceeding. We can assume that there will be nothing unjust or unfair to the inhabitants without the limits of the city acquiring jurisdiction in the scope of the work to be done, by reason of the safeguard against such contingency found in the provision that proceedings thereunder are subject to the limitation that the legislative body having jurisdiction over the territory outside the municipality shall consent to the proceedings. There is nothing in this proceeding which would indicate that the district was not properly laid out as one comprehensive plan for the benefit of all of the inhabitants of the district, whether within the city of Long Beach or within the city of Los Angeles. The return indicates no other reason than the one discussed for the refusal to sign the contract.

The peremptory writ will issue.

We concur: WORKS, P. J.; CRAIG, J.

91 Cal. App. 176

FIRST NAT. BANK OF LINDSAY v. GARNER et al. (Civ. 3452.)

District Court of Appeal, Third District, California. April 20, 1928.

1. Chattel mortgages ⚷157(2)—Evidence held to support finding that real estate mortgagee's advancement to crop mortgagee was direct loan on issue whether real estate mortgage lien was subsequent to that of crop mortgage.

In suit to foreclose mortgage on realty, evidence *held* sufficient to support court's finding that amount advanced to crop mortgagee by plaintiff and used in caring for crops was direct loan, and not made for purpose of caring for plaintiff's security on issue whether lien of real estate mortgage was subsequent to that of crop mortgage.

2. Appeal and error ⚷1011(1)—Trial court's finding, sustained by evidence, will not be reversed.

Trial court's finding on conflicting evidence will not be reversed, where there is evidence to sustain it.

3. Chattel mortgages ⚷138(2)—Citrus fruit mortgage held prior to earlier real estate mortgage (Civ. Code, § 2955 [St. 1893, p. 84; St. 1909, p. 34]).

Subsequent mortgage, given on all citrus fruit grown on mortgaged lands as authorized by Civ. Code, § 2955 (St. 1893, p. 84, and St. 1909, p. 34), *held* prior to real estate mortgage, decree for foreclosure of which should have provided that sale thereunder should be subject to crop mortgagee's right to take and hold all such crops at any time before expiration of redemption period.

4. Appeal and error ⚷1152—Error in conclusion that crop mortgage was subsequent to real estate mortgage held correctible without further proceedings below (Civ. Code, § 2955; Code Civ. Proc. § 956a, as added by St. 1927, p. 583; Const. art. 6, § 4¾).

Error in trial court's finding and conclusion that mortgage on citrus fruit, under Civ. Code, § 2955, was subsequent to real estate mortgage, and foreclosure decree not providing that sale of mortgaged lands thereunder should be subject to mortgagee's right to take crops at any time before expiration of redemption period *held* correctible, without further proceedings in trial court, by order of appellate court, under Const. art. 6, § 4¾, and Code Civ. Proc. § 956a, as added by St. 1927, p. 583.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the First National Bank of Lindsay against J. C. Garner, the Native Son Orchards Company, and another. Judgment for plaintiff, and defendant corporation appeals. Modified, and affirmed as modified.

C. W. Braswell, of Long Beach, for appellant.

Avery J. Howe and Howe & McBride, all of Lindsay, for respondent.

BARTLETT, Justice pro tem. This action was instituted to foreclose a mortgage on certain real property in Tulare county, Cal., executed by defendants James C. Garner and S. J. C. Garner his wife, on October 13, 1921, securing payment of a promissory note for $8,000, with interest at 8 per cent. per annum, payable quarterly, the note being payable on demand, and if no demand be made, then on January 1, 1924. The complaint was filed on October 13, 1925. The mortgage was recorded on October 17, 1921. The note and mortgage provided for the allowance of reasonable attorneys' fee in the event of the institution of foreclosure proceedings. The particular description of the properties mortgaged was followed by the clause, "together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof."

The defendants Garner and wife defaulted, and judgment was entered against them. The mortgaged property was an orange orchard of navel and Valencia orange trees, producing crops of oranges therefrom, requiring during the spring and summer months intensive care, proper plowing, pruning, spraying, and artificial irrigation. Defendant Native Son Orchards Company is a packing corporation engaged in the business of packing oranges at Lindsay in Tulare county. During the four years prior to the trial of this action on November 24, 1925, this corporation had advanced the Garners certain sums of money for the purpose of caring for the citrus trees upon the mortgaged premises, and on February 18, 1924, the Garners executed unto the Native Son Orchards Company a crop mortgage on all citrus fruit then growing on or to be grown on the mortgaged lands during the year 1924 and during each and every year thereafter until the indebtedness secured by the crop mortgage was paid; the items of indebtedness, for which the crop mortgage was made security being a promissory note of J. C. Garner to the Native Son Orchards Company for $1,420, dated February 13, 1924, payable December 15 after date, with interest at 8 per cent. per annum, a reasonable attorneys' fee if suit was instituted to collect the note, and such other moneys as might be thereafter loaned or advanced to the Garners by the Native Son Orchards Company during the continuance of the mortgage, not to exceed in all the sum of $1,500 exclusive of the sum mentioned in the note of $1,420.

Plaintiff alleged that the Native Son Orchards Company has or claims to have some interest or claim on the mortgaged premises, which claim it is alleged is subsequent and secondary to the lien of the plaintiff's mortgage. By its answer the Native Son Orchards Company admits that it has and claims an interest in the mortgaged premises,

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

by reason of the crop mortgage from the Garners of February 13, 1924, hereinbefore mentioned; denies that this crop mortgage is subsequent to plaintiff's mortgage; alleges that it had, for the purpose of caring for the citrus trees upon the mortgaged premises, advanced to the Garners approximately $2,372.43, that the Garners were partially insolvent and unable to care for the premises and the orange trees growing thereon, that the mortgaged property was located in an arid district, was dependent upon artificial irrigation, that without proper irrigation and other care the orange trees would have become totally worthless and of no value, that prior to the advancement of moneys to the Garners plaintiff agreed through its agent, one S. A. Warson, that the advancements made by the Native Son Orchards Company were for the protection of the security held by plaintiff, and that the same should constitute a prior lien as against that of plaintiff's mortgage; and, as relief in the action, the Native Son Orchards Company demanded that the crop mortgage be declared by the decree of the court to be paramount and prior to plaintiff's mortgage and for its costs.

The trial court found that the moneys advanced by the Native Son Orchards Company were not advanced under any understanding or agreement on the part of plaintiff that they were for the protection of plaintiff's security or that they would constitute a prior lien to that of plaintiff's mortgage, and found that the crop mortgage was and is subsequent in effect and time to the real property mortgage of plaintiff.

The usual decree of foreclosure of mortgage was thereupon made and entered on January 19, 1926, and under this a sale of the premises described in plaintiff's mortgage was made on February 23, 1926, by the commissioner appointed to make the sale, at which sale plaintiff purchased the properties described in its mortgage for the sum of $10,069.72, which amount covered and satisfied the judgment and all costs and left no deficiency.

It appears from the transcript on appeal that on the day the action was tried it was stipulated that a receiver of the properties be appointed and that one Chester Dowell was so appointed, the order of appointment being set forth in the transcript, specifying, as to his powers and duties, as follows:

> "Now, therefore, it is ordered that Chester Dowell be, and he is hereby, appointed the receiver of and for the plaintiff under the order of the court to take, care for, irrigate, cultivate, spray or fumigate said property, to take the rents, issues, and profits therefrom. That he shall take possession of said property described in said complaint and properly mature and raise any crops that may be raised or growing upon said trees on said property or that may hereafter grow thereon, market the same, and generally do and perform all acts that may be ordered and sanctioned by the court or by law, and retain any funds until further order of the court."

No question is raised or presented on this appeal concerning the appointment of the receiver or any action on his part that he may have taken by and through his appointment.

Defendant Native Son Orchards Company appeals from the judgment in the action and the whole thereof on a bill of exceptions. Appellant urges a reversal of the judgment on the grounds: (1) Insufficiency of the evidence to justify the finding that the sum of $1,100 which had been advanced to appellant by plaintiff and used in caring for the crops of citrus fruits growing on the mortgaged lands during 1925 was a direct loan to the Native Son Orchards Company and not made for the purpose of caring for plaintiff's security; (2) failure of the court to find the extent of the interest of Native Son Orchards Company in the crop of oranges on the trees on the mortgaged premises at the time of the trial of the action; (3) failure of the court to find the extent of the interest of the Native Son Orchards Company in the crop of oranges to be gathered during the redemption period; (4) error in adjudging that the Native Son Orchards Company be foreclosed of all right, title, or interest in and to the mortgaged premises; (5) error in not adjudging that the Native Son Orchards Company was entitled to the crops matured and unharvested on the mortgaged premises at the time of the entry of judgment and would be also entitled to such crops as would mature during the period of redemption.

[1] In support of its claim that the moneys advanced by respondent during the summer of 1925 was not a direct loan to appellant, reliance is placed upon a letter of appellant to respondent which reads as follows:

> "Native Son Orchards Co.
> "R. O. MacDonald, Manager.
> "Lindsay, California, June 29th, 1925.
>
> "First National Bank, Lindsay, California—Gentlemen: It is understood that during the summer you will advance us approximately $1,100 for purposes of financing the J. C. Garner place during the year. It is understood and agreed that we will advance this money to Mr. Garner under our crop mortgage, and that it will be repaid out of the first money realized on the crop after picking and hauling expenses are paid, and before any money is retained by us under the crop mortgage.
>
> "Your truly,
> "Native Son Orchards Co.,
> "By R. O. MacDonald."

There is nothing in the foregoing letter that implies there was any understanding that moneys advanced were to be considered as secured by the respondent's mortgage. It states that appellant will advance the money to Garner under its crop mortgage, and that, outside of packing and hauling charges, the proceeds realized from the crop shall be devoted to repaying the money advanced. In effect it made moneys realized from the crops payable to respondent as a charge on the crops prior to appellant having any claim on crop proceeds other than packing and hauling expenses. The conclusion of the trial court that the advances were direct loans to appellant finds ample support in the evidence. The manager of appellant, MacDonald, testified there was no agreement between the bank and appellant that the crop mortgage would be prior in effect to the bank mortgage. His testimony in this regard is as follows:

> "Q. Did Mr. Warson or any other official of the bank tell you they would waive their real estate mortgage in favor of your crop mortgage? A. No.
> "Q. Then you have never had any undertaking or agreement to the effect that the advancements made would be a prior lien as against the First National Bank Mortgage with Mr. Warson? A. I wouldn't say that was the understanding at all."

This shows there was neither a direct nor an implied undertaking that the real estate mortgage was to be considered a subsequent lien to the crop mortgage of appellant. The following question was asked MacDonald regarding the $1,050 note which appellant executed to respondent for the money advanced:

> "I suppose the $1,050 note must be paid regardless of the crop that is coming in? A. When they are due I will go in and pay them."

[2] The question of whether the moneys advanced were a direct loan or not was a question of fact resolved by the trial court in respondent's favor, and the evidence, if there be any conflict, will not permit a reversal, where there is evidence to sustain the finding. Estate of Jepson, 178 Cal. 257, 172 P. 1107; Hitchcock v. Rooney, 171 Cal. 285, 152 P. 913; McKean v. Alliance Land Co., 200 Cal. 396, 253 P. 134; Dam v. Bond (Cal. App.) 251 P. 818.

[3] The questions for solution on this appeal, presented by the second, third, fourth, and fifth specifications of error above set forth, involve matters of grave importance to the fruit-growing industries of the state of California. By its answer in this action the defendant Native Son Orchards Company asks that a subsequent crop mortgage be declared prior and paramount in effect to a prior mortgage on the lands and the rents, issues, and profits thereof, duly executed and recorded before the execution of the crop mortgage on the citrus crops growing and to be grown on the mortgaged land. Whether or not the foreclosure decree should so declare must be determined through a construction of the provisions of section 2955 of the Civil Code, reading as follows:

> "Mortgages may be made upon all growing crops, including grapes and fruit, and upon any and all kinds of personal property, except the following: 1. Personal property not capable of manual delivery; 2. Articles of wearing apparel and personal adornment; 3. The stock in trade of a merchant."

This statute was enacted in 1909 as it now stands. Stats. of Cal. 1909, p. 34. The clause, "mortgages may be made upon all growing crops, including grapes and fruit," was first enacted into section 2955 of the Civil Code in 1893 (Stats. of Cal 1893, p. 84). Prior to that the section had provided that mortgages may be made upon "growing crops." The purpose and intent of enacting the section in its present form was fully discussed by the Supreme Court of California in the case of Simpson v. Ferguson, 112 Cal. 180, 40 P. 104, 44 P. 484, 53 Am. St. Rep. 201, decided by the court in bank on March 28, 1896.

The facts in that case are very similar to those in the one at bar. Plaintiff sought to foreclose three promissory notes bearing date October 1, 1891, executed to him by the defendant Shaw, secured by a mortgage on orange lands in Riverside county. Following the particular description of the mortgaged lands was the clause:

> "Together, with all and singular, the tenements, hereditaments, and appurtenances thereunto belonging, and the rents, issues, and profits thereof."

Defendant Ferguson held a record mortgage on the same property executed by defendant Shaw, and also held a chattel mortgage executed to him by said Shaw on June 17, 1893, upon the crop of oranges then growing, or to be produced during the season of 1893 and 1894, upon the trees upon the mortgaged lands described in plaintiff's mortgage. A judgment of foreclosure was awarded plaintiff, directing that the mortgaged lands be sold and the proceeds applied in paying the amount due plaintiff, and directing that, if any such surplus remained, defendant Ferguson should be paid the amount found due him. Ferguson moved the trial court to amend its judgment so as to provide that the growing crop of oranges be sold separately and their proceeds applied upon the judgment in his favor. The trial court denied the motion, and Ferguson appealed from the judgment. The Supreme Court reversed the judgment and directed a modification directing a sale of the mortgaged property in accord with Ferguson's request. The decision as first rendered was by the court in department. A petition to have the case heard in bank was granted, and several eminent counsel appeared as amici curiæ, and the matters involved received a close and careful consideration and discussion; the court in bank finally adopting the conclusion arrived at in department. The court says:

> "It is urged that sections 2955 and following of the Civil Code, providing for the manner of mortgaging growing crops, do not establish an exclusive method; that, as this class of prop-

> erty may, under some conditions, be regarded as realty, and under other conditions as personalty, it must follow that under corresponding conditions the property may be the subject of a real estate mortgage or a chattel mortgage, according to the circumstances; and that plaintiff having a valid mortgage upon the land, with its rents, issues, and profits, this gives him a valid lien upon the growing crops, as effectually, to the same extent for all purposes, as if executed with the formalities required in the case of a crop mortgage. We are unable to coincide in this view.
>
> "In the first place, we think it quite manifest from the provisions of the code in question that the Legislature intended thereby to provide an exclusive mode for the mortgaging of growing crops, and intended to declare that for such purpose this species of property shall be regarded as chattels. There is nothing in the statute to indicate that it was not intended to cover every case of a mortgage given upon that class of property. In the second place, while it is perfectly true that growing crops may be either personal or real property, according to circumstances, and while, as suggested by respondent, a mortgage of the land gives a lien upon everything that would pass by a grant of the land, which includes crops growing thereon, it is, nevertheless, well established that such lien, so far as the growing crops are concerned, is limited in its effect to the crops growing upon and unsevered from the land at the time of foreclosure. It does not vest the mortgagee with a right to the crops grown intermediate the giving of the mortgage and the foreclosure thereof. Until the latter event, where, as in this state, the mortgage creates no estate in the mortgagee, but confers only a lien upon the property, the mortgagor is entitled to such crops, with the same absolute right and dominion over them as if the mortgage did not exist. This doctrine is thoroughly well settled, with no considerable diversity upon the subject among text-writers or the courts."

Since its rendition, this decision has been adhered to and approved in a number of cases of similar nature.

In Scott v. Hotchkiss, 115 Cal. 89, 47 P. 45, an action to foreclose a mortgage, a receiver was appointed under a clause in the mortgage authorizing such appointment. The mortgagor sold the property after executing the mortgage to one Fountain. Prior to this he had leased the property to one Millard. The mortgage was executed in 1891. Millard entered under his lease in 1892. The foreclosure action was begun in February, 1895. The court found that when the receiver was appointed a crop of wheat and hay was growing on the premises, 60 acres of summer fallow, 20 acres of winter-sown, and about 100 acres of volunteer; that Millard put in these crops, except the 20 acres of winter-sown, prior to December 1, 1894; that he furnished the seed, labor, and teams used in putting in the crops; that the customary rental for lands such as the mortgaged premises was one-fourth of the hay and grain grown on the premises, the other three-fourths being retained by the tenant as compensation for the labor, seed, use of teams, and other machinery used in producing the crop and the costs of harvesting, sacking threshing, baling, and piling the whole crop. The defendant Fountain claimed the entire crop, and Millard claimed three-fourths of the crop. The claim of Millard for three-fourths of the crop was sustained. The court says:

> "The general subject here under consideration was discussed in the late case of Simpson v. Ferguson, 112 Cal. 180 [40 P. 104, 44 P. 484, 53 Am. St. Rep. 201]. It was there held that growing crops could be mortgaged only as provided in section 2955 et seq., of the Civil Code. They are therefore not covered by an ordinary real estate mortgage. While growing they are real estate, and are included in the mortgage. But if the mortgagor is in possession, he is entitled to the rents and profits, and to the crops if harvested before foreclosure and the transfer of title thereby to a purchaser."

The court cites with approval a similar doctrine announced in Sexton v. Breese, 135 N. Y. 387, 32 N. E. 133, and West v. Conant, 100 Cal. 231, 34 P. 705, and Freeman v. Campbell, 109 Cal. 360, 42 P. 35.

Adherence to the conclusions adopted in the Simpson v. Ferguson Case is announced in the subsequent cases of Bank of Woodland v. Heron, 120 Cal. 614, 52 P. 1006; Modesto Bank v. Owens, 121 Cal. 223, 53 P. 552; Locke v. Klunker, 123 Cal. 231, 55 P. 993; Cowdrey v. London, etc., Bank, 139 Cal. 298, 73 P. 196, 96 Am. St. Rep. 115; and Mau, Sadler & Co. v. Kearney, 143 Cal. 506, 77 P. 411. These cases may be said to have established a rule of property concerning mortgages on growing crops in this state which clearly supports the claim of appellant that the trial court erred in finding, in its finding No. 9, "which crop mortgage was and is subsequent in effect and time to the real property mortgage of plaintiff," and, in its conclusion of law No. 4, "that the crop mortgage of the Native Son Orchards Company is subsequent in time and effect to the real property mortgage of plaintiff," and in not providing in the decree of foreclosure entered in this case that the sale thereunder of the mortgaged lands should be subject to the right of the Native Son Orchards Company, at any time prior to the expiration of redemption, to take and hold all the crops of citrus fruits growing and maturing on said lands.

[4] The record on appeal in this case shows a situation where the errors complained of can be corrected by an order of the appellate court made in pursuance to the powers given by section 4¾ of article 6 of the Constitution and section 956a of the Code of Civil Procedure (St. 1927, p. 583), without further proceedings in the trial court.

It is ordered that the following portion of finding No. 9 of the trial court, to wit, "Which crop mortgage was and is subsequent in effect and time to the real property mortgage of plaintiff," be stricken out and that there be substituted therefor the following: "Which crop mortgage was and is prior in effect to the real property mortgage of plaintiff to the extent of the crops of citrus fruits growing and maturing upon the mortgaged premises up to the time of the expiration of the period of redemption from sale under the order of foreclosure;" that conclusion of law No. 4 of the trial court, "that the crop mortgage of the Native Son Orchards Company is subsequent in time and effect to the real property mortgage of plaintiff," be stricken out, and that there be substituted therefor the following: "That the crop mortgage of the Native Son Orchards Company was and is prior in effect to the real property mortgage of plaintiff to the extent of the citrus crops growing and maturing upon the mortgaged premises up to the time of the expiration of the period of redemption from sale under the order of foreclosure;" and that the judgment appealed from be and the same is hereby modified by adding thereto the following: That the crop mortgage of the Native Son Orchards Company is a lien prior in effect to the lien of plaintiff's mortgage upon any and all crops of citrus fruits growing and maturing on the mortgaged premises up to the time of the expiration of the period of redemption from sale under order of foreclosure—and, as so modified, the judgment will stand affirmed, appellant to recover its costs of appeal.

We concur: HART, Acting P. J.; PLUMMER, J.

FISKE v. NIAGARA FIRE INS. CO. OF NEW YORK. (Civ. 4925.) ★

District Court of Appeal, Second District, Division 2, California. April 16, 1928.

Hearing Granted by Supreme Court June 14, 1928.

1. Insurance 🔑146(1)—Question of intent held determining factor in proper construction of insurance contract.

Question of intent of parties in contract of insurance insuring against theft, robbery, and pilferage *held* determining factor in arriving at proper construction of contract.

2. Insurance 🔑425—Policy against "theft," robbery, and pilferage of automobile held not to cover larceny by conditional buyer, one of parties insured, by trick or device of worthless check.

Parties to insurance contract *held*, in view of Pen. Code, § 490a, as added by St. 1927, p. 1047, § 7, not to have intended by insurance against theft, robbery, and pilferage of automobile to include in contract insurance against larceny by trick and device such as worthless check, of conditional buyer, one of the parties insured; "theft," in its ordinary acceptation as distinguished from its legal definition, meaning the secret, furtive act of feloniously appropriating to one's own use the property of another under cover of darkness or some scheme designed to escape detection.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Theft.]

3. Insurance 🔑146(3)—Doctrine that policy susceptible of two constructions will be construed favorably to insured will not be applied to misinterpret parties' intention.

While the Supreme Court recognizes the rule that, where provisions of an insurance policy are reasonably susceptible of two constructions consistent with the object of the obligation, one of them favorable to assurer and the other to assured, that the one favorable to assured will be adopted, yet it will not extend this doctrine to the point where it does violence to the English language or fails properly to interpret the minds of the parties.

Stephens, Justice pro tem., dissenting.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Willard O. Fiske against the Niagara Fire Insurance Company of New York, a corporation. From the judgment, defendant appeals. Reversed.

David R. Faries, John R. Berryman, Jr., and Edwin Heizman, all of Los Angeles, for appellant.

David D. Stuart, of Los Angeles, for respondent.

THOMPSON, J. This action was brought by the plaintiff against the defendant to recover on a contract of insurance, insuring against "theft, robbery, and pilferage." The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The lower court overruled the demurrer, giving the defendant ten days to answer. No answer having been filed within the time given, judgment was entered in the sum prayed for, and the defendant prosecutes this appeal therefrom on the judgment roll. While counsel for the parties litigant say the sole question to be decided in this case is whether larceny by trick and device is insured against, we feel that we cannot be so limited to a purely academic discussion of an abstruse problem, but rather must look to the complaint to determine in what manner, if at all, the theft is alleged.

We find that on February 21, 1923, the plaintiff and one Spainhower entered into a conditional contract of sale, by the terms of which plaintiff agreed to sell an automobile to Spainhower for $400, payable "$140 upon the execution" of the contract, and the balance at the rate of $30 per month. Subsequent to the execution of the contract, which was also subsequent to the delivery of the

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★Superseded by opinion of Supreme Court, 278 P. 861.

check for $140, but prior to the delivery of the automobile, the insurance policy was issued by the appellant insuring the plaintiff and Spainhower "jointly and severally" against loss occurring by reason of "theft, robbery, or pilferage." Payment of the check of $140 was never made, for the reason that Spainhower had no account with the bank upon which it was drawn. Spainhower departed with the automobile for "parts unknown," and neither he nor the automobile has ever been located.

We think the sole question in the case is reasonably stated by counsel, but perhaps the opinion may subsequently be cited with more assurance of its proper application if we reframe it to read: The sole question to be solved is whether it was the intent of the parties to the insurance policy by using the words "theft, robbery, and pilferage" to insure against a larceny by trick and device, by one of the parties named as a beneficiary under it, the trick and device having been made use of prior to the issuance of the policy. In other words, we are to inquire: What did the parties contemplate when they used the term "theft," under all the circumstances surrounding the making of the contract? Prior to the legislative session of 1927 we had no criminal offense in California designated by the word "theft." Some states, however, had previously given to the word "theft," as we now have done, a statutory meaning quite different from that sense in which it is popularly employed. We need not go farther afield than our own state to illustrate this thought. Prior to the passage of the statute shortly referred to there had been a consistent distinction marking the offenses of larceny and embezzlement. Last year the Legislature passed an act (section 490a, Penal Code [St. 1927, p. 1047, § 7]) which reads:

> "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor."

We might ask the question, was the word in the policy at the time it was used intended to be as comprehensive as the definition now given to it by statute? It is intimated in Hartford Fire Insurance Co. v. Wimbish, 12 Ga. App. 712, 78 S. E. 265, and Michigan Commercial Insurance Co. of Lansing v. Wills, 57 Ind. App. 256, 106 N. E. 725, that the words "theft, robbery, and pilferage" have the same meaning when used in an insurance policy as in a prosecution for such offenses. If in this instance the word "theft" at the time it was employed by the parties here was not intended to include embezzlement, then by which particular statutory or legal definition thereunder, if any at all, should it be governed? These questions are asked for the purpose of emphasizing the thought that, at least in the absence of a statutory definition in this state, the words would more faithfully depict the minds of the parties if they receive that meaning popularly and customarily attributed to them by laymen. A most interesting and illuminating case upon this subject is Anderson v. Hartford Accident Co., 77 Cal. App. 641, 247 P. 507, where it was said that the term "highway robbery" should be interpreted according to the customary meaning it had acquired by "its consistent use throughout the English speaking world."

[1] That the question of intent is the determining factor in arriving at the proper construction of the contract before us is evident from the following authorities upon the subject:

Buxton v. International Indemnity Co., 47 Cal. App. 583, 191 P. 84, involved the construction to be placed upon a policy as altered by a letter written by the insurer to the insured prior to the issuance of the particular policy, reading as follows:

> " 'I wish to advise you that the International Indemnity Company will from this date extend policies on all cars in which you may have an equity to cover any claims arising under the following conditions: * * * (3) If the conditional buyer of an automobile or any member of his immediate family should steal any automobile insured under our policies and thereby commit a felony, upon warrant being secured for the arrest of such party or parties, the company hereby agrees that your equity in any automobile insured by this company will be fully protected.' "

After holding that the letter and the policy constituted one contract, the court quite properly held that it was the intent of the parties to the contract of insurance thus made to insure against embezzlement of the automobile by the conditional purchaser in contravention of section 504a of the Penal Code. While it is too well settled to require citation of authority that the decision can only be read as settling the law applicable to the facts then before the court, it is important here to note that the intention of the parties was the governing factor in the determination of the case. In arriving at this intention, the court made use of dictum that the policy without the letter would cover "theft by one having a conditional contract of purchase, * * * if we concede the possibility of such an offense." The court also says:

> "It is difficult to imagine how he" (the conditional purchaser) "could commit larceny in connection therewith, for this offense involves unlawfulness in taking possession. Appellant enlightens us upon this point by arguing that, if the contract of purchase was entered into for the purpose of stealing the car, then the original possession would be unlawful and the act would be larceny. *It seems unlikely that the plaintiff desired insurance against a situation such as this. The necessary elements of such an offense to bring it within the terms of such a policy would be most difficult of proof.*"

We have italicized that portion of the quotation which seems to have an important bearing upon the proper construction to be put upon the terms of the policy here in question, and in arriving at the intent of the parties when the policy was issued, insuring the plaintiff and the conditional purchaser jointly and severally against loss.

The case of Delafield v. London & Lancashire Fire Ins. Co., 177 App. Div. 477, 164 N. Y. S. 221, also approaches the problem from the standpoint of the intent with which the word "theft" was employed in the policy. It says:

> "While this policy insures against 'theft,' it seems clear that it was not the intention of the parties to the contract of insurance to insure against larceny by trick and devise; that is, theft, the commission of which involves, as an essential element, the deception of the insured, resulting in a surrender of the possession of his property. The term 'theft,' as used in this policy, does not include all forms of larceny recognized by law. It does not include a larceny perpetrated, as this was, under the form and guise of a business transaction conducted by the insured himself."

We also draw some light from Stuht v. Maryland Motor Car Ins. Co., 90 Wash. 576, 156 P. 557, where the court was again considering the exact words of this policy. It is there said:

> "The words 'theft,' 'robbery,' and 'pilferage' are well understood. They were used in this policy in their common and ordinary meaning."

Reference may properly be had to two very interesting and instructive cases involving marine insurance contracts where the word "thieves" was under consideration, which cases go a long way toward demonstrating that the common or ordinary meaning of the word is to govern the construction of the instrument. In the first case, Atlantic Ins. Co. v. Storrow & Boyd, 5 Paige (N. Y.) 285, the policy contained a provision insuring against loss by "thieves," and the question was whether the policy was intended to cover a loss by "simple larceny (furtum)" or only one "perpetrated by open violence, denominated latrocinium by the civil law." It was determined that the policy was not limited to losses from assailing thieves, but also covered a loss occasioned by larceny unaccompanied by violence. This was contrary to the view entertained by the English and Continental text-writers and also contrary to the statement found in Kent's Commentaries (14th Ed.) 303, as follows:

> "The theft that is insured against by name, means that which is accompanied by violence (latrocinium) and not simple theft; furtum non est casus fortuitus."

In commenting upon the decision in Atlantic Ins. Co. v. Storrow & Boyd in the notes relative to the quotation just given from Kent's Commentaries, the author says:

> "This decision overrules all the old authorities and text-books, for they all apply the term 'furtum,' or simple theft, as well as 'latrocinium,' or robbery, to assailants from without the ship, and exclude from the policy simple theft, as not being properly a casualty. All the English text-writers follows the same rule, as Malynes (Lex Mer. c. 25), Molloy (de Jur. Mar. b. 2, c. 7, § 7), Beawes (Lex Mer. 313), Weskett (on Ins. tit. 'Theft'), Park (30, 31), Millar (145, 146), and Marshall (by Condy, i. 243). Park, in his 6th Ed., says that the English law is silent on the subject. The decision by Chancellor Walworth may be reasonable, and it is according to the popular acceptation of the word 'thieves,' but it is against all the text authorities, foreign and domestic. It is also in contravention of the principle that thefts are not casualties; and it may be a matter of questionable policy whether the owners and masters of ships ought to be indemnified against thefts of goods under their own care, and occasioned by their own lack of vigilance."

The pertinency of the last part of this last quotation to a correct application of the law to the facts before us is made apparent when we consider that ordinary business precaution would have prevented the acceptance of the check for $140 without certification of its genuineness. However, the next authority, the case of American Insurance Co. v. Bryan, 26 Wend. (N. Y.) 563, 37 Am. Dec. 278, is fully as illuminating. For a more thorough understanding of the meaning of the word "thieves," we have concluded to sacrifice somewhat the cause of brevity and quote liberally from this case. The policy in question insured against, "pirates, rovers, thieves, and barratry of the masters and mariners"; barratry being "a criminal, or at least intentionally fraudulent misconduct of the master or mariners towards the owner of the vessel." In the argument of counsel for the respondent, we find the following:

> "The word 'thieves' has the same meaning in the policy as in all other cases, and there is not a word in the English language which has, and has had for centuries, a more defined, limited, and restricted meaning, both in common use and among lexicographers. Walker defines 'thievish,' 'secret, sly, acting by stealth; the robbery may be by stealth, yet thievery is by common understanding intended to mean secret, private larceny.' "

Again he says:

> "There seems then no ground for saying that the law limits the meaning of the word 'thieves' to 'assailing thieves'—that it changes the meaning of furtum into latrocinium. No usage is shown establishing this distinction. On the contrary, the word when used in a policy is held by underwriters themselves to have its natural and usual meaning. This is evident from the fact that many companies limit their liability by excepting loss by thieves or by assuring in express terms against 'assailing thieves.' "

The court adopted this reasoning of counsel, and said:

> "This throws us back to examine the older use and meaning of the words 'thieves' and 'theft.' They have had a peculiar use in our language. The primary meaning, which is now the ordinary one, is that of secret stealing or simple larceny. But they had formerly a more general signification, and comprehended robbery or violent taking, although that was never the exclusive sense. The signification was either an unlawful and guilty taking of property generally, or else and more especially a secret taking. Our received translation of the Bible, that still fresh and living 'well of English undefiled,' was but little prior in date to the ascertained use of the clause in question, and it abounds in examples of these uses. The original words in the New Testament [here occur two Greek words] have respectively the precise sense of a 'secret thief,' and 'a robber by force.' They are translated indiscriminately by 'thief,' though the former word is never translated 'robber.' When the two words occur together, their distinct meanings are marked as 'he is a thief and a robber.' (John x, 1.) But we read, 'a certain man fell among thieves,' literally, 'among robbers.' Again: 'Ye have made my house a den of thieves,' in modern language, 'a robber's den' (spelunca latronum, in the vulgate).
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> "At a later date, we find Blackstone, a legitimate English classic, as well as the most pleasing and perspicuous of elementary teachers, explaining larceny by theft, and he speaks of it as either simple larceny or plain theft, unaccompanied by any atrocious circumstances, or else compound larceny, of which robbery is a species. It is needless to multiply examples, to show that at whatever period we may fix the introduction of this clause in our policies, the words comprehended the largest risk of felonious taking, with or without force, secretly or by open assault. Modern use has gradually restricted the sense to thieving unaccompanied by violence, but at no period do we find any usage of an exclusive signification of robbery only, which would not embrace the other meaning."

In the case of Spinetti v. Atlas Steamship Co., 80 N. Y. 71, 36 Am. Rep. 579, the bill of lading exempted the company from liability from loss arising by reason of "theft on land or afloat" and "barratry of master or mariners." This cause was determined by resolving the intent of the parties, the court citing with approval the authority from which we have just quoted. It is obvious that it is just as great an error to stretch the word beyond its proper signification as it is to restrict it by undue limitation. Rapalje in his work entitled "Larceny and Kindred Offenses" says:

> "'Larceny' is derived from the Norman 'larcyn,' Latin 'latrocinium.' * * * It must be done fraudulently and secretly, so as not only to deprive the owner of his property, but also to attempt to leave him without knowledge of the taker."

While this last statement quoted by Rapalje from State v. Ledford, 67 N. C. 71, may not receive approval as a legal definition, it is instructive upon the common or ordinary meaning of the word "theft," for it is apparently confused with that word. Our own word "furtive" is derived from the Latin furtum, and indicates the stealthiness or secretiveness inherent in the predecessor of simple theft. Webster's New International Dictionary defines thief as "one who steals, esp. stealthily or secretly; one who commits theft, or larceny; formerly, also, a robber."

[2] We are of the opinion from our investigation of the meaning of the word "theft" that it signifies, in its ordinary acceptation, as distinguished from its legal definition, the secret, furtive act of feloniously appropriating to one's own use the property of another under cover of darkness or some scheme designed to escape detection. Or, to phrase it differently, the word, to the ordinary layman, conveys the mental picture of one who secretly takes and carries away another's property, rather than one who deals with cheats and swindles, tricks, artifices, or devices.

That it was the intention of the parties to the contract to employ the word in its ordinary sense is strongly suggested by the fact that they were not satisfied to use it in an all-inclusive sense, but also employed the word "robbery" to indicate the loss occurring by the use of violence or fear (inherited from the Latin latrocinium) and "pilferage" to indicate petty thievery. One of the most potent factors to be considered in arriving at the sense in which the word was used in the policy is the fact that Spainhower was one of the beneficiaries named in the policy. Had it been intended that the contract was to insure the other beneficiary against loss from a trick and device used by Spainhower prior to the issuance of the policy, is it not more than passing strange that he also should have been insured? A case has been called to our attention, to wit, Neal v. Liverpool Ins. Co., 178 App. Div. 730, 165 N. Y. S. 204, in which it was held that, where the conditional vendor and vendee of a motorcycle were both named as beneficiaries in the policy, the conditional seller was entitled to recover the balance due on the contract where the loss occurred as a result of the conditional purchaser's stealing the motorcycle himself. No sound reason is advanced for the ruling. The intent of the parties is not discussed and apparently not considered. A portion of the opinion reads:

> "I am of the opinion that the policy covers the plaintiff's loss. It in effect insured each interest separately, namely, that of the plaintiff, the conditional vendor, and of Arthur, the conditional vendee, and by its express terms covers theft by any person other than such as are expressly excepted by the terms of the policy. As to the plaintiff's interest, Arthur is not within this exception."

We cannot help but remark that no account is taken of the fact that the persons who are excepted are those in the employment, service, or household of the insured. Even though the facts were not essentially different in the instant action, we could hardly accept the foregoing as authoritative.

In so far as the case of Rush v. Boston Insurance Co., 88 Misc. Rep. 48, 150 N. Y. S. 457, is concerned, we must bear in mind that, on the strict question as framed and limited by counsel, it is prior to the case of Delafield v. London & Lancashire Fire Insurance Co., supra, decided by the same department, and, if there be no distinction in the two cases, it must be considered as affected by the latter. However, the Rush Case is in no way pertinent to the question here under consideration, for the reason that all the facts said to constitute the larceny were committed by one other than a conditional purchaser, and subsequent to the time the policy was issued. Furthermore, the judgment for plaintiff against the insurance company was reversed because the trial court rejected testimony tending to show that the person who took possession of the automobile was acting under an honest belief that he was entitled to possession. Therefore this case is of no assistance whatever in the determination of our problem. The authority of Overland-Reno Co. v. International Indemnity Co., 115 Kan. 137, 222 P. 122, would be more valuable if it discussed the question under consideration, but the opinion is confined to a consideration of the question framed by counsel and stated by the court as follows:

> "The defendant contends that the act of Dolson did not constitute a larceny, but that the car was procured by false pretense."

After determining that the offense was larceny, it is assumed or taken for granted that it was covered by the policy without discussion of that question.

[3] The case of Hill v. North River Ins. Co., 111 Kan. 225, 207 P. 205, 24 A. L. R. 736, can hardly be accepted by us as authority for the reason that it extends the meaning of the word "theft" far beyond its popular or common acceptation. It is there said:

> "The prevailing rule is that any scheme, whether involving false pretenses or other fraudulent trick or device, whereby an owner of property is swindled out of it with the preconceived intent of the swindler not to pay for it, is classed as larceny, and is punished accordingly."

While we recognize the rule that where the provisions of a policy are reasonably susceptible of two constructions consistent with the object of the obligation, one of them favorable to the assurer and the other favorable to the assured, that the one favorable to the assured will be adopted, we cannot extend this doctrine to the point where it does violence to the English language or fails to properly interpret the minds of the parties. The case of Illinois Automobile Insurance Exchange v. Southern Motors Sales Co., 207 Ala. 265, 92 So. 429, 24 A. L. R. 734, is not helpful, for the reason that it was an appeal from an order granting a motion for a new trial where a judgment had gone for the defendant; the trial court being of the opinion at the time it granted the motion for a new trial that the plaintiff was entitled to recover under a policy containing the words here in question, where the purchaser executed notes representing a part of the purchase price secured by a certain amount of timber which he claimed to own, but which he did not own. The Supreme Court determined that the purchaser did not consummate a theft of the car, and reversed the order granting the motion for a new trial. If the case can be considered helpful, it must be taken as denying the doctrine laid down in Hill v. North River Insurance Co., supra, to the effect that any false pretense or fraudulent trick or device is classed as larceny and constitutes a theft under the policy. We are of the opinion that the demurrer should have been sustained.

Judgment reversed.

I concur: WORKS, P. J.

STEPHENS, Justice pro tem. (dissenting). The following opinion having been prepared by me, and my associates disagreeing therewith and having agreed upon and filed the main opinion, with which I cannot agree, I file this as my dissenting opinion in the case.

The defendant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The lower court overruled the demurrer, giving defendant ten days to answer. No answer having been filed within the given time, judgment was entered in the sum prayed for, and defendant appeals on the judgment roll.

Appellant states, and respondent agrees thereto, that the only question involved is, "Does the policy insuring against theft, robbery and pilferage insure against a larceny committed by means of trick and device?"

As shown by the allegations of the complaint, an automobile was obtained from plaintiff's assignor by trick and device, in that one Spainhower pretended to purchase the car through a lease contract, which provided that the title should remain in plaintiff's assignor until a full compliance with its terms was had, and delivered a check as and for the initial payment, stating that he had money in the bank and that the check would be paid upon presentation. Payment thereon was never made, for the reason that Spainhower at no time had an account with the drawee bank. The automobile has never been returned, and Spainhower immediately disappeared. As the judgment was entered after demurrer sustained and no answer filed, we must consider the whole transaction upon Spainhower's part as fraudulent and as a scheme to trick plaintiff's assignor into delivering the car to him so that he could make way with it. The agreement of counsel as to the sole point presented for decision also requires us to accept the facts as constituting a taking by trick and device.

The controversy, reduced to its simplest terms, is: Plaintiff claims that a taking by trick and device is a "theft," while defendant claims that it is not. Appellant contends that the word "theft" does not contemplate a loss through trick and device.

Bouvier says:

> "Theft is a popular term for larceny. It is a wider term than larceny and includes other forms of wrongful deprivation of property of another."
>
> "'Theft' is defined as a proper term for larceny, and is used by Blackstone as synonymous with the latter word and as descriptive of one and the same offense. Hence it is held that the word 'theft' describes a crime and is synonymous with larceny." People v. Donohue, 84 N. Y. 438.

The turning point in all cases of this nature is whether or not there was an intention on behalf of the owner of property to presently part with the title as well as the possession of the property. 25 C. J. 657, and cases cited. In the instant case the title was specifically retained by plaintiff's assignor. This rule in reference to larceny prevails alike in England and the United States. In the case of People v. Shaughnessy, 110 Cal. 602, 43 P. 3, the court says:

> "In The Queen v. Russett, L. R. 2 Q. B. Div. 312, decided in 1892, Coleridge, C. J., said: 'If the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud, this is larceny.'"

To the same effect are People v. Smallman, 55 Cal. 185, and People v. Rae, 66 Cal. 423, 6 P. 1, 56 Am. Rep. 102, the latter a leading case in which the principle is exhaustively treated, both in the main and dissenting opinions. The principle contended for here is affirmed in both. We quote from the main opinion:

> "Where, by means of fraud, conspiracy, or artifice, possession of the property is obtained with felonious intent, and the title still remains in the owner, larceny is established. While the crime is false pretenses, if the title, as well as the possession, is absolutely parted with."

This language is quoted with approval in People v. Delbos, 146 Cal. 737, 81 P. 131. See, also, People v. Johnson, 91 Cal. 271, 27 P. 663; In re Clark, 34 Cal. App. 440, 167 P. 1143; Matter of Moss, 120 Cal. 695, 53 P. 357; People v. Rial, 23 Cal. App. 713, 139 P. 661, and People v. Edwards, 72 Cal. App. 102, 236 P. 944.

Appellant relies upon Delafield v. London, etc., Ins. Co., 177 App. Div. 477, 164 N. Y. S. 221 (a case essentially the same as the instant one), in which his contention is squarely upheld; but after an extensive research there has been found no other authority holding to the principle therein enunciated. The case cited does not discuss the points presented and cites no authority in support of the conclusion therein reached. In Hill v. North River Ins. Co., 111 Kan. 225, 207 P. 205, 24 A. L. R. 736, a case where an automobile was stolen by trick and device, the insurance policy seems to have been about the same as in the instant case, insuring against "theft, robbery, or pilferage." The opinion reviews the authorities and holds the taking to be "theft," as the term is used in the policy. Commenting upon the Delafield Case, the court says:

> "It seems that this New York case may have had several features to distinguish it from the one before us; but whether it had or not, it does not * * * shake our conviction that the case at bar was correctly decided."

In Illinois Automobile Ins. Exchange v. Southern Motors Sales Co., 207 Ala. 265, 92 So. 429, 24 A. L. R. 734, the expression "theft, robbery, or pilferage" is analyzed in the light of the authorites, and "theft" is held to cover larceny by trick and device. The court there said:

> "The decision in Delafield v. London, etc. [177 App. Div. 477, 164 N. Y. S. 221], * * * is not acceptable authority. The court there seems not to have taken any account of the rule of construction to which we have referred."

Hartford Fire Ins. Co. v. Wimbish, 12 Ga. App. 712, 78 S. E. 265, analyzes the terms "theft, robbery, and pilferage" fully, and comes to the same conclusion reached in the two last above cited cases. The same may be said of Stuht v. Maryland Motor Car Ins. Co., 90 Wash. 576, 156 P. 557.

Buxton v. Industrial Indemnity Co., 47 Cal. App. 583, 589, 191 P. 84, deals with the words "steal" and "theft" in an insurance policy, and holds that "theft" covers a case where there is a felonious intent to make way with an automobile at the time a purchaser on a conditional sales contract acquired possession of it. And so in Rush v. Boston Ins. Co., 88 Misc. Rep. 48, 150 N. Y. S. 457, it was held, under an automobile insurance policy using the same terms as those in the policy considered in the instant case—theft, robbery, or pilferage—that the claimant "could not recover unless he had been deprived of [the automobile] feloniously * * * and that proof of taking by trick and device would be sufficient to allow an inference of intent."

In Overland-Reno Co. v. International Indemnity Co., 115 Kan. 137, 222 P. 122, the court was considering the exact point before us here, and said:

> "The defendant contends that the act of Dolson did not constitute a larceny, but that the car was procured by false pretense. We adhere to the doctrine in Motor Co. v. Insurance Co., 111 Kan. 225, 207 P. 205, 24 A. L. R. 736, and Overland-Reno Co. v. Indemnity Co., 111 Kan. 668, 208 P. 548. In the former it was said: 'The prevailing rule is that any scheme, whether involving false pretenses or other fraudulent trick or device whereby an owner of property is swindled out of it with the preconceived intent of the swindler not to pay for it, is classed as larceny.'"

This subject is fully treated in notes to 14 A. L. R. p. 215; 19 A. L. R. p. 171, and 24 A. L. R. p. 740.

Blashfield in his "Cyclopedia of Automobile Law," vol. 3, § 81, treats the law on this subject as follows:

> "It has been held, in one jurisdiction, that the word 'theft,' as used in such a policy, does not include all forms of larceny recognized by law, and does not cover larceny by trick and device, that is theft that involves as an essential element, the deception of the insured resulting in the surrender of the possession of the insured property but not in parting with title. Delafield v. London & Lancashire Fire Ins. Co., 177 App. Div. 477, 164 N. Y. S. 221. But, in other jurisdictions, under the rule that where the provisions of a policy of indemnity are reasonably susceptible of two constructions consistent with the object of the obligation in question, one favorable to the insured and the other favorable to the insurer [see Faris v. American Nat. Ass'n, 44 Cal. App. 55, 185 P. 1035], that one will be adopted that is favorable to the insured, it is held that the words 'theft,' 'robbery,' or 'pilferage,' in an automobile policy, will include larceny in any and every form not expressly excluded by other provisions of the policy, and that the term may therefore include securing the possession of a chattel, not the title thereto or a special property thereunder, by or with the consent of the owner, through a fraudulent trick or device, then intending to steal the chattel, or the act of a swindler, who deprives the insured of the possession of an automobile, the insurer retaining title to it, by means of a preconceived plan which involves impersonation, misrepresentation, and fraud. Under this rule, any scheme, whether involving false pretenses or other fraudulent trick or device, whereby an owner of an automobile is swindled out of it, with the preconceived intent of the swindler not to pay for it, is larceny within such a policy. * * *"

It may be debatable whether or not, under the agreed point at issue, as mentioned in the briefs of both parties, attention should be given to and comment made in this opinion upon possible questions that may have importance in the case. However, two points will be briefly noticed.

A reading of the complaint will show that the spurious contract for the sale of the automobile was entered into, and the check for the first payment delivered, prior to the issuance of the policy of insurance, also that the delivery of the automobile under the contract was subsequent to the issuance of the policy. This state of facts does not change the effectiveness of the policy. While the whole plan to steal the automobile was in course at the effective date of the insurance policy, the theft had not been accomplished. It was only accomplished when the possession was actually obtained by the thief. To argue otherwise would be to say that an insurance policy would not be applicable to a case where prior to the date thereof a person had secured duplicate keys to the insured car for the purpose of stealing it, but had only used them successfully after the date of the policy.

The other point which possibly may properly be considered here is as to whether the policy, having been issued to the owner and the contract holder, who turned out to be a thief, as to their respective interests, affects the contract as to the owner. Logically this cannot be. It has been held in O'Neill v. Queen Ins. Co., 230 Mass. 269, 119 N. E. 678, that a policy insuring an automobile against theft, taken out by one who has no insurable interest, is void as to him. The statement that a person who steals an automobile, as in the instant case, has acquired no insurable or other interest therein is incontrovertible, and needs no citation of authority to support it. A person has no insurable interest in a thing if his assumed or asserted right therein arises under a contract which is void or unenforceable in good morals or at law or in equity. Hessen v. Iowa Automobile Mut. Ins. Co., 195 Iowa, 141, 190 N. W. 150, 30 A. L. R. 657. The further statement that, the policy having been procured by the owner in good faith, it cannot be invalidated by the felonious act of the thief, is axiomatically sound. The point is decided in Neal v. Liverpool, etc., Ins. Co., 178 App. Div. 730, 165 N. Y. S. 204, a case dealing with a theft by trick and device on a conditional sales contract:

> "The plaintiff sold the motorcycle by a conditional bill of sale to Arthur. The verdict is for the amount due and unpaid to plaintiff for the purchase price. The proof tends to show that Arthur, one of the insured, himself stole the motorcycle, and the question is whether the plaintiff, the other insured, may recover for its interest in the motorcycle. I am of the opinion that the policy covers the plaintiff's loss. It in effect insured each interest separately, namely, that of the plaintiff, the conditional vendor, and of Arthur, the conditional vendee, and by its express terms covers theft by any person other than such as are expressly excepted by the terms of the policy. As to the plaintiff's interest, Arthur is not within this exception."

The judgment should be affirmed.

91 Cal. App. 150

PEOPLE v. POZZI. (Cr. 1005.) *

District Court of Appeal, Third District, California. April 19, 1928.

Hearing Denied by Supreme Court June 18, 1928.

1. Indictment and information 🔑130—Information in three counts charging maintenance of liquor nuisance held not demurrable because charging three distinct offenses not relating to same transaction (Pen. Code, §§ 950, 951, 952; Volstead Act, tit. 2 [27 USCA § 4, et seq.]).

Information charging in three separate counts that defendant willfully and unlawfully maintained on three separate dates place in city where intoxicating liquor, to wit, whisky and jackass brandy, was kept and sold and bartered, which liquor was fit for beverage purposes, in violation of Volstead Act, tit. 2, § 21 (27 USCA § 33), *held* not demurrable under Pen. Code, §§ 950, 951, and 952, providing requisites of information as charging three separate and distinct offenses not relating to same act or transaction.

2. Indictment and information 🔑128—Information charging in three separate counts maintenance of place where intoxicating liquor was sold, held proper under statute (Volstead Act, tit. 2, § 21 [27 USCA § 33]; Pen. Code, § 954).

Information charging in separate counts that defendant maintained on three separate dates place where intoxicating liquor was kept, bartered, and sold, in violation of Volstead Act, tit. 2, § 21 (27 USCA § 33), providing that place where liquor is sold was common nuisance, *held* proper under Pen. Code, § 954, providing two or more different offenses of same class may be charged in same information.

3. Indictment and information 🔑130—Information charging maintenance of common nuisance on three different dates held to charge three separate offenses (Volstead Act, tit. 2, § 21 [27 USCA § 33]).

Information in separate counts charging maintenance of place where intoxicating liquor was kept, bartered, and sold on three different dates under Volstead Act, tit. 2, § 21 (27 USCA § 33), making such maintenance nuisance, *held* to charge three separate offenses.

4. Intoxicating liquors 🔑224—That proof showed sales of liquor were made on separate dates did not authorize inference that sales were continuous, constituting but one offense (Volstead Act, tit. 2, § 21 [27 USCA § 33]).

Where information charged sale of liquor on three separate dates constituting place, thereby constituting place where liquor was sold a common nuisance under Volstead Act, tit. 2, § 21 (27 USCA § 33), *held* that it could not be inferred from proof of sale on several days named in information that sales were continuous so that different sales constituted but one offense.

5. Intoxicating liquors 🔑143—Statute providing for notice to one maintaining public nuisance held inapplicable to common nuisance under Volstead Act (Volstead Act, tit. 2, § 21 [27 USCA § 33]; Pen. Code, § 373a).

Pen. Code, § 373a, providing that one who, after reasonable notice, refuses to remove public nuisance, is guilty of misdemeanor, *held* inapplicable to common nuisance prohibited by Volstead Act, tit. 2, § 21 (27 USCA § 33).

6. Criminal law 🔑371(10)—In prosecution for maintenance of liquor nuisance, evidence of subsequent sales held admissible to show intent (Volstead Act, tit. 2, § 21 [27 USCA § 33]).

In prosecution for maintaining liquor nuisance under Volstead Act, tit. 2, § 21 (27 USCA § 33), admission of evidence of sales of intoxicating liquor at place named in information subsequent to several occasions upon which offenses were alleged to have been committed *held* proper as tending to show intent with which crime was committed.

7. Criminal law 🔑369(1)—Generally evidence of crime other than that for which defendant is on trial is inadmissible.

General rule is that evidence of commission of certain crime by defendant other than crime for which he is on trial is inadmissible.

8. Criminal law 🔑371(10)—Evidence of sales two and three months prior to first offense of maintaining liquor nuisance, charged to show intent, held not too remote (Volstead Act, tit. 2, § 21 [27 USCA § 33]).

In prosecution for maintaining common nuisance under Volstead Act, tit. 2, § 21 (27 USCA § 33), admission of evidence of sales of liquor three and two months prior to date upon which it was alleged defendant committed first offense charged in information *held* admissible to show intent and not too remote; question of remoteness being one of weight for jury.

9. Intoxicating liquors 🔑236(9)—Evidence held to sustain conviction for maintaining common nuisance in violation of Volstead Act (Volstead Act, tit. 2, § 21 [27 USCA § 33]).

In prosecution for maintaining common nuisance under Volstead Act, tit. 2, § 21 (27 USCA § 33), evidence *held* sufficient to sustain conviction.

10. Criminal law 🔑829(1)—Refusal of requested instructions, covered by instructions given, held not error.

Refusal of instructions requested, which were covered by instructions given, *held* not erroneous.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Privato Pozzi was convicted of maintaining a nuisance, and he appeals. Affirmed.

Hearing denied by Supreme Court: PRESTON, J., voting for a hearing.

Lewis D. Mooney, of Ft. Bragg, and A. L. Wessels, of Ukiah, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★ Hearing denied by Supreme Court.

HART, J. [1] The defendant, by information filed in the superior court in and for the county of Mendocino, was charged in three different counts of maintaining a common nuisance on three different designated occasions, in that, as the information charges, he willfully and unlawfully did, on the 1st day of April, 1927 (first count), on the 3d day of May, 1927 (second count), and on the 21st day of May, 1927 (third count), maintain "a place, in the city of Ft. Bragg, Mendocino county, state of California, where intoxicating liquor, to wit, whisky and jackass brandy, was kept, sold, and bartered, which said whisky and jackass brandy was then and there fit for beverage purposes, in violation of title 2 of the Volstead Act" (27 USCA § 4 et seq.), contrary, etc. The information is based on section 21 of title 2 of said act (27 USCA § 33), which provides that:

> "Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both," etc.

The information, as a whole, was demurred to on the general ground, also upon the ground that it "does not conform to the requirements of section 950, 951, and 952 of the Penal Code," and on a number of other special grounds, to wit, uncertainty, ambiguity, and indefiniteness in certain specified particulars. Each count of the information was separately demurred to on like grounds.

The demurrer was overruled. The jury, by whom the questions of fact were tried, found the accused guilty on each count of the information. The defendant made a motion in arrest of judgment, and also moved for a new trial. Both motions were disallowed, and the court pronounced judgment upon the accused as follows: Upon the first count, a fine of $1,000, with the alternative, upon default in the payment of said fine, or any part thereof, of imprisonment in the county jail one day for each $2 of the fine not paid, not exceeding one year; upon the second count, a fine of $500, or, upon default in the payment of said fine, the like imprisonment to the one preceding; and, upon the third count, "imprisonment in the county jail for the term of six months"—said "sentences to run consecutively."

The defendant appeals from the judgment and the order denying him a new trial.

The grounds urged for a reversal, generally stated, are: (1) That the information, without authority of law, charges three separate and distinct offenses not relating to the "same act, transaction, or event, but each relating to separate and distinct act, transaction, or event"; (2) that the court erred to the prejudice of the substantial rights of the accused in certain of its rulings upon the evidence; (3) that there is not in the evidence sufficient support to the verdict; (4) that error was committed by the trial court in its refusal to allow and submit to the jury certain instructions proposed by the accused.

1. The demurrer was properly overruled. The information states the offense charged in each count "in ordinary and concise language," and "in such manner as to enable a person of common understanding to know what is intended." Pen. Code, §§ 950, 951, and 952.

[2] The joinder of the three separate offenses in the information under as many different counts was legally proper. Pen. Code, § 954. Said section authorizes the charging in an indictment, information or a complaint of "two or more different offenses connected together in their commission, or different statements of the same offense, or *two or more different offenses of the same class of crimes or offenses, under separate counts.*" The offenses charged in the information here under the three separate counts are "of the same class of crimes or offenses." In fact, as is obvious, the three counts charge precisely the same offense, committed, however, at different times. The cases cited by counsel for defendant in support of his position that the joinder in an indictment or information under separate counts of two or more different offenses not relating to the "same act, transaction, or event" is not authorized by law, and therefore involves prejudicial error, were decided before section 954 was amended so as to permit the joinder in the accusatory pleading of "two or more different offenses of the same class of crimes or offenses." Hence those cases have no application.

[3, 4] But it is further contended that the alleged offenses charged in the information constituted but one offense; that, in other words, the crime of maintaining a common nuisance cannot be segregated into two or more offenses and so charged under different counts in an indictment or information as the commission of separate and independent offenses, where, as here, the several acts constituting the alleged nuisance have been committed between intervals of time of several days or two or three weeks only from each other, but that a single charge only may be alleged, all the acts committed on the three several occasions being merely evidentiary or proof of the commission of the single offense. We are not impressed with this contention. It will be noted that the language of section 21, tit. 2, of the Volstead Act, under which the defendant in this case was proceeded against, is that any house, place, or any of the other structures therein mentioned, "where intoxicating liquor is manufactured, sold, kept, or bartered, in violation of this title, and all intoxicating liquor and property kept and used

in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor." It is clear that under that provision, where any one of several things or acts is done at such building, structure, etc., the place where such act is done or committed ipso facto and instantly becomes a common nuisance, and any person, not exempt by express provision of the statute from the penalties thereof, who maintains such nuisance, is guilty of a misdemeanor. If, in other words, intoxicating liquor is manufactured at any such place, or if such liquor is sold or bartered at any such place, or if it be kept at any place, then in either case the place at which such act is committed is by the statute itself stamped as a common nuisance, and the party so maintaining such nuisance is guilty of a misdemeanor. If a person on one certain day of each month were to engage in manufacturing intoxicating liquor, no one would say that every such time he had so manufactured such liquor for two, three, or four months, would not constitute as many different and distinct offenses of maintaining the common nuisance defined by the federal act. As to the crime of maintaining a common nuisance for the selling of such liquor, let it be supposed that a person owned or had legal possession of a place located near a park where public festivals or other outdoor amusements were held once every week—on every Sunday, for instance—and that at such place he engaged in selling intoxicating liquor on each of such days only, would it be reasonable to say that he would not, under the federal statute, be guilty of maintaining a common nuisance on each and every one of such days? We can conceive of no reasonable ground for a negative answer to the question thus propounded. But, as has been shown, the Volstead Act (27 USCA) unqualifiedly declares that any place where intoxicating liquor is sold is a common nuisance and that any person who maintains that nuisance—that is, who sells such liquor at such place—is guilt of a misdemeanor. The act does not prescribe a specific period or length of time of the unlawful possession of intoxicating liquor or during which it shall be sold shall be necessary to constitute a nuisance. It has been said that "the offense may be committed in one day as well as in two or more." McFadden, Prohibition, § 428, p. 389; Feigin v. U. S. (C. C. A. 9th Cir.) 279 F. 107. Of course, the evidence, direct and circumstantial, must be such as to show that such liquor was unlawfully sold, kept, or bartered on the premises on the particular day in question. It must be shown that surrounding the case are special circumstances which might themselves be sufficient to establish the habitual character of the offense, or the intent or purpose with which the liquor was kept by the accused. Marshallo v. U. S. (C. C. A. 2d Cir) 298 F. 74. Manifestly, it cannot be held, as a matter of law, that the fact of the sale of liquor on each particular day of several, in the absence of proof of other sales in the interval of time elapsing between the several sales charged under the different counts, warrants the conclusion or an inference that the accused did not discontinue the unlawful business during such intervals of time. The fact of the sales made on each of the days in question might afford an inference that the sales were continuous—that is, in this case, that they were more or less made every day from and including the 1st day of April to and including the 21st day of May—but, in the absence of proof to that effect, it cannot, from the mere proof of sales on the several days named in the information, be so inferred as a matter of law.

[5] Counsel for the defendant appear to assume that section 373a of the Penal Code has application here. That section provides:

> "Every person who maintains, permits, or allows a public nuisance to exist upon his or her property or premises, and every person occupying or leasing the property or premises of another who maintains, permits or allows a public nuisance to exist thereon, *after reasonable notice in writing from a health officer or district attorney to remove, discontinue or abate the same has been served upon such person*, is guilty of a misdemeanor, and shall be punished accordingly."

The first answer to the proposition is that the prosecution of the accused in this case is under the Volstead Act, which contains no provision, as does the Code section, requiring notice to be given to the offending party to discontinue the nuisance. Secondly, it is to our minds obvious that the provision of said section requiring such notice to be given to a party guilty of maintaining a public or common nuisance has no application whatever to a case of the character of the one at bar. It is readily perceivable how such a provision may properly apply to a case where a legitimate business may, by the manner in which it is conducted and maintained, become a menace to the health and comfort of a considerable portion of the public, and so become under the law a public or common nuisance. Such nuisances may be abated by recourse to appropriate civil remedies afforded by the law, and the Legislature may, as it has done, for good and sufficient reasons, denounce the act of maintaining such nuisance as a public offense, and provide, as in effect it has, that if, after notice by the authorities to discontinue the same, the person maintaining such nuisance, fails or omits to discontinue it or remove the cause thereof, will be prosecuted and punished for such dereliction. His omission to abate the nuisance is in reality wherein he offends the law. But it is inconceivable that such a notice should be required to be given a party maintaining a nuisance per se, or which is of and in itself criminal. Every element of the offense of maintaining a common nuisance under the federal statute upon which this prosecution is founded involves a criminal act. The keeping by a person of intoxicating liquor at any of the places mentioned in the statute is itself an act which subjects him to the penalties of a misdemeanor, as likewise does the sale thereof. The possession of intoxicating liquor and the sale thereof by one not included within the excepted class are separate and distinct offenses, and a person keeping and selling the same may be prosecuted for either separately; yet both offenses are essentially elements or ingredients of the crime of maintaining a common nuisance under the Volstead Act. It would indeed be an unique anomaly in the administration of criminal law to require notice to be given to an habitual transgressor of public law to cease his criminal activities before he could be proceeded against in a criminal action to punish him for his offenses against society.

[6, 7] 2. It is contended that error was committed by the trial court in permitting evidence of sales of intoxicating liquor at the place named in the information subsequent to the several occasions upon which the accusatory pleading alleges that the several offenses charged were committed.

It is a well-settled general rule that evidence of the commission of a certain crime by the defendant other than the crime for which he is on trial is inadmissible. There are, however, exceptions to that rule, and we think the case here comes within such exceptions. These exceptions rest on various reasons, dependent upon or according to the nature of the case and the circumstances attending or surrounding the act of committing the crime charged. Apt and illuminating illustrations of the application of the exception under different circumstances are to be found in the following cases: People v. Craig, 111 Cal. 460, 44 P. 186; People v. Koller, 142 Cal. 621, 76 P. 500; People v. Harben, 5 Cal. App. 29, 91 P. 398; People v. Zimmerman, 11 Cal. App. 115, 104 P. 590; People v. Weir, 30 Cal. App. 766, 159 P. 442; People v. Ferdinand, 194 Cal. 555, 563, 229 P. 341. The general theory upon which evidence of the commission of other crimes cognate in nature to the one for which the accused is on trial is received is that the legal relation of the two crimes is such that the proof of the commission of the "other crime" tends directly to show the intent or the purpose or the motive with which the crime for which the defendant is on trial was committed. So, in the present case, the theory of the legal propriety of permitting evidence of similar crimes to those charged in the information committed by the accused prior and subsequent to the commission of those charged is (the unlawful possession of the liquor by the defendant having been shown) that the commission of such prior or subsequent acts tends to show that the defendant had conceived and contrived a system for the illicit traffic in prohibited alcoholic liquors and hence to show the wrongful intent with which or the like purpose for the accomplishment of which he kept or possessed intoxicating liquor at the place where it is charged that he was selling the same to such of the public as might desire thus to be accommodated.

[8] The claim that the allowance of proof of the sale by the defendant of intoxicating liquor in the months of January and February, 1927 (three and two months prior to the 1st day of April, 1927, on which day it is alleged, as seen, that the defendant committed the first of the offenses charged in the information), is too remote from the date of the alleged commission of said first offense or the other offenses to be relevant or material or competent cannot be sustained. That evidence was admissible on the same theory as that upon which evidence of subsequent sales was receivable. The question of the remoteness, in point of time, of the several occasions from each other, is one of weight, which it was for the jury to determine.

What has been said above answers the proposition advanced by defendant that evidence of sales charged under one particular count of the information would naturally but wrongfully be considered by the jury in passing upon and determining whether the charges in the other counts were sufficiently proved. The jury would have the right to consider the fact of sales on each of the dates on which the several offenses are respectively charged to have been committed as evidence of the intent or purpose with which the liquor was kept by the accused on each of such dates. In other words, and by way of illustration, evidence of sales of liquor on the 1st of April would be proper to be considered by the jury in determining the intent or purpose of the accused in having possession of intoxicating liquor at the place named on the 3d and 21st of May. The rule is well stated in People v. King, 23 Cal. App. 259, 262, 137 P. 1076, 1077, as follows:

> "Such evidence is admissible as an exception to the general rule upon the theory that, if it be shown that a defendant has been repeatedly guilty of similar offenses, it may be reasonably and logically inferred that the act charged against him in the information was accomplished with a felonious intent"—citing Underhill on Criminal Evidence (2d Ed.) §§ 87, 89, and certain California, as well as cases from other jurisdictions.

[9] 3. The evidence sufficiently supports the verdict as to the three counts of the information. Briefly summarizing the evidence addressed to the proof of the offense charged in each count of the information is all that is conceived to be necessary. First, it should be stated that the defendant owned and conducted the Pacific Hotel at the town of Ft. Bragg, in Mendocino county. This was the place at

which the alleged offenses were committed. One Louis P. Remegie, who was the manager of a private detective agency in San Francisco, was employed by the district attorney of Mendocino county early in the year 1927 to investigate supposed "bootlegging" activities in Ft. Bragg. He testified he first met defendant at his hotel in February, 1927; that he then represented to defendant that he was a drummer, and as such was selling "pants presses."

He testified (count 1): Was at defendant's hotel on April 1, 1927, about 7 p. m., accompanied by a man named Northern; the latter took witness into a back room, which was the kitchen; they purchased two drinks of whisky, for each of which they paid 25 cents, or 50 cents for the two; they also purchased one pint of liquor and paid $2.50 therefor; defendant served the liquor to witness and Northern and received the money; they bought and paid defendant for four drinks that day; at the time spoken of there were several other men in the kitchen; some of these men then present appeared to be under the influence of liquor; witness took with him the pint bottle of whisky sold to him by defendant.

Witness Northern: Worked in the mill of the Caspar Lumber Company, in Mendocino county near Ft. Bragg; worked for that company from the 1st day of February until the 16th of April, 1927; during that time went to Ft. Bragg "twice or three times a week"; always saw defendant, usually at the Pacific Hotel in Ft. Bragg; during that period of time he purchased from defendant at the Pacific Hotel about eight drinks of intoxicating liquor; made those purchases at different times from the 1st of February to the 16th of April, 1927; paid defendant for those drinks 25 cents a drink, the defendant always personally serving the drinks to witness; saw other persons during the time mentioned buy drinks from defendant fifteen or twenty times; had seen on several different occasions during the period of time above stated persons under the influence of liquor at defendant's place; witness stated that during the period of time referred to by him he was in the employ of the sheriff of Mendocino county, being paid by the sheriff for his services $100 per month.

Cross-examination: Purchased for the first time a drink of whisky from defendant on the 1st of February; saw intoxicated persons at the hotel "twice or three times, one of those times being the 1st of April; one man witness knew was intoxicated on said date; knew it from the way the man walked, talked, and acted; the man talked loud; saw him obtain from defendant three drinks there on the 1st of April; the time of day witness was in the kitchen of the Pacific Hotel on April 1st was about 7:45 p. m.

Witness Young, detective, employed by the district attorney of Mendocino county to investigate conditions as to traffic in intoxicating liquor in Ft. Bragg, was in said place in January, 1927, and on the afternoon of the 27th day of said month bought from defendant, "in a room behind the kitchen in the Pacific Hotel," about eight drinks of whisky and a bottle of whisky "which I took away with me"; witness on that day paid the defendant the money for the drinks which were personally served and delivered to witness by defendant in said room of the hotel, the latter accepting and receiving from witness the money therefor; on the evening of January 31, 1927, witness purchased two drinks from defendant at the same place, the latter personally serving the liquor and receiving the money therefor from witness; witness was first taken to the Pacific Hotel by one Curley Flaherty, who introduced witness to defendant; on the second visit of witness to the hotel (January 31), he was accompanied by one Jim Brown, a deputy sheriff.

Second count. Remegie, the detective, testified that on the 3d day of May, 1927, about 4 p. m., he and one George Saleskie, one of his "operators," or another detective in his employ, went to the Pacific Hotel and in the "back room" above mentioned, he purchased seven drinks and a pint bottle of moonshine whisky from defendant, and paid the latter 25 cents each for the drinks and $2.50 for the pint bottle; that there were several other persons whose names the witness did not know and also defendant's two brothers in the room at the time; that some of the "other men" appeared to be under the influence of intoxicating liquor. Said Saleskie testified that he was with Remegie at the Pacific Hotel on the 3d of May, and that he was there also on the 4th of May; it was about 4:30 p. m. that he and Remegie were at said hotel on the 3d of May; he, Remegie, and the defendant at that time "shook dice" for the drinks; they played ten games; Remegie lost four, witness three, and defendant three; they were then "taken to the back" or the "kitchen"; they "had ten drinks coming; witness paid defendant for three drinks of 'moonshine whisky'" and Remegie for four, "and we took the balance out in cigars"; "around 11:55 of the same evening (3d of May) Mr. Remegie purchased six glasses, one round of drinks, and a pint bottle"; Remegie paid the money for the six drinks and the pint bottle to the defendant; all this occurred in the kitchen of the Pacific Hotel.

Cross-examination: A man named Cavanaugh suggested playing the dice game for drinks; defendant's two brothers were present, but they did not participate in the game; Cavanaugh was the man who appeared to be intoxicated.

Count 3. Remegie testified: On the evening of May 21, 1927, he, with Sheriff Byrnes of Mendocino county, a deputy sheriff and the district attorney, Gibson, drove to Ft. Bragg and parked their car near the Pacific Hotel;

this was about 8:40 p. m. of the 21st; the officers then searched Remegie to be able to say that he then had no liquor on his person; no liquor was then found on his person; Sheriff Byrnes thereupon marked a $5 bill in a way that it could be identified and delivered it to the witness who, with the bill in his possession, immediately thereafter went to the defendant's hotel; on entering the hotel, Remegie first saw defendant's two brothers; he asked them where defendant was, and one or the other replied, "He is back behind"; witness conversed for a moment with the brothers, when defendant "came out, and went behind the bar and placed some money in the cash register."

Continuing, Remegie testified: "I then shook hands with him (defendant) and went in the back of the kitchen where I purchased four drinks of whisky at 25 cents a drink, and also purchased one pint of whisky for two dollars and a half from Privato Pozzi (defendant) with this marked $5 bill"; witness then left the premises and returned to where the car in which he and the officers mentioned rode to Ft. Bragg and "handed the bottle over to Mr. Gibson (district attorney); Sheriff Byrnes and his deputy, McDaniels, examined the bottle; about an hour later, witness, with Sheriff Byrnes and District Attorney Gibson, returned to the Pacific Hotel, "raided" the place, and, among other articles, found the marked $5 bill in defendant's cash register; they searched all the rooms of the hotel, in fact, they searched the premises inside and out; the search was first begun by Deputy Sheriff McDaniels and another deputy, known as "Frenchie" Brochner; witness did not know what, if anything, in the way of incriminatory evidence was found at that time; later a more thorough search was made by the sheriff, district attorney, and witness; they found no liquor about the premises; they found a 5-gallon vinegar keg; it had a strong odor of whisky; witness was certain that it "smelled of moonshine whisky."

C. H. McDaniels, deputy sheriff, assisted in the search. He corroborated Remegie as to parking near the hotel, the search of Remegie's person as told by the latter, and that no liquor was found on the person of Remegie; was instructed before proceeding with the search of defendant's place to guard the cash register; found in the cash register the marked $5 bill spoken of above; saw and smelled the "5 or 10 gallon" keg mentioned by Remegie; it "smelled of whisky"; also found a "funnel and syphon, which both smelled of moonshine whisky, and there was a trough to the side of the dining room in the rear of the place with quite a number of pint bottles there which recently had been washed out, and one bottle contained a half teaspoonful of moonshine whisky; there was also one case of empty pints there; probably those cases hold about 24 dozen; it was a large case; * * * they were regular pint flasks like these," referring to some bottles taken from defendant's place on the night of the search and introduced in evidence; 5 glasses were found on and taken from a table in the kitchen, which "smelled of" whisky; a bottle was found in the trough "to the side of the dining room."

Sheriff Byrnes corroborated the testimony of McDaniels in all vital respects as to the circumstances of the search of defendant's premises on the evening of the 21st of May, 1927, and the results of such search, and also as to the marking of the $5 bill from which the payment for a bottle of liquor was made and the finding of said bill in the cash register of the defendant at the time the search was in progress. The details of the sheriff's testimony need not be recited herein. It should be stated, though, that the sheriff further testified that, on either the 20th or the 21st of September, 1927, he stepped into the defendant's hotel and into the kitchen and there saw several men playing dice at a table, on which also, at the same time, there were standing several whisky glasses and a pint bottle "partly full of whisky." The glasses had just been used, as they "smelled of" whisky. The defendant and his two brothers and three other men were standing by the table. This was near the hour of 7 a. m. The defendant himself did not testify at the trial, nor did he introduce any testimony in his defense. His brother, Palmiro Pozzi, was called to the stand by the people and testified that the defendant was the owner of and conducted the hotel at all the times mentioned herein. No one can reasonably doubt from a perusal of the testimony as above given that each offense stated in the information is amply supported.

[10] 4. The complaint that the court erred in refusing to submit to the jury certain instructions proposed by the defendant is not well founded. The principles declared in the instructions so proposed and by the court rejected, where pertinent to the case, were clearly set forth in the court's charge. The principal criticism in this particular is that the court failed to instruct the jury that the purpose for which testimony of sales of liquor by defendant prior and subsequent to the 1st of April, the 3d of May, and the 21st day of May, 1927, was not to prove other different and distinct offenses from those charged in the information, but merely to show the purpose for which defendant kept intoxicating liquor in his possession and the character of the place; that refusal by the court to adopt into its charge an instruction proposed by defendant covering that proposition emphasized the prejudice resulting to the rights of the accused by the court's omission and refusal thus to instruct the jury. We are somewhat at a loss to understand why such complaint is made, since within the charge delivered by the court to the jury is embraced a

clear statement of the rule referred to. Indeed, upon all the principles pertinent to the case as made, the instructions given to the jury were full, clear, and correct, and afforded sufficient enlightenment upon the law of the case to enable the jury to perform their important duties intelligently and justly. The case was fairly tried, and the verdict as to each count of the information appears to be just.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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91 Cal. App. 121

O'NEILL v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 3491.)

District Court of Appeal, Third District, California. April 18, 1928.

1. **Master and servant 🔑417(7)—Findings that employee unreasonably refused medical treatment, not shown to have been tendered to him, held unwarranted (Workmen's Compensation Act, § 16).**

On insurance carrier's application for limitation of liability under Workmen's Compensation Act (St. 1917, p. 831), Industrial Accident Commission's findings that employee unreasonably refused medical treatment tendered him by applicant and that his failure to submit to hospitalization and medical care and his insistence on chiropractic treatments were unreasonable *held* not supported by record, in absence of showing that any tender of medical or surgical treatment was ever made to him by employer or insurance carrier, or that he would not submit readily to examination provided for in section 16.

2. **Master and servant 🔑405(6)—Evidence held to show injured employee entitled to compensation for services of nurse and physician called by his relatives (Workmen's Compensation Act).**

On insurance carrier's application for limitation of liability under Workmen's Compensation Act (St. 1917, p. 831), evidence *held* to show that injured employee was entitled to compensation for services performed by nurse and medical treatment given him by physician called by his relatives on employer's failure to furnish proper medical treatment for two weeks after injury.

3. **Master and servant 🔑393½, 404—Insurer's failure to tender medical treatment until after employee secured treatment did not bar such tender and proof of proper treatment on application to limit liability (Workmen's Compensation Act, §§ 9, 16; § 11, subd. E).**

Employer's neglect to furnish injured employee proper medical treatment for two weeks after injury, and insurance carrier's failure to tender proper treatment until after employee secured treatment for himself, *held* not to bar insurance carrier's right to make such tender and present to Industrial Accident Commission proof of what treatment should be given on application for limitation of liability, in view of Workmen's Compensation Act, §§ 9, 16, and section 11, subd. E (St. 1917, pp. 836, 842, 845).

Application by the Fidelity & Casualty Company of New York, for limitation of its liability on any claim for compensation under the Workmen's Compensation Law, by Gilman F. O'Neill, employee, against Charles F. Gildersleeve, employer. To review an order of the Industrial Accident Commission limiting applicant's liability, the employee brings certiorari. Award set aside in part and cause remanded.

Wallace Rutherford, of Napa, for petitioner.

G. C. Faulkner and R. P. Wisecarver, both of San Francisco, for respondents.

PLUMMER, J. Upon the application of the petitioner this court heretofore issued its order directing the respondent Industrial Accident Commission to certify to this court a transcript of the record of the proceedings had before said body wherein it was found that the petitioner was not entitled to be reimbursed for his reasonable medical and hospital treatment after the 23d day of September, 1927, and further found that on said date the petitioner unreasonably refused medical treatment tendered him by the insurance carrier, and further finding that the failure of the employee to submit to hospitalization and medical care in San Francisco and his insistence upon the chiropractic treatments are unreasonable, and the insurance carrier is not liable for such portion of disability or death caused, continued, or aggravated by such refusal of medical treatment, and thereupon limiting the award to the petitioner herein to the sum of $16.67 a week beginning as of September 11, 1927, as disability indemnity.

The record shows: That the petitioner, prior to and on the 3d day of September, 1927, was a laborer employed by Charles H. Gildersleeve, of Mendocino county, near the town of Covelo. That on said date the petitioner was riding with a truck driver on a truck going after a load of lumber, when by some means the truck was overturned and the petitioner received an injury to the twelfth dorsal vertebra, resulting in paralysis from the hips down. That at the time of his employment petitioner was receiving a wage of $27 per week. Immediately after the injury Charles H. Gildersleeve employed one Dr. Osborne to care for the petitioner. Dr. Osborne gave the petitioner a narcotic to allay the pain, treated the cuts and abrasions on the petitioner's body, assuring him that he was suffering from shock and would soon recover the use of his limbs. Dr. Osborne did nothing further and went away on a camping trip without making any arrangements for the care of the petitioner, the petitioner being left in a bunkhouse at the camp belonging to the employer. On September 4, 1927, Dr. Hogshead, of Covelo, was called into the case. He treated the cuts and abrasions for the period of two weeks, caused the petitioner to be removed to a private hospital operated by a practical nurse, but other than taking care of the immediate daily necessities of the petitioner and caring for the cuts and abrasions, did nothing toward caring for petitioner's spine or to relieve the petitioner from the paralysis above mentioned. This continued for a period of about two weeks, during which period of time the employer visited petitioner occasionally, knew of petitioner's physical condition, but neither the employer nor the insurance carrier made any arrangements for nor performed any act toward taking proper care of the petitioner or giving him proper medical or surgical treatment. After the lapse of about two weeks the relatives of the petitioner, learning of his condition, caused him to be moved to the city of Napa and placed in the home of a trained nurse, where three doctors were called in to the case. It appears that Dr. Virginia Enos, a chiropractor, was employed to reduce the dislocation of the twelfth dorsal vertebra. Dr. Welty was first called to look after the physical condition of the petitioner and subsequently Dr. Dawson.

The record shows that Dr. Welty, after being called upon the case, made some arrangements, not disclosed, to remove the petitioner to a hospital and engaged the services of an ambulance to be used in such removal. This appears, however, to have been done without any consultation with the petitioner or any of his relatives who had brought him from Covelo to Napa. Dr. Welty then retired from the case. Subsequent to this it appears that Dr. Dawson prescribed for the petitioner, and Dr. Enos gave chiropractic treatments to reduce the spinal dislocation. The record also sets forth that X-ray photographs were taken of the petitioner's spine while at Napa, and the record contains photostatic copies thereof. On or about the 23d day of September, 1927, an agent of the insurance carrier, in conference with the mother, father, and sister of the petitioner, at Napa, tendered the treatment of a specialist in San Francisco, the name of the specialist not being given. This tender was not accepted. The record, however, shows that the offer was not made personally to the petitioner, and that the petitioner did not hear anything about such offer. On the 3d day of October, 1927, the insurance carrier filed with the Industrial Accident Commission an application for adjustment of the claim of the petitioner that might be made under the Workmen's Compensation Law of the state (St. 1917, p. 831), setting forth the injury suffered by the petitioner, the fact of his still being disabled, and seeking to have its liability limited on the theory that the employee had unreasonably refused to submit to medical or surgical treatment, etc. Upon this hearing it is contended that the findings of the commission are not supported by the testimony, that the conclusion based thereon is therefore erroneous, and that the matter should be returned to the commission for further hearing. That the petitioner in this case was neglected by the employer for the period of at least two weeks after his injury is a conceded fact, and that during said period of time, no proper medical treatment, and in fact no proper treatment of any kind was given the petitioner, and that under such circumstances, as the act provides, the petitioner was justified in obtaining treatment.

[1] The findings and conclusion of the commission appear to be based upon the following letter written by Dr. Harbaugh, M. D., in response to a memorandum previously submitted by the commission:

"San Francisco, Oct. 26, 1927.

"Attention, Mr. Campbell.
"Subject: Gilman F. O'Neill—Claim No. 23616.

"In answer to your memorandum of October 25th, I would state that in my opinion the man's refusal to accept the treatment tendered by the insurance company is unreasonable and should be so interpreted by the Industrial Accident Commission. I do not believe that at this time we should enter into any discussion as to whether he has been benefited by the treatment of the chiropractor. I believe it would be unfair to the insurance carrier and, in my opinion, against the best interests of the man to make any other decision in the case.

"R. W. Harbaugh, M. D.,
"RWH:LD Asst. Medical Director."

While this letter was proper to be considered by the commission, the conclusion therein stated, or the opinion expressed, or the direction as to how the act of the petitioner should be interpreted, must be read in the light of the record. Dr. Harbaugh's letter, to the effect that "the man's refusal to accept the treatment tendered by the insurance company is unreasonable," can only be given weight by assuming that the insurance carrier had tendered some treatment. As we have stated, however, the record shows without any question that the insurance carrier never tendered the petitioner any treatment whatever. An agent of the insurance carrier did have a conversation with certain relatives of the petitioner, but information concerning the same was never conveyed to the petitioner. The record shows that the petitioner was over 23 years of age, and nothing appears in the record showing why he might not have been individually consulted or the tender made to him personally. At the time of the hearing in October, 1927, and the taking of testimony in relation to the application filed by the insurance carrier, the record discloses that the referee had some conversation with the injured man which, however, constituted no tender on the part of the insurance carrier, as will appear by the following excerpts which we set forth:

> (By the Referee): "Mr. O'Neill, what is your attitude in the event that the insurance company should tender you the names of three physicians, approved by the commission, or recognized by the commission, as qualified to treat your particular injury, for your spine, and a neurologist, who are capable of treatment of the spinal cord or nerve injury, and hospitalization in a hospital in San Francisco, under the belief that by such hospitalization and under the care of those capable of treatment of your condition, would you reject such treatment?"

To which the injured man replied:

> "Well, now, you mean the way I feel like now, the way I am progressing, at the present state of progress I would not.
>
> "Q. What you mean is that you would rather continue in your present treatments so long as you are actually improving? A. Yes.
>
> "Q. My question is assuming the tender of three, three under the law, if you are dissatisfied with the physician treating you, you are entitled to ask for three, so assuming all these qualifications to be established, would you or would you not accept? A. Well, it is a hard question to answer, because if I continue to improve, I don't see why I should have a change.
>
> "Referee: The first question is as to whether he would or would not accept. Now there is this weakness in the situation, that a tender according to the terms I have outlined has not been made."

After some conversation as to the fact that no tender had actually been made by the employer or the insurance company, the referee asked the injured man the following question:

> "Am I to understand, Mr. O'Neill, from your statement, that your refusal of medical treatment of the type indicated is subject to revision in the event that diagnostic examination would indicate that your improvement was not an actuality as far as the spinal condition is concerned—your feeling on the matter to the contrary notwithstanding? Have I made myself clear? A. Well I will repeat. You mean if this tender, this offer, which I refused, if it wasn't proved to me that the condition hadn't improved?
>
> "Q. If it were shown. What is your answer? A. Well, now, if it could be shown it had not been improved, why certainly the treatment would be changed in that case."

Here follows some testimony in relation to the X-ray pictures which it was stipulated should be submitted to Dr. Harbaugh for examination and report thereon.

Under the state of the record in this case, as shown by the foregoing, the question of whether the petitioner was or was not receiving proper treatment, or whether chiropractic treatment for the employee's injury to the spine was or was not proper under the circumstances or such as should have been given, or whether a surgical operation should have been performed becomes wholly immaterial in view of the fact that no tender of medical or surgical treatment was ever made by either the employer or insurance carrier, for the injured man to refuse, and therefore the opinion of Dr. Harbaugh, "That the man's refusal to accept the treatment tendered by the insurance company is unreasonable," has absolutely nothing upon which to rest.

[2] No contention is made by the petitioner that he is entitled to recover his costs and expenses incurred for the services rendered by the chiropractor, but that he is entitled to compensation for the services performed by his nurse and also for the medical treatment given him by Dr. Dawson, which contention, under the facts disclosed by the record, should have been sustained. As we have stated, the record showing that nothing else was tendered, we cannot escape the conclusion that there is nothing in the record to support the last sentence of finding No. 3 of the commission, which reads:

> "On said date [referring to September 23, 1927], the employee unreasonably refused medical treatment tendered him by the insurance company, and is not entitled to be reimbursed for any expenses thereafter incurred."

Nor is there any testimony in the record to support finding No. 4 of the commission, which reads:

> "The failure of the employee to submit to hospitalization and medical care in San Francisco and his insistence upon chiropractic treatments is unreasonable, and the insurance carrier is not liable for such portion of disability or death caused, continued or aggravated by such refusal of medical treatment."

We may also add that there is nothing in the record which indicates that the employee would not submit readily to an examination as provided for in section 16 of the Compensation Act for the purpose of ascertaining whether his condition is being improved, or what other or different treatment should be given, if any, or whether any surgical operations should be performed.

[3] It was contended upon the argument that by reason of neglect on the part of the employer and the failure to make tender by the insurance carrier of proper medical treatment until after the petitioner had secured treatment for himself, that the right of the insurance carrier now to make such tender and present to the commission proof of what treatment should be given, is barred. We do not, however, think that this is a correct interpretation of the Compensation Act. The intent and purpose of the section to which we have referred, and also of section 9 and subdivision E of section 11 would lead to the conclusion that at any time during the continuance of the injury, the insurance carrier might tender additional medical services, ask for an examination, and present to the commission the facts, if such facts exist, showing the necessity for a change in treatment or what treatment should have been given,

which, if refused, would relieve the insurance carrier from liability under subdivision E of section 11 if so found by the commission.

It follows from what we have said that the findings of the commission and the award based thereon must be set aside, save and except as to the allowance to the petitioner of $16.17 weekly benefits and $25 attorney's fee, and the cause remanded for further proceeding, and it is so ordered.

We concur: HART, Acting P. J.; JAMISON, Justice pro tem.

204 Cal. 125

CONAWAY et al. v. YOLO WATER & POWER CO. (Sac. 3822.) ★

Supreme Court of California. April 30, 1928.

Rehearing Denied May 28, 1928.

1. Eminent domain ⇨69—Corporation, though possessing power of eminent domain, must make adequate compensation for taking or damaging private property (Const. art. 1, § 14).

Corporation, though possessing power of eminent domain, cannot, under Const. art. 1, § 14, take or damage private property without first making adequate compensation.

2. Eminent domain ⇨79, 80—Right to compensation for taking or damaging private property under power of eminent domain may be waived by owner (Const. art. 1, § 14).

Right to require adequate compensation for taking of private property under power of eminent domain, pursuant to Const. art. 1, § 14, may be waived by owner, and, in order to prevent obstruction of progress, he must be held to diligence in asserting his right as against a corporation administering public use.

3. Eminent domain ⇨79, 80—Landowners permitting irrigation company for five years to divert water from another watershed for use in irrigation cannot thereafter enjoin diversion.

Where landowners permitted irrigation company for a period of five years to divert water from one watershed and distribute it to other landowners within watershed in which their land was situated without objection thereto, they cannot thereafter enjoin such diversion; there being an intervention of public use attaching at inception of right of diversion and existing until it had wrought its purpose requiring a system of drainage.

In Bank.

Appeal from Superior Court, of Yolo County; W. A. Anderson, Judge.

Action by B. F. Conaway and others against the Yolo Water & Power Company and others. Judgment for defendants, and plaintiffs appeal. Affirmed and remanded.

Rehearing denied: CURTIS, J., voting for a rehearing.

Elmer W. Armfield and Arthur B. Eddy, both of Woodland, Frank Freeman, of Willows, and John S. Partridge, of San Francisco, for appellants.

Arthur C. Huston, Charles W. Thomas, Hurst & Hurst, and Grant & Bailey, all of Woodland, and Downey, Downey & Seymour, Downey, Brand, Seymour & Dunn and White, Miller, Needham & Harber, all of Sacramento, for respondents.

PRESTON, J. This is an action by plaintiffs, owners of certain lands lying at the mouth of a water course situated in Yolo county, known as Willow slough, seeking to enjoin defendant Yolo Water & Power Company, a corporation, and about eighty other defendants, from unlawfully draining into said water course, after use for irrigation, water theretofore conducted into this watershed from Cache creek.

Appellants have presented a brief in three volumes, which with the appendix covers some 2,500 pages. We mention it because it is admirably arranged, indexed, and cross-indexed, and is worthy of imitation; besides, it contains a full presentation of the law respecting the many issues raised. But in our view the appeal is determined adversely to them by a rule of public policy in the nature of an estoppel specially pleaded by the defendants.

We are also of the view that the complaint

★Rehearing denied.

on its face shows this want of equity: The issues made by it were not enlarged to any extent by the answer or otherwise. Defendants answered with general and certain special defenses, but asked no affirmative relief of any kind. It is proper, therefore, to consider the legal effect of the material allegations of the complaint, which, as summarized by appellants, are, in substance, as follows:

That the defendant Yolo Water & Power Company is now, and at all times herein mentioned has been, a public utility corporation organized and existing under and by virtue of the laws of the state of California, and engaged, in the diversion, sale, and distribution of water for irrigation purposes. That plaintiffs at all times herein mentioned have been and now are the owners and in possession, and entitled to the possession of, all those certain lands situate, lying, and being in the county of Yolo, state of California (describing them). That said lands are agricultural lands, and have produced and now are producing valuable crops of rice, beans, and grain and other crops, and are adapted to the production thereof.

That Willow slough is now, and from time immemorial has been, an unnavigable natural water course, having its source in or near the foothills in the southwesterly part of Yolo county, state of California, and flowing thence in a general easterly direction, and through and terminating on plaintiffs' said lands. That plaintiffs' said lands are flat and comparatively level, and are all lower than the lands hereinafter mentioned and being cultivated, worked, operated, and irrigated, as herein alleged by the defendants. That a portion of plaintiffs' said lands are lower than the natural banks of said Willow slough.

That Willow slough, where it crosses the westerly boundary line of the plaintiffs' said lands, has a deep bed and high banks. That easterly of said westerly boundary the bed of the said Willow slough becomes more shallow and the banks thereof lower, until the said bed and banks lose their identity, and the water flowing therein spreads out over the adjoining lands of the plaintiffs hereinabove described.

That in the late spring and during the summer and fall months, and during the time crops are customarily planted, grown, and harvested on plaintiffs' said lands, the natural water falling or rising within the watershed of said Willow slough and its tributaries, which finds its way ultimately into the said Willow slough, is small in quantity, and does not at such seasons fill the banks of said Willow slough, or spread out over plaintiffs' said lands where the bed and banks of said Willow slough lose their identity, as aforesaid, or elsewhere.

That, but for the acts of all of the defendants hereinafter mentioned and complained of, all of the said lands of the plaintiffs at all times herein mentioned have been and now are susceptible of being cultivated and cropped and valuable crops of rice, beans, and grain have been planted and produced thereon. That the natural water falling or rising within the watershed of said Willow slough and its tributaries and which finds its way ultimately into said Willow slough and flows therein, has not prevented, nor does not now prevent, plaintiffs from successfully cultivating their said lands, planting the same to crops, and harvesting profitable crops therefrom during the late spring, summer, and fall months of the year.

That defendant Yolo Water & Power Company within five years last past has been and now is diverting large quantities of water flowing in Cache creek, a natural water course, and by means of a system of canals, laterals, and ditches has carried and now is carrying the said water so diverted into the watershed of the said Willow slough and its tributaries, and has sold or otherwise disposed of, and now is selling or otherwise disposing of, the said waters so diverted in large quantities to all of the other defendants for the purpose of flooding vast areas of land devoted to the cultivation of rice and other agricultural and horticultural products, and for irrigation generally. That the defendant Yolo Water & Power Company at all times knew and now well knows that the said waters so diverted and now being diverted by it from said Cache creek, as aforesaid, found and now find their way into the said Willow slough, and flowed and now flow therein and through the same to the plaintiffs' said lands, spreading thereover, and causing the injury to the plaintiffs' said lands and crops hereinafter complained of.

That the watershed of which said Cache creek is the natural drainage channel is foreign to and entirely different and removed from the watershed of which the said Willow slough and its tributaries are the natural drainage channels.

That all of the defendants within five years last past have been and now are engaged in agriculture and have purchased or otherwise obtained, and now are buying or otherwise obtaining, water from the said Yolo Water & Power Company, or from other sources, which they have used and are now using for irrigation upon lands which they either own, lease, operate, or manage, all of which are situated within the watershed of the said Willow slough and its tributaries and at a higher elevation than the plaintiffs' said lands. That the said water, which has been and is now being so used by all of the said defendants for irrigation, has not been, and is not now being absorbed by the soil, but has been and now is by all of the said defendants being drained into said Willow slough and its tributaries by means of waterways, natural depressions, artificial channels, and ditches, and by seepage.

That the quantity of said irrigation water so drained by all of said defendants from said lands either owned, leased, operated, or managed by them has been and now is very great, and has been and now is unnaturally flowing in the said Willow slough, and has found and now finds its way by force of gravity and by seepage to the said lands of the plaintiffs and spreads thereover, and during the said cropping seasons the said water so spreading over and flooding the plaintiffs' said lands saturates the ground and prevents the cultivation thereof and makes it impossible to gather such crops as might be grown thereon, and destroys the same. That the said water which has been and now is being so used has and now does become charged and saturated with alkali and other saline substances and materials present and existing in and on the lands being irrigated by the defendants, as aforesaid. That the said alkali and other saline substances and materials have been and now are being carried in solution in said irrigation water drained into said Willow slough and its tributaries, as aforesaid, to and upon the plaintiffs' said lands, thereby rendering the said lands unfit for agricultural purposes, and destroying the fertility and productivity thereof.

That all of said defendants either owning, leasing, operating or managing lands within the watershed of said Willow slough and its tributaries are now, by means of water developed by wells and pumps on their said lands and water purchased or otherwise obtained from the said defendant Yolo Water & Power Company, irrigating their said lands, as aforesaid. That the said defendants are continuing to develop water by means of said wells and pumps, and are continuing to purchase or otherwise obtain water from the said Yolo Water & Power Company and to use such water to irrigate said lands, as aforesaid, and all of said defendants continue and threaten and intend and will, unless restrained by an order of this court, drain all of the said water used for the irrigation of said lands, as aforesaid, into the said Willow slough and its tributaries, and discharge the same unnaturally, through said slough and its tributaries onto and over plaintiffs' said lands, and will by such acts continue to prevent the cultivation of plaintiffs' said lands and the operation thereof, and render impossible the harvesting of crops growing and standing thereon, and will destroy the same, and will injure the freehold, all to the great and irreparable damage and injury of these plaintiffs.

That the continuation by defendants of all of the acts herein complained of by plaintiffs will ripen into and constitute a right adverse to plaintiffs. That plaintiffs have no plain, speedy nor adequate remedy at law.

That, unless defendants are restrained, as plaintiffs hereinafter pray that they be, defendants will continue to drain said waters into said Willow slough and its tributaries and onto plaintiffs' said lands. That it will be impossible for plaintiffs to ascertain or determine the amount of damage or injury sustained by them by reason of each of the acts of defendants herein complained of. That, if defendants continue to do the acts and things herein complained of by plaintiffs, plaintiffs will be compelled to bring many actions against each of said defendants for the commission by each of them of the torts hereinabove complained of. That the bringing of such actions would be continuous, and would result in a multiplicity of actions.

[1, 2] It is perfectly true that not even a corporation possessing the power of eminent domain may under the Constitution (article 1, § 14) take or damage private property without first making adequate compensation. But this right may be waived by the owner, and, in order to prevent the obstruction of progress, he must be held to diligence in asserting his right as against a concern administering such a public use. If he allows his property right to be invaded and either taken or damaged for a public use, and the public right has so far intervened as to justify the belief that objection has been waived, then in law the property right so taken or damaged is to that extent dedicated to the public use.

"Where the complainant has stood by while the development was made for public use, and has suffered it to proceed at large expense to successful operation, having reasonable cause to believe it would affect his own water supply, the injunction should be refused and the party left to his action for such damages as he can prove. Fresno, etc., Co. v. Southern Pacific Co., 135 Cal. 202 [67 P. 773]; Southern California R. Co. v. Slauson, 138 Cal. 342 [71 P. 352, 94 Am. St. Rep. 58])." Katz v. Walkinshaw, 141 Cal. 116, 136, 74 P. 766, 772 (64 L. R. A. 236, 99 Am. St. Rep. 35).

"So far as this company is concerned, the case comes within the rule established in Fresno, etc., Co. v. Southern Pacific Co., 135 Cal. 207, 67 P. 773, and followed in Southern C. R. Co. v. Slauson [6 Cal. Unrep. 874], 68 P. 107, and Crescent Canal Co. v. Montgomery, 143 Cal. 252, 76 P. 1032 [65 L. R. A. 940]: This rule briefly stated, is that where one whose property is taken for a public use has stood by without objection, knowing that it was so taken and applied, and has allowed the public use to be instituted and carried on at great expense, and has permitted the people benefited thereby to adapt themselves to the new conditions and avail themselves of the conveniences and advantages thereby afforded, he cannot thereafter maintain an action to enjoin the continuance of such public use or to recover possession of the property so taken, but will be relegated to an action for damages." Barton v. Riverside Water Co., 155 Cal. 509, 515, 101 P. 790, 792 (23 L. R. A. [N. S.] 331).

"It is plain to us that the facts of this case bring it squarely within the cases which hold that, where property is taken for a public use by a public service corporation and the owner of the property has not in an appropriate way objected to its being so taken, but has, by silence or quiescence, permitted the public use to be inaugurated and carried on for some period of time, he has thus waived or lost his right to proceed against such use of his property by ejectment or abatement. In such case, if he has suffered damage to his property by reason of such taking and use of his property, he is, of course, entitled to be compensated in damages. The Constitution expressly gives him this right (Const. art. 1, sec. 14), and such right in the plaintiff here is not denied by the respondent. But, in the case stated, the owner is restricted to the relief which is obtainable in an action for damages. The theory of the rule as above stated is that after property is taken for a public use by a public service corporation and has been devoted to that purpose, the public thereby and thereupon acquires rights in such public use which cannot be divested or destroyed at the behest of a private individual upon the ground or for the reason that his property will suffer damage or deteriorate in value, or even become valueless for the purposes to which it is peculiarly adapted and for which it has always been used, by reason of the act depriving him of such of his property rights as were necessary for the installation and prosecution of the public use." Reed v. Oakdale Irr. Dist., 46 Cal. App. 139, 142, 188 P. 832, 833.

"The plaintiff's predecessor in interest stood by while one million three hundred thousand dollars of the defendant's money was being expended in the erection of its dam, tunnel, and plant. He even assisted in some ways in the work by furnishing commodities which the defendant needed in the prosecution of its enterprise, and he sold part of his land to the defendant for a dam site. All this the plaintiff knew when he purchased the land, which he did while the defendant was in the midst of its work of building the dam and preparing to divert the waters of the river. It is impossible that he did not know that the purpose of this enterprise was for a public use; that the defendant was about to inaugurate a public service, and that the waters of the river when diverted would be used for the purposes to which it was afterwards put. In view of these facts, and of the fact that he waited four years after the public use began, and until thousands of people had become dependent upon it for light and power and necessary water for irrigation, his right to an injunction is barred by this intervening of the public interest." Holmes v. Snow Mountain W. & P. Co., 36 Cal. App. 394, 397, 172 P. 178, 180.

"In substance, the doctrine established by these decisions, tho not, strictly speaking, the doctrine of prescription, at least amounts to this: That where a person has suffered property belonging to him and under his control to be taken and devoted to a public use by one engaged in administering such use, and the matter has gone on so far that the beneficiaries thereof rely on its continuance and adjust their affairs accordingly, such owner having knowledge thereof and making no objection or protest, this conduct will be regarded by the courts as a dedication by such owner of the property to the particular public use, and he cannot thereafter interrupt nor prevent the same, his only remedy being to seek compensation for the property he has thus allowed to be taken, or as indicated in the Newport Case." Miller & Lux v. Enterprise Canal, etc., Co., 169 Cal. 415, 429, 147 P. 567, 573.

See, also, Gurnsey v. Northern Cal. Power Co., 160 Cal. 699, 711, 117 P. 906, 36 L. R. A. (N. S.) 185.

From the allegations of the complaint, it appears that defendant utility, in exercising a public use, has for approximately five years next prior to the filing of the complaint diverted water from one watershed into another, and distributed it to the other defendants, and the drainage from use has for all said period reached plaintiffs' lands through said slough, to their injury; that plaintiffs have made no objection thereto in any way, but have silently borne the injuries; that defendants intend to continue this use of the said waters to the continued detriment of plaintiffs. But no allegation is found charging defendants or any of them with an intention to enlarge the diversion or distribution of said water nor to increase the capacity of the diverting or transportation works. Nor is there any allegation of an intention on the part of any defendant to increase the amount of water to be used thereafter on any of his said lands, nor is there any allegation that an increase in the amount of drainage water is threatened. In other words, so far as alleged, there is no threat to increase the existing burden or drainage to plaintiffs' lands.

[3] Defendants pleaded in their answer the intervention of a public use, and called for an application of the above rule of estoppel. We can find no reason why it does not, as found by the court, fully operate in this case. Suit for this identical relief could have been instituted any day for approximately five years next preceding its actual commencement. Learned counsel for appellants contend that this rule is inapplicable because the public use in these waters spends its force on delivery to the rice grower at his premises, and that the drainage from the grower's lands is of no concern to the utility that furnishes the water, and that the private land proprietors are without power to invoke the rule. We cannot in this case subscribe to such limitation upon the doctrine.

The institution of this suit against both the utility and the water users argues strongly against the position, for, if this limitation be sound, then the utility is really not a necessary party to this litigation. If the rice growers purchased the water at the Cache creek diversion point, the public interest would cease there under this doctrine. Then, too, if the utility were to buy a drainage right from the plaintiffs it would be an ultra vires act under such doctrine. If the utility were to institute an action in eminent domain to acquire from plaintiffs a right of way or easement for the drainage of these waters, the action would fail for want of proof of exercise of a public use for such purpose. Irrigation without drainage is impossible. Rice growing without a large amount of drainage is impossible. The utility might not be able to sell water in this locality or even to exist without first providing a drainage system for its users. Drainage in some localities might be as important as the supply of water itself.

We think that under the allegations of this complaint the public use attaches at the inception of the right of diversion and exists until it has wrought its purpose, and in this case at least that point is not reached until a system of drainage is provided. The private owner, who stands by inactive, hesitating, or half-consenting until the burden to his land becomes a part of the public use, must content himself with legal as distinguished from equitable remedies for relief.

If we resort to the record, we find that the court, upon ample evidence, finds that the plaintiffs did not protest or object, but remained silent for more than five years; that they reconstructed and improved or manipulated the channel of this slough probably to better handle this drainage water, and for a season or two actually used this drainage in the growing of rice upon their own lands. The court also found that the use made of this drainage by the upper users on the watershed of the slough was such that plaintiffs could not at any time mentioned herein have been ignorant of the damage, if any, that these drainage waters have done or would or will do. The court further found that there was no other feasible method of drainage except through said slough and through plaintiffs' lands, and, so relying on this fact, the utility spent large sums of money to equip itself to divert and distribute these waters, and, too, that the rice growers spent large sums in preparing their lands for rice culture and to receive and apply their quota of these waters. Defendant utility has therefore acquired with the same effect as if it had sued in eminent domain the right or easement to burden the lands of plaintiffs to the extent alleged in the complaint and found by the court. The answers also make the following defenses: Laches, statute of limitations, irrevocable license, and some others. We deem it unnecessary and inadvisable, however, to discuss these additional special defenses, but we are not intending to have it inferred that we think they are all without merit.

So much of the judgment as denies plaintiffs an injunction is affirmed, but the cause is remanded, with permission to them to pursue herein, if so advised, any other remedy not inconsistent with the holding here announced.

We concur: WASTE, C. J.; LANGDON, J.; RICHARDS, J.; TYLER, J., pro tem.; SHENK, J.

204 Cal. 119

In re REED et al.

SHOOTER v. PEAIRS.

(L. A. 8937.)

Supreme Court of California. April 24, 1928.

1. Records ⚷9(10)—Superior court had authority to order reference in proceeding to have titles registered and certified (St. 1915, p. 1932; Code Civ. Proc. § 638 et seq., particularly § 639).

In proceeding to have titles to certain lots or parcels of land registered and certified under provisions of St. 1915, p. 1932, where trial court ordered reference in proceeding and adopted report of referee over objection, *held* that proceeding for registration of land titles, being in nature of special proceeding over which superior court was given jurisdiction under provisions of act, and also in nature of an equitable proceeding analogous to an action to quiet title, it came within contemplation of Code Civ. Proc. § 638 et seq., which provided for references and trials by referee, particularly section 639, providing court may direct reference when necessary in special proceeding.

2. Records ⚷9(12)—Objection to order of reference in proceeding to register title held without merit on appeal, where not made at time of making order (St. 1915, p. 1932).

In proceeding under St. 1915, p. 1932, to have title to land registered and certified, where court ordered reference to which no objection was made either before trial court at time of hearing, or at time of entry of decree *held* that objection was without merit on appeal to the Supreme Court.

3. Escrow ⚷12—Deed delivered to grantor's agent to deliver to grantee after adjudication of title in grantor conveyed title as of date of final delivery.

Where deed was delivered to agent of grantor with instruction to complete delivery thereof by handing same to grantee after entry of decree adjudging grantor owner of property *held* in nature of escrow, becoming effective at time of final delivery of conveyance to grantee, so that title of grantor as of date of final delivery vested in grantee.

4. Records ⚷9(10)—Two judgments concluding respondent from asserting title held sufficient basis for judgment for petitioner in proceeding to register title, irrespective of strength or weakness of petitioner's title (St. 1915, p. 1932).

In proceeding to register land under St. 1915, p. 1932, where petitioner introduced in evidence two judgments concluding respondent from asserting any title in herself to premises, *held* that, whatever strength or weakness of original title of petitioner was, it was sufficient to form foundation of judgment and decree of court against one who had been finally concluded by foregoing judgments from asserting any right.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

In Bank.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

In the matter of the application of Herbert O. Reed, Frederick S. Shooter, and others to have titles to certain lots or parcels of land registered and certified, opposed by Helen T. Peairs. From a decree of registration as prayed for in the application, respondent appeals. Affirmed.

James W. Bell, of Los Angeles, and Earl A. Bagby, of Oakland, for appellant.

Wilson & Snow, of Los Angeles, S. Lackman, of Long Beach, and J. K. Wilson and C. E. Snow, Jr., both of Los Angeles, for respondent.

RICHARDS, J. This proceeding had its inception in an application filed in the superior court, in and for the county of Los Angeles, by one Herbert O. Reed and ten other applicants, among whom was the respondent herein, Frederick S. Shooter, to have their and each of their respective titles to certain lots or parcels of land registered and certified under the provisions of the initiative law adopted by the people of the state of California at the general election held November 3, 1914, entitled, "An act to amend an act entitled 'An act for the certification of land titles and the simplification of the transfer of real estate,' approved March 17, 1897." St. 1915, p. 1932. Due notice having been given of said application, the appellant herein Helen T. Peairs, who was alleged in the application to claim some right or interest in one of the parcels of land described in said application, appeared to contest the title of the respondent to said parcel of land and his right to the registration thereof under said act. The trial court, when the issues were thus made up and the proceeding called for trial, made an order of reference to the official referee to take evidence and report to the court. The parties appeared before the referee, and a hearing was held by him without objection, during which such testimony and evidence as the respective parties wished to present were offered, and, the matter being submitted, the referee made his report embodying such evidence, together with his conclusions thereon; whereupon a further hearing was had in the trial court, during which the appellant herein presented her objections to the report of the referee and to certain evidence which had been offered and admitted before him. She did not, however, include among these any objection to the order appointing said referee or to the hearing had before him as such. The trial court overruled the appellant's objections and adopted the report of the referee as its findings in said proceeding, and upon the conclusions of law drawn therefrom found the title to the premises in question to be in the petitioner, and it thereupon made and entered its decree of registration as prayed for in said application. It is from said decree that this appeal has been taken.

[1] The first contention which the appellant urges upon this appeal is that the trial court was in error in ordering a reference in this proceeding, for the alleged reason that there is no express authority to be found in the Initiative Act under which this proceeding was instituted for the appointment of a general referee. We are of the opinion that this objection is without merit for two main reasons, the first of which is that the proceeding for registration of land titles under the said initiative law is in the nature of a special proceeding over which the superior court has been given jurisdiction under the provisions of that law, and is also in the nature of an equitable proceeding analogous to an action to quiet title, and hence is such a proceeding as comes within the contemplation of sections 638 et seq. of the Code of Civil Procedure, which provide for references and trials by referees, and particularly section 639 thereof, which provides that:

> "When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases: * * * 4. When it is necessary for the information of the court in a special proceeding."

This subject was exhaustively considered by this court in the case of Frances Inv. Co. v. Superior Court, 189 Cal. 107, 208 P. 105, wherein it was definitely decided that a proceeding under the Torrens Land Title Act was in substance and effect an action to quiet title.

[2] The additional reason why the objection of the appellant herein to the order of reference made by the trial court is without merit is that no objection was made by the appellant to the making of said order, nor was any such objection urged by her before the trial court at the time of the hearing upon the report of the referee, nor at the time of making an entry of the decree of the trial court based thereon.

The appellant's next and main contention is that the conclusions of law and the judgment made and entered thereon, from which this appeal has been taken, is unsupported by the evidence in the case. A review of such evidence and of the rulings of the trial court made thereon becomes necessary in order to determine this contention. The title to the premises involved in this appeal was acquired by one Peter McMahon in the year 1887. He allowed the taxes assessed thereon to become delinquent through several years, as a result of which the property was sold to the state in 1902 and again in 1908. On April 26, 1910, Frederick S. Shooter, the respondent herein, redeemed said property from all previous tax sales, and thereupon received a redemption certificate in due form. It does not appear from this record by virtue of what right or interest in said premises Shooter exercised the privilege of paying said delinquent taxes or of receiving said redemption certificate. But, however, that may be, after the issuance thereof to him, and on the 28th day of June, 1910, Shooter by quitclaim deed conveyed all his right, title, and interest in the property in question to one John R. French, who shortly thereafter commenced an action in the superior court in and for the county of Los Angeles to quiet his title thereto, in which action the said Peter McMahon was made a party defendant and was personally served with process. He failed to appear or to answer, and his default was duly entered, and thereafter, and on December 8, 1910, after a hearing before said court, judgment was rendered and entered in said action in favor of said French and against said McMahon, and in which the court adjudged and decreed that said French was the owner of said property, and that the adverse claims of said McMahon and all other persons claiming or thereafter to claim said premises under him were declared to be invalid. The record discloses that just before the date of the commencement of said action said John R. French had made and signed a quitclaim deed of said property to said Frederick S. Shooter, and that he had handed said deed to one C. C. Grove, as his agent with instructions to deliver it to Mr. Shooter if and after a decree in favor of French was entered in said action.

[3] It is one of the contentions of the appellant that the said conveyance of French to Shooter, being a quitclaim deed, conveyed no other or further title to the latter than that which the grantor named therein had upon the date of the making and execution of said conveyance, and hence that whatever right or title in or to said premises was gained by the making and entry of the decree in his said action to quiet title against McMahon was in the nature of an after-acquired title, which did not pass to Shooter under the terms of said quitclaim deed. We are of the opinion, however, that the delivery of said deed to Grove, the agent of the grantor, with instructions to complete the delivery thereof by handing the same to Shooter after the entry of the said decree, was in the nature of an escrow, and that it was clearly not the intention of the grantor in said deed that the same should be operative as a present conveyance at the time of his delivery thereof in said escrow, and that, this being so, the doctrine of relation cannot be held to apply to such a conveyance, and that whatever title was intended thereby to be transferred by French to Shooter must be held to have become effective as such transfer at the time of the final delivery of said conveyance to the grantee named therein. This question seems also to be fully covered by our decision in the case of Whitney v. Sherman, 178 Cal. 435, 173 P. 931, wherein the provisions of section 1057 of the Civil Code are given application to such a case as this, and wherein it is held, in conformity with said section of the Code, that a grant in escrow upon condition takes effect upon the performance of such condition and upon its delivery by the depositary to the grantee. It follows that whatever right or title in and to said premises the plaintiff in said action to quiet title gained thereby as against the defendant McMahon and his successors in interest passed to the respondent herein upon the delivery of said quitclaim deed, and became, as against the latter, an absolute title when said judgment became final. Thereafter, and on February 7, 1912, one William J. Farrow received a quitclaim deed to said premises from said McMahon, which he recorded, and which deed forms the foundation of whatever right or title Helen T. Peairs, a subsequent grantee of said Farrow, has since asserted and now asserts to said premises. On September 14, 1921, Helen T. Peairs, as the grantee of said William J. Farrow, commenced an action in the superior court, in and for the county of Los Angeles, against Frederick S. Shooter, wherein she sought to have her title quieted and to have it declared that she was the owner in fee of said premises, and that said Shooter had no right, title, or interest therein.

This cause came on for trial in said court on January 30, 1923, and, after a full hearing thereon, the court made and entered its decree dated November 24, 1923, wherein it was declared and decreed that Helen T. Peairs "is not now and never was the owner or entitled to the possession of all or any portion of the premises involved in said action." No appeal having been taken from said judgment, it in due time became final. Upon the hearing of the instant proceeding before the referee, the records, respectively, of the two foregoing cases and of the judgments made and entered therein were offered in evidence in support of the title of said Shooter and in opposition to the claim of title of the appellant herein, and were admitted in evidence both upon said hearing and before the trial court upon the report of the referee, and apparently formed the basis of the findings and judgment of the trial court in this proceeding, to the effect that the applicant Shooter was the owner of the title in fee to said premises, and that Helen T. Peairs, the appellant herein, had no right, title, or interest therein.

[4] That these two judgments are conclusive upon the question of the ownership of the record title to said premises by the respondent Shooter, and of the total absence of any right or title of the appellant therein, we entertain no doubt. The appellant does not seem to seriously contend that said judgments are not final and conclusive in so far

as they relate to any title which she might assert in said premises or any portion thereof as the successor in interest of said McMahon. Her contention at the final analysis seems to be that, since the record is silent as to the original source of the respondent's right to redeem the premises in question from the several tax sales to the state of California, the title to said premises still remains in the state, and hence that said Shooter has shown no right to the registration to said title in favor of himself as the owner of said premises. Whatever right, if any, the state might have asserted in said premises at any time would seem to be utterly immaterial. As between the plaintiff French in the aforesaid action to quiet title and said McMahon, and hence his successors in interest, the question of the foundation of the title of said Shooter and of his right to redeem said premises from the sales thereof to the state was finally set at rest by the terms of the judgment and decree in said action, and was again determined and set at rest in the subsequent suit to quiet title to the same premises instituted by Helen T. Peairs as the successor in interest of said McMahon against the respondent herein. By virtue of these two judgments, the appellant herein was fully and finally concluded from asserting any title in herself to said premises in the instant proceeding, and whatever the strength or weakness of the original right and title of the respondent Shooter, in and to said premises, it was sufficient to form the foundation of the judgment and decree of the court in the instant proceeding as against one who had been finally concluded by the foregoing judgments from asserting any right or title in or to said premises or any portion thereof.

The motion to dismiss the present appeal might well have been granted upon the ground that the appellant was not a party aggrieved by the judgment appealed from, but we have preferred to consider and decide this cause upon its merits.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

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204 Cal. 78

SCOTT v. BECK. (L. A. 8103.)

Supreme Court of California. April 20, 1928.

1. Quieting title 🔑44(4)—Evidence of actual possession by plaintiff and her grantor prima facie established ownership, in action to quiet title.

In action to quiet title, evidence of plaintiff's actual possession of entire tract claimed, and that grantor was in possession at time of transfer, *held* sufficient prima facie to establish ownership in plaintiff.

2. Taxation 🔑615—Law applicable at time of sale for delinquent taxes follows through all proceedings dependent thereon.

Law applicable when sale of property was made to state for delinquent taxes follows through all proceedings dependent upon the sale.

3. Taxation 🔑746, 789(1)—Tax collector may convey property sold for taxes directly to purchaser, and such deed is pertinent to prove title (Pol. Code, §§ 3764, 3771, 3785b, as amended and added by St. 1913, pp. 556–558, §§ 1, 2, 4, and § 3786, subd. 5, as amended by St. 1911, p. 1103, § 2).

Tax collector, selling property for delinquent taxes under Pol. Code, §§ 3764, 3771 (as amended by St. 1913, pp. 556, 557, §§ 1, 2), section 3785b (as added by St. 1913, p. 558, § 4), and section 3786, subd. 5 (as amended by St. 1911, p. 1103, § 2), is authorized to convey property to the purchaser without the formality of making a deed to the state in the first instance, and such deed is pertinent and permissible piece of proof in support of chain of title.

4. Taxation 🔑734(7)—Tax sale held not void for failure to include property in delinquent list, where tax for previous year had been paid and properly appeared in addenda list (Pol. Code, §§ 3764, 3771, 3785b, as amended and added by St. 1913, pp. 556–558, §§ 1, 2, 4, and § 3786, subd. 5, as amended by St. 1911, p. 1103, § 2).

Tax sale, under Pol. Code, §§ 3764, 3771 (as amended by St. 1913, pp. 556, 557, §§ 1, 2), section 3785b (as added by St. 1913, p. 558, § 4), and section 3786, subd. 5 (as amended by St. 1911, p. 1103, § 2), *held* not void for failure to include description of property in delinquent list for the year of sale, where the property appeared in the addenda list attached thereto and to the notice of sale, and could not have properly appeared in delinquent list on account of payment of taxes for previous year.

5. Taxation 🔑788(5)—Tax deed is prima facie evidence of due publication and mailing of delinquent notice (Pol. Code, §§ 3764, 3771, 3785b, as amended and added by St. 1913, pp. 556–558, §§ 1, 2, 4, and § 3786, subd. 5, as amended by St. 1911, p. 1103, § 2).

Tax deed under Pol. Code, §§ 3764, 3771 (as amended by St. 1913, pp. 556, 557, §§ 1, 2), section 3785b (as added by St. 1913, p. 558, § 4), and section 3786, subd. 5 (as amended by St. 1911, p. 1103, § 2), is prima facie evidence of due publication of delinquent notice, and of fact that copy of notice as published was mailed.

6. Taxation 🔑734(7)—Failure to prove mailing of notice held not to render tax deed void, where it did not appear address of person to whom land was last assessed was known, or appeared on tax roll (Pol. Code, §§ 3764, 3771, 3785b, as amended and added by St. 1913, pp. 556–558, §§ 1, 2, 4, and § 3786, subd. 5, as amended by St. 1911, p. 1103, § 2).

Tax deed under Pol. Code, §§ 3764, 3771 (as amended by St. 1913, pp. 556, 557, §§ 1, 2), section 3785b (as added by St. 1913, p. 558, § 4), and section 3786, subd. 5 (as amended by St. 1911, p. 1103, § 2), *held* not void for failure to prove mailing of notice of delinquency to party to whom land was last assessed, where it did not appear by stipulation or otherwise that the address of such party appeared on the assessment roll or was known to tax collector, and where it was not affirmatively shown that the required notice was not mailed; the tax deed being prima facie notice of mailing.

7. Taxation ⚷693—Courts assume delayed tax sale was commenced within time required, but was continued from day to day (Pol. Code, §§ 3764, 3771, 3785b, as amended and added by St. 1913, pp. 556–558, §§ 1, 2, 4, and § 3786, subd. 5, as amended by St. 1911, p. 1103, § 2).

In absence of contrary showing, courts assume that delayed tax sale under Pol. Code, §§ 3764, 3771 (as amended by St. 1913, pp. 556, 557, §§ 1, 2), section 3785b (as added by St. 1913, p. 558, § 4), and section 3786, subd. 5 (as amended by St. 1911, p. 1103, § 2), was commenced within time required, and that sale was continued from day to day until property was sold to highest bidder.

In Bank.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action by Georgia E. Scott against S. Beck to quiet title. Judgment for plaintiff, and defendant appeals. Reversed.

Superseding opinion in 259 P. 933.

See, also, 254 P. 637.

McKenna & McKenna, Van Lee Hood, Lewis S. Riley, Catherine A. McKenna and J. Irving McKenna, all of Los Angeles, for appellant.

Andreani & Haines, John L. Bisher, Jr., Clara Shortridge Foltz, Elliott H. Barrett, and Frank E. Carleton, all of Los Angeles, U. S. Webb, Atty. Gen., Frank L. Guerena, Deputy Atty. Gen., for respondent.

Emmet H. Wilson, John F. Poole and Benjamin Kirby, all of Los Angeles, amici curiæ.

WASTE, C. J. Action to quiet title to lot 93 in tract No. 909, situate in the city of Los Angeles. The statement of the case, as here quoted, is taken from the decision of the First District Court of Appeal, Division 1, rendered prior to the order for hearing in this court, and is adopted as part of this decision:

"The complaint alleged title in the plaintiff with right to possession. The averments of the complaint were denied by defendant, who alleged title in himself through a tax deed from the state of California. Neither of the parties to the action was in actual possession of the lot, which was unimproved. Judgment was entered for the plaintiff, from which the defendant appeals on the ground that the evidence was insufficient to sustain the allegations of the complaint and the conclusion of the trial court that defendant had no title to the property.

[1] "The plaintiff, in support of her complaint, introduced in evidence a deed dated October 16, 1911, executed by Clara G. Spring et al., which in terms transferred the tract mentioned to Lizzie J. Brent, a deed from the latter and her husband to Brent Investment Company, a corporation, conveying the same property, together with a deed from the corporation to plaintiff of the lot in question, the latter transfer being dated April 3, 1913. The testimony of an officer of the corporation sufficiently shows that Lizzie J. Brent was in actual possession of the entire tract, and that the corporation likewise was in possession at the time of the transfer to the plaintiff. This evidence was sufficient prima facie to establish ownership in the plaintiff. Holthoff v. Freudenthal, 22 N. M. 377, 162 P. 173; Mitchell v. Titus, 33 Colo. 1042, 80 P. 1042; Rockey v. Vieux, 179 Cal. 681, 178 P. 712; Bond v. Aickley, 168 Cal. 161, 141 P. 1188; Kilfoil v. Warden, 46 Cal. App. 502, 189 P. 303.

"Defendant claims title as grantee under a tax deed dated August 4, 1919, executed by the tax collector of Los Angeles county. The deed recited that the lot described was duly assessed for taxation in the year 1913 to Lizzie J. Brent, and was thereafter, on the 3d day of July, 1919, duly sold to S. Beck by W. O. Welch, tax collector of the county of Los Angeles, for nonpayment of delinquent taxes which had been legally levied in the year 1913, and were a lien thereon; further stating the total amount for which the same was sold, and that all taxes levied and assessed against the property prior to the year 1919 had been paid and discharged.

* * *

"It appears from the evidence that the lot was assessed to the plaintiff in the years 1916 to 1920, inclusive, and that the taxes levied thereon after the year 1913 to and including the first installment of the year 1921 were paid by her, with the exception of the second installment of 1919, which became delinquent, and the lot was again sold to the state in 1920. Defendant redeemed the property from the latter sale, and, after the year 1920, the taxes levied thereon, with the exception of the first installment of 1921, were paid by him. The proceedings leading to the sale to defendant on July 3, 1919, were conducted under the provisions of sections 3764 and 3771 of the Political Code as amended in 1913 (Stats. 1913, pp. 556, 557). In the addenda attached to the published tax list and notice of sale appeared the name of Lizzie J. Brent, the person to whom the lot which was therein described was assessed for the delinquent taxes of 1913. The name of the plaintiff, who was the record owner in the years 1918 and 1919, and to whom the property was last assessed next before the sale in question, did not appear in the list or in the notice mentioned above. Furthermore, it was not directly shown at the trial that the tax collector complied with the provisions of section 3771 of the Political Code by mailing a copy of the list or publication to the last known post office address of the plaintiff. It is contended by the plaintiff that it was essential to the validity of the published notice that her name, as the owner and the person to whom the property was last assessed next before the sale, be inserted therein, and that the evidence was insufficient to show a compliance with the statutory requirement of notice by mailing.

"It was provided by section 3764 of the Political Code (Stats. 1913, p. 556) that on or before the 5th day of June of each year the tax collector must publish the delinquent list, which must contain, among other things, 'the names of persons and a description of the property delinquent', and that before its publication the tax collector and auditor should jointly arrange the list so as to designate in some particular manner the property contained in the list which was sold to the state five years previous under the provisions of section 3771 of the Political Code.

"It was provided by section 3771 of the Political Code (Stats. 1913, p. 557) that the property contained in the advertised list, as provided by section 3764 of the Political Code, which had not been redeemed from the previous sale to the state, be sold by the tax collector at public auction, and further that within five days after the first publication of the list the tax collector should mail a copy of the list or publication, postage prepaid thereon and registered, to the party to whom the land was last assessed next before such sale at his last known post office address. It was further provided by section 3785b of the Political Code (Stats. 1913, p. 558) that the tax collector should execute to the purchaser a deed to the property sold, this deed to contain certain recitals, those here material being as follows: That the property was duly assessed for taxation, the year assessed and the name of the person to whom assessed being stated, and was thereafter, on the date of the sale, duly sold by the tax collector to the grantee named for nonpayment of the delinquent taxes which had been legally levied in the year first mentioned, and were a lien on the property, no provision being made for a recital of the name of the owner or of the person to whom the property was last assessed next before the sale. It was also provided that no matters other than those stated in the section need be recited in the deed, which by subdivision 5 of section 3786 of the Political Code (Stats. 1911, p. 1103) was made primary evidence that 'at a proper time and place the property was sold as prescribed by law, and by the proper officer.'"

[2, 3] It must be kept in mind that we are dealing with, and speak of, the law as it was in July, 1914, when the sale of this property was made to the state for delinquent taxes of 1913. That law follows through all proceedings dependent upon that sale. Biaggi v. Ramont, 189 Cal. 675, 679, 209 P. 892. The sale in the instant case does not purport to have been made under sections 3897 and 3898 of the Political Code, which deal with the sale of delinquent property after a deed thereof has been made to the state, and a subsequent sale made to a purchaser. This sale was made under the provisions of sections 3764, 3771, and 3785b, supra, which must be construed together, and which comprise a complete plan for the sale of property for nonpayment of taxes. While the rule appears to be different if a sale is made under sections 3897 and 3898, if the sale is made to a purchaser under sections 3771 and 3785b, no provision is made for a deed to the state. The tax collector is authorized to convey the property directly to the purchaser without the formality of making a deed to the state in the first instance. Jacoby v. Wolff, 198 Cal. 667, 678, 682, 247 P. 195. His deed is a pertinent and permissible piece of proof in support of the defendant's chain of title. Jacoby v. Wolff, supra, page 684 (247 P. 195). See, also, Bernhard v. Wall, 184 Cal. 612, 623, 194 P. 1040.

[4] A description of the property in question was not included in the delinquent list for the year 1919, but did appear in the addenda list attached to the delinquent list and notice of sale. It could not properly appear in the delinquent list, for the tax for the previous year had been paid, and therefore was not delinquent. We are of the view that the publication was sufficient.

[5, 6] The respondent contends that the appellant has not established the validity of his title because he did not prove, or offer to prove, that notice was mailed to the party to whom the land was last assessed. The rule of law making the mailing of a copy of the delinquent list a jurisdictional prerequisite to the making of a valid tax deed by the tax collector has been limited by the more recent decisions of this court to cases where the last known post office address of the landowner was upon the assessment roll from the date of the delinquent assessment down to the assessment last made before the sale. Jacoby v. Wolff, supra, page 681 (247 P. 195); Kehlet v. Bergman, 162 Cal. 217, 218, 121 P. 918. It was stipulated in the court below that the real property was assessed in the name of the respondent on the 1918 tax roll, but it does not appear, by stipulation or otherwise, that the address of the respondent also appeared on the roll. The record is also silent as to whether or not the address was known to the tax collector from any other source. The only evidence on the subject of notice was a question propounded to the respondent by her own counsel as to whether or not she had ever received "any notice from" the appellant "that he had purchased the property." It does not in any way appear that the required notice was not mailed. The tax deed was prima facie evidence of the due publication of the delinquent notice and of the fact that a copy of the notice as published was mailed. Bell v. Brigance, 74 Cal. App. 322, 327, 240 P. 50. We are therefore unable to say that the deed was void for failure to mail notice. See Campbell v. Shafer, 162 Cal. 206, 213, 121 P. 737.

[7] Respondent contends that the sale to appellant was void because made more than 28 days from the time of the first publication of the notice. In the absence of a contrary showing, we may assume that the sale commenced within the time required, not less

than 21 days, and not more than 28 days, after June 5th, the date of the first publication of the notice, and that the sale was continued from day to day until July 3d, when the property was sold to the highest bidder. Bell v. Brigance, supra.

The judgment is reversed.

We concur: PRESTON, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.

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204 Cal. 136

CITTI v. BAVA. (S. F. 11363.)

Supreme Court of California. April 30, 1928.

1. Appeal and error 🔑1170(7)—In action by guest against automobile driver for personal injuries sustained in collision, admitting evidence of defendant's insurance carrier's settlement with motorist struck held reversible error (Const. art. 6, § 4½).

In action by guest against automobile driver for personal injuries sustained in collision with car driven by A., admitting evidence of defendant's insurance carrier's settlement with A., not connected with act or admission of defendant, and concerning which he had nothing to do, *held* reversible error, despite Const. art. 6, § 4½.

2. Trial 🔑127—Examination of witnesses which suggests to jury that defendant is indemnified against judgment for damages is improper and prejudicial.

Line of examination of witnesses which suggests to jury that defendant is indemnified against any judgment for damages against him is improper, and prejudicial to defendant's rights.

3. Appeal and error 🔑1053(1)—In action by guest against motorist for injuries, striking out evidence that defendant's insurance carrier made settlement with driver of car struck did not cure error in admitting evidence.

In action by guest against automobile driver for personal injury sustained in collision of defendant's car with car driven by A., striking out evidence relating to settlement of defendant's insurance carrier with A. *held* not to cure error in admitting such evidence, especially where instructions to disregard testimony stricken did not extend to that portion which referred to defendant's indemnification.

4. Appeal and error 🔑977(1)—Trial court's conclusion on motion for new trial is not conclusive on appeal (Code Civ. Proc. § 963, as amended by St. 1915, p. 209).

Under Code Civ. Proc. § 963, as amended by St. 1915, p. 209, taking away right of appeal from an order denying motion for new trial, conclusion of trial court on motion for new trial, while entitled to much consideration, is not conclusive on appeal.

In Bank.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by F. Citti against Pietro Bava for damages for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed.

Superseding opinion of District Court of Appeal, 254 P. 299.

Wm. M. Abbott, K. W. Cannon, and J. E. Reardon, all of San Francisco, and H. A. Gabriel, of San Jose, for appellant.

R. V. Bressani and D. T. Jenkins, both of San Jose, for respondent.

SHENK, J. This is an appeal by the defendant from a judgment on a verdict in favor of the plaintiff in an action for damages for personal injuries resulting from an automobile accident.

On the evening of September 26, 1922, the defendant was driving his six-passenger Haynes automobile from San Jose to San Francisco for the purpose of attending a wrestling match to take place the same evening. With him in the car as his guests were the plaintiff herein, R. Dei, who is the plaintiff in a case decided concurrently herewith, and two other men. The defendant drove his car through Cupertino, and arrived at the intersection of the highway with Fremont avenue at a point about 10 miles north of San Jose, at which intersection the defendant's car collided with a Ford car driven by one Louis Aftergut. The plaintiff and Dei were injured, and thereafter brought separate actions, based on the alleged negligence of the defendant in the operation of the car at the time of the accident. The evidence was sharply conflicting as to the speed of the defendant's car at the time. According to the plaintiff's witnesses, the defendant's car was traveling at a speed of 55 or 60 miles per hour. According to the defendant's witnesses, the speed of said car was from 15 to 25 miles per hour. The way in which the car overturned immediately after the impact indicates that the speed of the car was somewhere between the two estimates, but not necessarily at an excessive speed under the circumstances shown. Whether the defendant's car ran into the Ford or the Ford ran into the defendant's car was also involved in a conflict of the evidence. The plaintiff and Dei were seated in the rear seat of the defendant's car, and they testified that they admonished the defendant to slow down his car just before the accident. The defendant and the two other occupants of the car testified that no such admonition was given, and that there was no reason for any one to complain of the way the defendant was then driving his car. The contributory negligence of the plaintiff was pleaded, and was an issue at the trial.

[1, 2] The plaintiff called Louis Aftergut as one of his witnesses. Plaintiff's counsel, over the repeated and insistent objections of the defendant, interrogated this witness at length concerning a compromise and settlement which had been made with him by the Olds & Stoller Inter-Exchange under an insurance policy, which company plaintiff's counsel was particular to bring out was not a company in which Aftergut had a policy of insurance. The plaintiff also called as his witness one Curtaz, who, the record shows, was acting on behalf of the insurance carrier, and elicited from him the information that he was the person who negotiated the settlement with Aftergut, and that he was identified with the defense in the action.

The defendant is correct in his contention that it was error to admit evidence of the compromise and settlement. The record does not show any admission of the defendant of his liability independent of the settlement. Nor does it appear that the defendant himself made any offer of compromise to Aftergut or conducted any settlement negotiations with him. In fact, the record discloses that the defendant had never had any dealings with Aftergut, and that the settlement with the latter had been made by the insurance company. The evident purpose of counsel for the plaintiff was to prove the fact of the compromise and settlement with Aftergut by the insurance carrier of the defendant as an admission of liability on the part of the defendant and to get before the jury the fact that the defendant was indemnified by a policy of insurance. Independent of the fact of settlement, there was no endeavor to prove an admission of liability by the defendant in connection with the compromise. The evidence of the settlement, alone, not connected up with any act or admission of the defendant, and concerning which he had nothing to do, was clearly inadmissible in evidence. The error in admitting it might not in and of itself require a reversal, but, coupled with the avowed purpose and successful attempt of plaintiff's counsel to get before the jury, not only the fact of the settlement, but also that the settlement was made by the insurance carrier of the defendant, puts the case in a position where section 4½ of article 6 of the Constitution will not save the judgment. The natural tendency of a line of examination that suggests to the jury that the defendant is indemnified against any judgment for damages against him is highly prejudicial to his rights, especially in a closely balanced case where the evidence otherwise would be easily sufficient on appeal to support a verdict either for the plaintiff or for the defendant. Such attempts on the part of counsel have frequently been held to be improper and prejudicial. Roche v. Llewellyn Iron Works, 140 Cal. 563, 74 P. 147; Pierce v. Mutual Gas & Electric Co., 161 Cal. 176, 118 P. 700; Dameron v. Ansbro, 39 Cal. App. 289, 178 P. 874; Arnold v. California Portland C. Co., 41 Cal. App. 420, 183 P. 171.

From an examination of the record in this case it is impossible for us to state that the jury would not have found a different verdict had the objectionable examination not taken place and the evidence not been admitted.

[3] The court granted the motion of the defendant to strike out the testimony with reference to the settlement with Aftergut, and instructed the jury to disregard the matter so stricken out. The plaintiff insists that this action of the court had the effect of curing whatever prejudice might have theretofore existed by reason of the presence of such testimony in the record. We are satisfied that the nature of said evidence was such and the purpose of its injection into the record so apparent as not to have been effaced by the granting of the motion and the admonition of the court. Furthermore, the instruction of the court to disregard the testimony stricken out related to that portion which referred "to the settlement," and did not extend to that portion which referred to the defendant's indemnification. This fact furnishes an additional reason why it cannot be said that the objectionable evidence with reference to the insurance company had no prejudicial effect on the minds of the jurors. What the verdict would have been in the absence of this "false quantity" so introduced into the case is not possible of definite or even proximate ascertainment. See Keena v. United Railroads, 197 Cal. 148, 158, 239 P. 1061; Wright v. Broadway Department Store, 199 Cal. 562, 250 P. 572.

The defendant complains of numerous instructions given by the court. They have been examined, and are found to be free from just criticism with the exception of instruction No. 12. In this instruction it is not made sufficiently clear that, in order for the plaintiff to recover, he must be free from contributory negligence on his part.

[4] Finally, the plaintiff contends that, as a motion for a new trial was denied, the court must have concluded that the defendant suffered no prejudice by reason of the reception of the objectionable evidence, and that the decision of the trial court is controlling in the premises, citing Lafargue v. United Railroads Co., 183 Cal. 720, 192 P. 538. The case relied on did not go to the length contended for by the plaintiff. That case merely decided that, under the facts there presented, the conclusion of the trial court on the motion for a new trial should not be disturbed by the appellate tribunal. That such was the fact is accentuated by the dissenting opinion, a portion of which was quoted with approval in the case of Keena v. United Railroads, supra, at page 159 (239 P. 1061). While it is true that the conclusion of the trial court on the motion for a new trial is entitled to much consideration, its decision thereon is not con-

clusive on appeal. Indeed, by the amendment of section 963 of the Code of Civil Procedure in 1915 (St. 1915, p. 209) taking away the right of appeal from an order denying a motion for a new trial, the right to have a review of such order on an appeal from the judgment was preserved. Wilcox v. Hardisty, 177 Cal. 752, 171 P. 947; 2 Cal. Jur. p. 828.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; LANGDON, J.

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204 Cal. 697

R. DEI, Plaintiff and Respondent, v. Pietro BAVA, Defendant and Appellant.
(S. F. 11364.)

Supreme Court of California. April 30, 1928.

In Bank.

Appeal by defendant from a judgment of the Superior Court of Santa Clara County, F. B. Brown, Judge, in an action for damages for personal injuries. Reversed.

Superseding opinion in District Court of Appeal, 254 P. 306.

Wm. M. Abbott, K. W. Cannon, and J. E. Reardon, all of San Francisco, and H. A. Gabriel, of San Jose, for appellant.

R. V. Bressani and D. T. Jenkins, both of San Jose, for respondent.

PER CURIAM. The appeal in this action involves the same matters discussed and decided in the case of Citti v. Bava (No. S. F. 11363) 266 P. 954, this day decided, and is presented on the same briefs. On the authority of that case the judgment herein is reversed.

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91 Cal. App. 213

SIMPSON v. NEW YORK HARDWARE TRADING CO. (Civ. 3505.)★

District Court of Appeal, Third District, California. April 23, 1928.

Hearing Denied by Supreme Court June 21, 1928.

1. Injunction 🔑130—Where lease would have been meaningless without extrinsic evidence relative to location of partition, meaning of lease was not solely law question.

In action by landlord to restrain first floor tenant from removing canopy from building and erecting a sign, where plaintiff alleged such removal and erection would interfere with rights of tenant of second story, meaning of the lease was not solely a question of law, where, due to use of words "as now partitioned off," extrinsic evidence was necessary to prevent lease from being meaningless, in that such evidence was required to show location of partition.

2. Appeal and error 🔑1010(1)—Trial court's finding on fact question held conclusive on appeal, where supported by substantial evidence.

Trial court's finding on question of fact as to meaning of lease *held* conclusive on appeal, where there was substantial evidence in the record to sustain such finding.

3. Landlord and tenant 🔑37—Lease should be construed according to terms as a whole.

A lease should be construed according to its terms as a whole; the scope, purpose, and effect of the entire lease being looked to for its interpretation, rather than resort being had to any individual clause.

4. Trial 🔑404(1)—Findings are to be liberally construed in support of judgment.

Findings are to be liberally construed in support of judgment and, if possible, are to be reconciled so as to prevent any conflict upon material points.

5. Appeal and error 🔑1071(1)—Judgment will not be reversed on ground of conflict in findings unless conflict is clear and findings are incapable of being harmoniously construed.

A judgment will not be reversed on the ground of a conflict in the findings unless the conflict is clear and the findings are incapable of being harmoniously construed.

6. New trial 🔑70—Motions for new trial, based on insufficiency of evidence, are addressed to trial court's sound discretion.

Motions for new trial, based upon the insufficiency of evidence, are addressed to the sound discretion of the trial court.

7. Appeal and error 🔑979(1)—Trial court's exercise of discretion in ruling on motion for new trial on ground of insufficiency of evidence to support findings will not be disturbed unless record shows abuse.

Trial court's exercise of discretion in granting or refusing a new trial upon the ground of insufficiency of the evidence to support the findings will not be disturbed on appeal unless the record shows an abuse of discretion.

8. New trial 🔑70—In landlord's action against tenant to restrain removal of canopy and installation of sign, denying defendant's motion for new trial because of insufficiency of evidence to support findings held not abuse of discretion.

In landlord's action against tenant to restrain removal of canopy and installation of sign, trial court *held* not to have abused discretion in denying defendant's motion for a new trial on ground of insufficiency of the evidence to support findings.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Frank Simpson against the New York Hardware Trading Company. Judgment for plaintiff, and, from such judgment and an order denying a motion for a new trial, defendant appeals. Judgment and order affirmed.

★Hearing denied by Supreme Court.

Marcus L. Roberts, of Los Angeles, for appellant.

Frank M. Bering and Victor Koenig, both of Los Angeles, for respondent.

TUTTLE, Justice pro tem. This action was brought by respondent for the purpose of obtaining a perpetual injunction against appellant, enjoining it from removing an ornamental iron marquee over the entrance of certain premises in the city of Los Angeles, and from erecting or placing a sign over the entrance to said premises. A decree was entered granting said injunction, and appellant now appeals from the judgment and from the order denying a new trial.

The facts of the case may be briefly summarized as follows:

On November 12, 1925, respondent and appellant entered into and executed a lease containing the following provisions, to wit:

> "The lessor hereby leases to lessee, and lessee hereby hires and takes of and from lessor, those certain premises in the city of Los Angeles, county of Los Angeles, state of California, more particularly described as follows:
>
> "That certain storeroom known as 625 South Hill street, Los Angeles, Cal., together with the basement immediately thereunder, and the yard running to the alley immediately in the rear of said storeroom; said storeroom being the northerly half of the ground floor and basement as now partitioned off.
>
> "Lessee shall have the privilege, at its own expense, of constructing a one-story addition to the rear of said storeroom running as far as the alley.
>
> "No signs or other advertising matter shall be placed, installed, or maintained in or about the demised premises except as follows:
>
> "Such lettering on the windows as may be desired by the lessee, and one sign over the front of the leased premises below the level of the second story floor.
>
> "It is agreed that the lessee may alter the store front, said store front as altered to be the property of the lessor and such alterations to be at the expense of the lessee."

And a rider to said lease contained the following:

> "The conditions in the lease of October 1, 1925, from Frank Simpson to Frank Balzano appertaining to the front and rear stairway and *the right of ingress and egress to and from the second floor of the building in which the demised premises are located are as follows:*
>
> "The second floor of the building known as 625–627 South Hill street, together with the present stairway about five feet in width running to said second floor from the present doorway at the foot of said stairway, and *the right of ingress and egress* over a space five feet in width from Hill street to said doorway, and the *right of ingress and egress from* the rear of said second floor down the present stairway over a space four feet in width through the yard in the rear of said building as now being used by the 'Victor Hugo.'
>
> "*It is agreed that* if the permission granted to the lessee to construct an addition to said storeroom is exercised, that such additional construction shall during the life of *this lease be subject to the easements and rights contained in the Balzano lease above mentioned* and shall be for the benefit of the second floor of said building whether the Balzano lease shall terminate or not."

At the time said lease was executed, respondent was the owner of a two-story building and lot on South Hill street, Los Angeles, Cal. The ground floor of said building is divided by a solid wall (running east and west) into two rooms or stores. The northerly half of said premises is known as 625 South Hill street, and this is the portion with which we are here concerned. The entire second floor is occupied by a restaurant and is commonly known as 623½ South Hill street, and is referred to in the said lease as 625–627 South Hill street. Access is obtained to the same by means of a stairway in the front thereof, and one in the rear thereof. The front stairway abuts upon the north wall of the said building, and on the south side it is separated from the premises leased by a solid wall, which extends some four feet beyond the point where said stairs commence. From this end of said wall the north side of appellant's show window extends to the sidewalk line. The entrance to the premises in the second story is some six feet in width, but on account of the angle at which said window is constructed, it narrows down to some four feet at the point where it joins said wall. The length of said glass window is some six feet. Over the entrance to the second story of said premises is an ornamental metal marquee, more commonly known as a canopy, extending some eight feet over the sidewalk abutting upon said entrance, and being about six feet in width. The said premises on the second floor were leased on October 1, 1925, to one Balzano as a restaurant, and were occupied for that purpose at the time the lease in question was executed.

It will be seen that the said entrance way to said restaurant was entirely separated from the remainder of the store leased to appellant, by means of said wall and said north side of appellant's show window.

After the execution of said lease between the parties hereto, appellant commenced to alter its store front, and in so doing threatened to remove said marquee and to use the portion of the premises to which it was attached for placing, installing, and maintaining a sign, and the purpose of the suit was to enjoin such action so far as the marquee and sign were concerned.

The grounds for both appeals are the insufficiency of the evidence to support the findings, and there is also an additional contention that the findings fail to support the judgment.

The only issue presented to the trial court for determination was based upon paragraph XIII of the complaint, which reads as follows:

"That the hallway and stairway hereinbefore described are not part of the premises demised to defendant."

Not only are the issues thus limited by the pleadings, but this is the position taken by defendant at the trial, as is clearly shown by the following colloquy between court and defendant's counsel:

"The Court: It seems to me that if you have the right to change that window, you would not have the right to change the sign over the entranceway. That is the real contention here; that is what you are contending about.

"Mr. Roberts: We contend this to be a part of our store front, and that we have the right to alterations, which would mean we have the right to remove.

"The Court: Am I stating the problem correctly?

"Mr. Roberts: Yes."

The findings of the court which are attacked are:

"Finding XV. The court further finds that said marquee extends out from and is attached to the store front of the premises leased by defendant, and is not so located as to prevent the alteration of said store front.

"Finding XVI. The court further finds that it is not necessary, in order to enable defendant to make the proper and necessary alterations permitted by said lease, to remove said marquee, and it has no right under said lease so to do.

"Finding XI. The court further finds that unless defendant is restrained from removing said marquee and from placing a sign over the entrance to said hallway, plaintiff will suffer irreparable injury which cannot be compensated in money damages.

"Finding XII. The court further finds that the hallway and stairway hereinbefore described are no part of the premises demised to defendant.

"Finding XIII. The court further finds that the description of the property leased to defendant is as hereinbefore described, and is not the northerly half of the ground floor and basement of the building owned by plaintiff, as divided from the southerly half by the partition now existing and dividing the same, subject to the rights of Frank Balzano herein under that certain lease agreement dated October 1, 1925, from Frank Simpson, the plaintiff, to Frank Balzano, to wit. 'The second floor of the building known as 625–627 South Hill street, together with the present stairway about five feet in width running to said second floor from the present doorway at the feet of said stairway, and the right of ingress and egress over a space five feet in width from Hill street to said doorway, and the right of ingress and egress from the rear of said second floor down the present stairway over a space four feet in width through the yard in the rear of said building as now being used by the "Victor Hugo."'

"Finding XIV. The court further finds that the building owned by plaintiff was, at the time of the execution of said lease, partitioned off by solid wall dividing the ground floor and basement of said building into the northerly and southerly half, and that the northerly portion of said northerly half was also partitioned off, so as not to include the entrance or stairway to the premises commonly known as 623½ South Hill street, Los Angeles, Cal.; that the premises leased to defendant by plaintiff, includes the northerly half of the basement and the ground floor of said building, except the space on the ground floor occupied by the stairway leading from the ground floor to the second floor, and except said space occupied by the entrance to said stairway from the floor of the building to the door at the foot of the stairway, which said door is approximately six feet in from the front line of said building."

The evidence before the trial court was the lease between the parties, and photographs and a blueprint showing the floor plans of the buildings. One of the photographs showed the buildings during the progress of alterations which appellant was making. These documents disclosed the situation very clearly, and the statement of facts is largely predicated upon them. The oral evidence before the court was extremely brief. The respondent, Simpson, testified that he was the owner of the premises; that it was a two-story building, the first floor being divided into two stores and the second into one; that the property known as 625 South Hill street is a part of the building. This was the only witness for respondent. Witness Spooner, for appellant, testified that the partition on one side of the stairway ended at the front of the glass (show window). He was a director of appellant corporation. The other witness for appellant, Guerrant, testified that he was president of appellant and that he executed the lease for the corporation.

The position of appellant is that it was entitled to remove said marquee and to use the portion of the premises above the entrance described, supra, for the reason that its lease covered that particular portion of the building. The purported authority for so doing is based upon the provision of the lease which refers to the premises demised as "being the northerly half of the ground floor and basement as now partitioned off." The question as to just what property was covered by the lease thus becomes one of fact for the determination of the trial court upon the evidence adduced at the trial, and extrinsic evidence was introduced for that purpose. The photographs and the blueprint delineate the partition. It is contended that, because a portion of the "partition" is composed of glass, therefore, no partition existed. We are not aware of any definition which restricts the word "partition" to any particular substance. It need only to partition, that is to say, to separate one space from another, and if it does that it is unquestionably a partition, regardless of the materials of which it is constructed.

[1, 2] The question is not one solely of law, as contended for by appellant. The lease would be meaningless unless evidence was introduced to show the extent of the demised premises "as now partitioned off." The court

having found adversely to the contention of appellant on this question of fact, and there being substantial evidence in the record to sustain this finding, the inquiry, so far as this court is concerned, is ended, and we cannot disturb the conclusion reached in respect thereto. Taylor v. U. S. Fid. & Guar. Co. (Cal. App.) 260 P. 898; Gjurich v. Fieg, 164 Cal. 429, 129 P. 464, Ann. Cas. 1916B, 111.

It is claimed that the court erred in the construction of the lease in respect to certain reservation made in favor of the lessee of the second story The "rider" attached to the lease made the same subject to certain easements and rights contained in a lease between respondent and the said lessee of the second story. The easements referred to are those of ingress and egress over a space between the foot of the stairs leading to the second story and Hill street, said space being five feet in width on Hill street. Appellant contends that this clause indicated an intention on the part of his lessor to lease him the said entranceway subject only to said easement.

[3] It is no doubt the rule, as appellant states, that:

> "The scope, purpose, and effect of the lease must be determined from a consideration of it as a whole, rather than by a resort to any individual clause thereof." Lang v. Pacific Brewing Co., 44 Cal. App. 618, 187 P. 81.

Another clause in the lease described the property "as now partitioned off," and, as we have pointed out, the court located the partition by extrinsic evidence, and thus definitely settled the matter, which was purely a matter of fact, and not open for further consideration here.

[4, 5] In connection with the objection made by appellant that the findings fail to support the judgment, it is pointed out that one of the findings made by the trial court is as follows:

> "That said marquee extends out from and is attached to the store front of the premises leased by defendant" (Clk. Tr. p. 45),

—and appellant contends that this finding justifies this court in directing the trial court to enter a judgment in its favor. As the court expressly found "that the hallway and stairway were no part of the leased premises and that appellant has no right under said lease to remove said marquee," the finding attacked might well be construed as referring merely to the fact that the marquee is attached to the building of which the leased portion is a part. The other findings leave no doubt as to the position and determination of the trial court on this question, nor has appellant taken the position that the said findings cannot be harmoniously construed. "Findings are to be liberally construed in support of a judgment and, if possible, are to be reconciled so as to prevent any conflict upon material points, and unless the conflict is clear, and the findings are incapable of being harmoniously construed, a judgment will not be reversed upon the ground of a conflict in the findings." Goodwin v. Snyder, 70 Cal. App. 98, 232 P. 763. We see no merit in this contention.

[6-8] The motion for new trial was made upon the ground of the insufficiency of the evidence to support the findings, and this question has been fully covered. Motions of this character, based upon the insufficiency of evidence, are addressed to the sound discretion of the trial court, and its action will not be disturbed unless the record shows an abuse of such discretion. Waltz v. Silveria, 25 Cal. App. 717, 145 P. 169; Colusa R. R. v. Glenn, 25 Cal. App. 634, 144 P. 993. We cannot say that the court abused its discretion in denying the motion.

We are satisfied that the judgment of the trial court was in all respects just and correct.

The judgment and order are affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

91 Cal. App. 187

DAVIS v. SCHNEIDER. (Civ. 5815.)

District Court of Appeal, Second District, Division 1, California. April 21, 1928.

Appeal and error ⚷543—Trial court properly made minute order permitting substitution of copy of notice of appeal, in lieu of original, which was lost (Code Civ. Proc. § 1045).

Under Code Civ. Proc. § 1045, providing that, if original pleading or paper be lost, court may authorize copy thereof to be filed and used instead of original, trial court was justified in making minute order of April 7, 1925, permitting substitution of copy of notice of appeal, where original was in fact filed on June 24, 1924, but was lost.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Mary Davis against George H. Schneider, administrator de bonis non of the estate of James Kinley, deceased, and George H. Schneider, executor of the last will and testament of Anna Kinley, deceased. Judgment for defendant. From an order granting a motion for filing a copy in lieu of the original notice of appeal, defendant appeals. Affirmed.

Kennicott & Williams, of Los Angeles, for appellant.

MacDonald & Thompson and Kimball Fletcher, all of Los Angeles, for respondent.

WOOD, Justice pro tem. Defendants appeal from an order of the superior court per-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

mitting the filing of a copy of plaintiff's notice of appeal to be used in lieu of the original. Notice of the entry of judgment in favor of defendants was served on April 26, 1924. Stipulations were filed whereby plaintiff was given to July 2, 1924, in which to prepare, serve, and file her bill of exceptions. A proposed bill of exceptions was served on July 2, 1924, and amendments thereto were proposed on July 10, 1924, most of which were accepted, leaving certain matters for settlement by the court. These matters appear from the record without recourse to the affidavit of Kimball Fletcher, one of plaintiff's attorneys. In this affidavit it is set forth that the affiant, in November, 1924, telephoned to Mr. Williams, one of the attorneys for the defendants, and asked Mr. Williams if he was ready to propose his amendments, to which Mr. Williams replied that he had lately inspected the files, and, not finding any record of a notice of appeal, concluded that the appeal had been abandoned. Thereupon Mr. Fletcher, according to the affidavit, caused a search to be made in the office of the county clerk, but could find no notice of appeal or record of its filing in the register of actions. Affiant states positively that he had in fact filed the notice of appeal on June 24, 1924, and details the circumstances surrounding the filing. In explanation of his delay in presenting a motion for a substitution of a copy in lieu of the original notice of appeal, affiant mentions certain work in which he was engrossed, including that of chairman of the committee of the Los Angeles Bar Association on the subject of bills to create the municipal court. Mr. Williams did not file an affidavit denying Mr. Fletcher's statement concerning the conversation by telephone in November.

The trial court was justified in making its minute order of April 7, 1925, permitting a substitution of a copy of the notice of appeal. Section 1045 of the Code of Civil Procedure provides:

> "If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original."

In Knowlton v. Mackenzie, 110 Cal. 183, 42 P. 580, a motion was made in the Supreme Court to dismiss the appeal upon the ground that the transcript failed to show that the notice of appeal had been served on the respondent. In reply to the motion, the appellant caused to be filed a certified copy of certain proceedings in the superior court, from which, quoting from the opinion, "it appears that the original notice of appeal has been lost * * * and that the said notice of appeal was on the same day filed in the office of the clerk of that court; and that the court thereupon made an order directing that a copy of said notice of appeal, together with the affidavit showing its original filing and service, be filed nunc pro tunc, and that the same has been so filed." In denying the motion to dismiss, the Supreme Court used this language:

> "Upon the order of the court made in the present case, the substituted papers are entitled to the same weight as would be the originals."

The order is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

91 Cal. App. 318

TAYLOR v. DE VAUGHN. (Civ. 4777.)★

District Court of Appeal, Second District, Division 2, California. April 25, 1928.

Hearing Denied by Supreme Court June 21, 1928.

1. Appeal and error ⚷110—Order denying new trial to defendant in malpractice action held not appealable (Code Civ. Proc. § 963).

Order denying a new trial to defendant in malpractice action *held*, under Code Civ. Proc. § 963, not appealable.

2. Physicians and surgeons ⚷13—Physician's employment continues until ended by consent, revoked by dismissal, or services are no longer needed.

When a physician takes charge of a case and is employed to attend a patient, his employment, as well as the relation of physician and patient, continues until ended by the consent of the parties or revoked by the dismissal of the physician, or until his services are no longer needed.

3. Physicians and surgeons ⚷14(4)—Physician or surgeon is required to use degree of care and skill ordinarily possessed and used by physicians and surgeons in good standing practicing in same locality.

It is required that a physician or surgeon in the practice of his profession shall possess and use that degree of care and skill ordinarily possessed and used by physicians and surgeons in good standing practicing in the same locality.

4. Physicians and surgeons ⚷15—"Negligence" on physician's part consists in doing something which he should not have done or omitting that which he should have done.

Negligence on the part of a physician consists in his doing something which he should not have done or in omitting to do that which he should have done.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence.]

5. Evidence ⚷512—Physicians and surgeons ⚷18(8)—What is proper practice of physician is question for experts to be established only by their testimony.

What is or is not proper practice in examination and treatment, or the usual practice and treatment, by physicians and surgeons, is a

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★Hearing denied by Supreme Court.

question for experts, and can be established only by their testimony.

6. Physicians and surgeons ⊂⊃13—Relation of surgeon and patient held to have continued between defendant and plaintiff, where fractured femur had not healed, though plaintiff had been removed from hospital, since surgeon had not been dismissed nor had relationship been ended by consent.

In action against a surgeon for malpractice in reducing fracture of left femur of plaintiff, relationship of surgeon and patient *held* to exist, where fracture had not entirely healed, although plaintiff had been removed from the hospital, since the relationship had not been ended by consent of the parties nor had it been revoked by dismissal of physician.

7. Physicians and surgeons ⊂⊃18(8)—Evidence held sufficient to support trial court's findings that surgeon was negligent in treating fracture of femur.

In malpractice action against a surgeon for negligence in treatment of plaintiff's fractured femur, wherein evidence was introduced relative to making measurements of limb by steel tape instead of using X-ray, evidence *held* sufficient to support trial court's findings of physician's negligence.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Robert G. Taylor, a minor, etc., against Thomas J. De Vaughn. Judgment for plaintiff, and defendant appeals therefrom and from an order denying a new trial. Judgment affirmed, and appeal from an order denying a new trial dismissed.

Hearing denied by Supreme Court: TYLER, Justice pro tem., dissenting.

See, also, 266 P. 963.

John C. Miles, of Los Angeles, for appellant.

Munson T. Case and Carleton R. Bainbridge, both of Los Angeles, for respondent.

HAZLETT, Justice pro tem. Plaintiff recovered judgment against defendant for $850 damages and costs of suit on account of the alleged malpractice of defendant, a physician and surgeon. Plaintiff had suffered a transverse fracture of the middle third of his left femur; defendant reduced the fracture, and the trial court held that he failed to give plaintiff the usual and necessary surgical care and attention after the reduction, which failure made necessary an operation upon the broken limb and a resetting of the bone, to plaintiff's damage.

[1] Defendant made a motion for a new trial, which was denied, and he appeals from the order denying the motion and from the judgment. The order denying the new trial is not appealable (Code Civ. Proc. § 963).

The record shows without controversy, except as below specially mentioned, and the court found, the following facts:

Plaintiff was a little less than 8 years old when his injury occurred; defendant was employed by plaintiff's mother to reduce the fracture and care for the injured boy afterwards; the boy was taken to the Corby Hospital at Huntington Park, where defendant, assisted by a Dr. Preston, reduced the fracture, exercising reasonable care and skill in so doing, and in applying splints, plaster of paris cast, and extension of the limb with weights; the boy was kept in bed and the endeavor was to have him lie on his back, but about three days after the fracture was reduced he turned over on his side or on his face, which may have caused the ends of the broken bone to lose their proper positions; prior to the reduction of the fracture defendant took X-ray pictures of the limb, but took no other such pictures until about 15 days thereafter; very soon after the boy turned over the mother requested defendant to have X-ray pictures taken to determine whether the ends of the broken bone had lost their apposition thereby, but defendant said that it was not necessary; the mother was a working woman and was delayed in raising money with which to pay the hospital and doctors' charges, and eight days after the limb was set and pursuant to defendant's consent, she moved the boy from the hospital, but defendant gave her no instructions as to his care; she took him to her own home and a short time later moved him to another private house, and he was kept in bed with weights attached to his limb (there is a conflict in the evidence as to whether defendant consented that the boy be removed to any place other than another hospital); while being so moved the boy was carried in arms several times, which might have caused the broken bone ends to move out of place; after the boy was taken from the hospital the mother observed that he suffered cramps in his injured limb, and so advised defendant; on the thirteenth day after the limb was set defendant again examined the boy, he was asked by the mother to have X-ray pictures of the limb taken, and he said it was not necessary as the boy was getting along all right, but two days later defendant had such pictures taken and they disclosed that the ends of the broken bone were misplaced and had slipped past each other, shortening the leg about 2½ inches; and on the nineteenth day after the fracture was set one Dr. Nelson, who was employed by the mother, operated on the limb. He opened it and he found very firm callouses over the ends of the bone at the place of fracture and connecting the broken portions of the bone, the callouses being of the character which required two or four weeks' time to form, and he found it necessary to chisel away the callouses, to pry the broken portions of the bone apart and to reset the broken bone. This operation was very dangerous but necessary.

⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Defendant and Dr. Preston testified that shortly after the boy had turned over they measured both his legs with steel tape, measuring from the anterior superior spine to the internal malleolus (ankle joint) and found the legs the same length, the foot in proper position, and the injured limb straight, and that thereafter, while the boy was in the hospital, he suffered little pain; and defendant further testified that he refrained from taking X-ray pictures after he reduced the fracture for fear of injury to the boy.

Other surgeons testified that such measurement of the limbs is not a sufficient guide to determine whether there has been a slipping or side movement of the broken bone ends and that there may be a difference of one-half inch to one inch in the lengths of the two limbs which will not be discovered by measurement alone, as the tipping of the pelvis may mislead; that the only sure way to determine whether such a fracture has been properly reduced is to follow with X-ray pictures, and that such is the only sure practice and is the general practice among skillful physicians in Los Angeles county, Cal., where the occurrences herein mentioned took place; and that when the X-ray is properly used for that purpose there is no danger to the patient. Dr. Nelson also testified that the splints and plaster cast which had been originally placed on the limb would not have prevented movement of the limb or a slipping of the broken bone ends.

The court also found that defendant was negligent and failed to exercise reasonable skill in the following particulars: He failed to take X-ray pictures to ascertain whether the fracture had been properly reduced, or after the boy turned over or after the boy was moved to determine whether any injury had been done by the turning or moving; he failed to give instructions to lessen the danger of displacing the fractured bone by the moving of the boy from the hospital; he failed to give the boy his personal attention between the moving and his visit to the boy five days later; and he did not have such pictures taken until repeated demands and requests had been made by the mother therefor and not by reason of correct or reasonably careful diagnosis.

The principal contentions made by appellant are that the evidence is insufficient to support any findings or judgment predicated upon negligence on the part of defendant, and that it does not appear that any damage was suffered by plaintiff from the acts of defendant which the court found constituted negligence on his part.

The main questions for consideration are whether the relation of surgeon and patient existed between defendant and plaintiff at the time subsequent to the reduction of the fracture when the broken ends of the bone lost their apposition or for any period following that time, and, if the relation continued, whether defendant exercised that degree of care of the boy required of him as a surgeon following the reduction.

[2-5] The general rules covering those questions are announced in Hopkins v. Heller, 59 Cal. App. 447, 452, 210 P. 975, Dimock v. Miller (Cal. App.) 256 P. 236, and in Perkins v. Trueblood, 180 Cal. 437, 441, 443, 181 P. 642. In the Hopkins Case the court announced that:

> "When the physician takes charge of a case and is employed to attend a patient, his employment, as well as the relation of physician and patient, continues until ended by the consent of the parties, or revoked by the dismissal of the physician, or until his services are no longer needed. For example, when a surgeon performs an operation, not only must he use reasonable and ordinary care and skill in its performance, but also in the subsequent treatment of the case. It is his duty to give the patient such attention after the operation as the necessity of the case demands, in the absence of any special agreement limiting the service or reasonable notice to the patient."

In the Dimock Case the court said that:

> "Evidence of what is not 'good surgery' or of what is 'bad technic' does not prove negligence on the part of a physician within the rule of the authorities in this state. In cases of this character it is required that the physician or surgeon in the practice of his profession shall possess and use 'that degree of care and skill ordinarily possessed and used by physicians and surgeons in good standing practicing in the same locality.'"

And in the Perkins Case the court said that:

> "'The difficulties and uncertainties in the practice of medicine and surgery are such that no practitioner can be required to guarantee results and all the law demands is that he bring and apply to the case in hand that degree of skill, care, knowledge and attention ordinarily possessed and exercised by practitioners of the medical profession under like circumstances.' * * * 'Negligence on the part of a physician consists in his doing something which he should not have done, or in omitting to do something which he should have done.' * * * That as to what is or is not proper practice in examination and treatment, or the usual practice and treatment, is a question for experts, and can be established only by their testimony."

Counsel cite a large number of decisions from other jurisdictions, but as, in general, they merely adhere to or elaborate upon the foregoing rules announced by our own courts, they are not cited in this opinion.

[6] Applying the rules above announced to the facts in this case, it satisfactorily appears that the relation of surgeon and patient existed between defendant and plaintiff until two or three days before Dr. Nelson operated and found the callouses, which were 14 to 30 days old, and that the broken portions of

the bone had lost their apposition and slipped by each other at least 10 days before defendant was discharged from the case, and, as testified by several reputable surgeons, that good surgeons practicing in Los Angeles county invariably use the X-ray to verify their work in reducing fractures, and particularly when reducing a fracture of the femur they take X-ray pictures from time to time thereafter until union occurs, to determine whether any slipping at the fracture has occurred, and that the necessities of such cases require the use of the X-ray.

[7] The findings of the trial court have ample support in the evidence. Defendant was remiss in his duty to plaintiff in failing to verify his work by the use of the X-ray after he reduced the fracture, and in failing to give the boy that degree of attention which the conditions required. There is substantial evidence sustaining the view that the operation performed by Dr. Nelson would not have been necessary had defendant exercised that degree of care and skill ordinarily used by surgeons in Los Angeles county. Plaintiff suffered damage by reason of the negligence of defendant.

Other contentions, are made by appellant, to the effect that the findings of negligence are not supported by any sufficient allegations of negligence in plaintiff's second amended complaint, and that the court erroneously admitted and rejected evidence. None of these contentions have merit. Plaintiff's pleading alleges the acts of negligence fairly and clearly, and the court committed no prejudicial error in receiving or rejecting evidence.

The judgment is affirmed. The appeal from the order denying a new trial is dismissed.

We concur: WORKS, P. J.; CRAIG, J.

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91 Cal. App. 324

TAYLOR et al. v. DE VAUGHN.

(Civ. 4779.)

District Court of Appeal, Second District, Division 2, California. April 25, 1928.

1. Appeal and error 🔑110—Order denying new trial to defendant in malpractice action held not appealable (Code Civ. Proc. § 963).

In malpractice action, order denying new trial to defendant *held*, under Code Civ. Proc. § 963, not appealable.

2. Appeal and error 🔑757(1)—Error held not shown where neither party printed in briefs or in supplement thereto any part of record as required (Code Civ. Proc. § 953c).

On appeal from judgment in malpractice action, error *held* not shown, where neither party had printed in his briefs or in any supplement thereto any part of record as required by Code Civ. Proc. § 953c.

3. Appeal and error 🔑436—Trial court's order that appeals of cases heard together should be considered together held ineffective, since appeals divested court of further jurisdiction except as to matters not affected by judgments or orders appealed from.

Trial court's order that the appeals in two malpractice actions should be considered together *held* ineffective, for the reason that the appeals divested that court of further jurisdiction except as to matters not affected by the judgments or orders appealed from.

4. Courts 🔑78—Trial court is without authority to govern procedure in court of appeal.

The trial court is without authority to govern the procedure in a Court of Appeal.

5. Appeal and error 🔑837(2)—Where two cases were consolidated for trial, plaintiffs filed separate notices of appeal, separate transcripts were made, and there was no stipulation that transcript on one appeal should be considered in the other, reviewing court could not consider one transcript in other appeal.

Where two cases of malpractice were consolidated in the trial court, separate notices of appeal were filed and a separate transcript of the record, or of portions of it, was made in each appeal, and there was no stipulation that the transcript on appeal in the one action should be considered in the other, the reviewing court could not consider one transcript on the other appeal.

6. Appeal and error 🔑544(3)—Where transcript was incomplete, court would consider appeal on merits.

Where, on appeal, there was an incomplete transcript, the reviewing court would consider the appeal on its merits.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Cora M. Taylor and another against Thomas J. De Vaughn. Judgment for plaintiffs, and defendant appeals therefrom, and from an order denying a new trial. Judgment affirmed, and appeal from order denying a new trial dismissed.

John C. Miles, of Los Angeles, for appellant.

Munson T. Case and C. R. Bainbridge, both of Los Angeles, for respondents.

HAZLETT, Justice pro tem. [1] Defendant appeals from a judgment against him and from an order denying his motion for a new trial. The order denying the new trial is not appealable (Code Civ. Proc. § 963).

Plaintiffs sued as parents of their minor son, and they alleged that they were damaged by reason of malpractice on the part of defendant, a physician and surgeon, in failing to give the minor the usual and necessary surgical care after he reduced a fracture of the minor's left femur.

A companion action was brought against defendant by the minor for damages he alleged he suffered by reason of the alleged malpractice. Counsel for the respective parties in their briefs state that the action by the minor was consolidated and tried with this action in the trial court pursuant to a stipulation and order of court thereon providing for the consolidation and that the evidence received should be used in each case so far as applicable. Separate findings and judgment were given in each action. Defendant appealed separately from the judgment and from the order of the trial court denying his motion for a new trial in the action by the minor. That appeal is entitled Robert G. Taylor v. De Vaughn, and is numbered Civil No. 4777, 266 P. 960.

[2] The only portions of the record certified to this court in this appeal are those set out in the typewritten clerk's transcript, which contains the judgment roll, defendant's notice of intention to move for a new trial, and order denying the motion, notice to the clerk to prepare a transcript as provided in section 953a of the Code of Civil Procedure, notice of appeal and an ex parte order of the trial court to the effect that the action by the minor be consolidated with this action for the purposes of appeal so that both appeals may be considered together.

A typewritten reporter's transcript of the phonographic report of the trial was filed in the appeal in the minor's case, and appellant requests this court to consider that transcript as the reporter's transcript in this appeal, but neither appellant nor respondents printed in their briefs or in any supplement thereto any part of the record as required by section 953c of the Code of Civil Procedure. Therefore there is nothing before us to show error on the part of the trial court. Dahlberg v. Dahlberg (Cal. Sup.) 260 P. 290, and cases therein cited.

[3, 4] The order of the trial court that the appeals in the two actions should be considered together is ineffective for the reason that the appeals divested that court of further jurisdiction except as to matters not affected by the judgments or orders appealed from (Estate of Waters, 181 Cal. 584, 185 P. 951; Hennessy v. Superior Court, 194 Cal. 368, 228 P. 862); and the trial court is without authority to govern the procedure in a court of appeal.

[5] It also appears that a separate motion for a new trial was made in each action, separate notices of appeal were filed, and a separate transcript of the record or of portions of it was made in each appeal, and there is no stipulation that the transcript on appeal in the minor's action should be considered in this appeal. Therefore this court cannot consider that transcript on this appeal even though the two cases were consolidated and tried together in the lower court. Harmon v. San Francisco & S. R. R. R. Co., 86 Cal. 617, 25 P. 124; Soule Co. v. Severtson, 68 Cal. App. 46, 48, 225 P. 351.

It appears from appellant's briefs on this appeal that he relies mainly upon the transcript of the phonographic report of the trial filed in the appeal in the minor's case. This court has just given its opinion in that appeal affirming the judgment in favor of the minor. There is nothing in that transcript which would authorize this court to reverse the judgment.

[6] As an incomplete transcript was filed, this appeal should be and has been considered on the merits. Oberkotter v. Spreckels, 63 Cal. App. 683, 219 P. 1010.

The judgment is affirmed. The appeal from the order denying a new trial is dismissed.

We concur: WORKS, P. J.; CRAIG, J.

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91 Cal. App. 129

WIXON v. RAISCH IMPROVEMENT CO. et al. (Civ. 6073.)★

District Court of Appeal, First District, Division 2, California. April 19, 1928.

Hearing Denied by Supreme Court June 18, 1928.

1. Appeal and error ⚷628(1)—Delay in filing transcript due to congestion in printing office held not fatal, where transcript was filed after interval of one and one-half working days after receipt from printer.

Failure to file transcript within time prescribed by rules of Supreme Court *held* not to require dismissal of appeal, where delay was occasioned by unusually heavy run of printing business, and transcript was filed on third day after its receipt; one and one-half days of intervening time being holidays.

2. Automobiles ⚷170(8)—Motorcyclist, entering apparently clear intersection, had right to assume no car from opposite direction would collide with him after he passed medial line of intersecting street.

Where intersection was clear at time motorcyclist entered, he had right to assume that no car would enter the intersection from opposite direction and collide with him after he had passed medial line of intersecting street.

3. Automobiles ⚷245(16, 82)—Negligence and contributory negligence held for jury, where motorcyclist was struck by truck approaching intersection from opposite direction and making turn (Motor Vehicle Act 1923, § 129).

Negligence and contributory negligence of motorcyclist entering apparently clear intersection and struck by truck approaching from opposite direction which attempted to make turn *held* question for jury in action for injuries under Motor Vehicle Act, § 129 (St. 1923,

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★Hearing denied by Supreme Court.

p. 558), notwithstanding alleged contradictions in plaintiff's testimony.

4. **Automobiles ⟹246(10) — Instruction that truck driver, turning at intersection, must stop until he could make turn in safety, held not erroneous.**

In action by motorcyclist for injuries resulting from collision with truck at intersection, instruction that truck driver was under duty to see that turning of vehicle could be made in safety, and "to stop until he could make such turn in safety," *held* not erroneous for use of word "stop" under Motor Vehicle Act (St. 1923, p. 517).

5. **Automobiles ⟹213—Motorcycle driver entering intersection without warning of danger could rely on presumption that others would use reasonable care.**

In action for injuries resulting from collision at street intersection, motorcycle driver might rely on presumption that others using highway would use reasonable care and prudence, and would obey traffic laws, and would not be guilty of contributory negligence in acting on such presumption, where there was no warning of danger.

6. **Appeal and error ⟹301—Alleged excessiveness of damages was not considered on appeal, where not urged on motion for new trial.**

Question of excessiveness of damages awarded in action for injuries was not considered on appeal, where not argued in trial court on motion for new trial.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Bruce Wixon against the Raisch Improvement Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Cooley & Gallagher, of San Francisco, and C. W. Davison and James P. Sex, both of San Jose, for appellants.

Harry Houser, of San Jose (W. A. Beasly, of Berkeley, of counsel), for respondent.

MURPHEY, Justice pro tem. In this case the respondent interposed a motion to dismiss the appeal on the ground that the transcript was not filed within the time prescribed by the rules of the Supreme Court. The transcript was filed on the forty-fourth day after the bill of exceptions had been settled and filed in the office of the county clerk of Santa Clara county. On the forty-second day after the settlement and filing of the bill of exceptions, respondent served his motion to dismiss the appeal, accompanied by affidavits sufficient in form and substance. On the date of the hearing, in the absence of any affirmative showing by the appellants, the appeal should have been dismissed, but on that date appellant asked, and was granted, time to file affidavits in support of his application then made to be relieved from default. Several affidavits were filed by the respective parties, and the matter was set for hearing and heard on the 19th day of March, 1928.

[1] The printer, who had in charge the printing of the transcript in this case, stated in his affidavit as follows:

> "At said time" (referring to the dates of the settlement and the filing of the bill of exceptions and the forty-day period thereafter) "the firm of Pernau-Walsh had an unusually heavy run of business and a very large amount of printing to be done and said judgment (roll) could not be set up, for the reason that all of its linotype machines and operators were busy, and it was impossible to have the transcript completed and ready for delivery until about 3 o'clock p. m. on December 11, 1925."

The delivery was made to Lasher B. Gallagher, the attorney for the appellants. This, of course, was a matter over which appellants had no control, and for which they may not be held responsible. The 11th of December was the forty-first day after the settlement and filing of the transcript on appeal, and, of course, was not within the time prescribed by the rules of the Supreme Court. After receiving the printed transcript, it was necessary to have the same certified and filed in the office of the county clerk of Santa Clara county, and we are disposed to think, in view of the fact that between the 11th day of December, 1925, and the 14th day of December, 1925, the date on which the transcript was filed, one and one-half days of the time were holidays, that the appellants did all that might be reasonably expected of them to have the said transcript certified and filed in the office of the county clerk of Santa Clara county and thereafter in the office of the clerk of the Supreme Court of this state. The affidavits, with respect to the activities of the several parties between the afternoon of December 11th and the 14th of December, are quite contradictory in character, but, on the whole, we are disposed to think that the showing made by the appellants is sufficient, and the motion to dismiss the appeal will now be denied.

We will now take up and consider the appeal on its merits.

Judgment in the trial court was in favor of the plaintiff, and defendants appeal.

In this action the plaintiff sues to recover damages as the result of a collision between a motorcycle driven and operated by plaintiff and a truck owned by the defendant Raisch Improvement Company driven and operated by the defendant Walker. The accident occurred at the intersection of North Thirteenth and Jackson streets in the city of San Jose. The plaintiff was driving south on North Thirteenth street. It is the contention of the plaintiff that the collision occurred a few feet south of the medial line of Jackson street, and under the following circumstanc-

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es: He testified that, when he arrived at the property line of Jackson street, he looked to the left and right, and that there were absolutely no machines or vehicles of any kind within the boundary lines of the four corners of the curb lines; that the intersection was entirely clear; that he probably saw the truck of the defendants, but, if he did, it was south of the south curb line of Jackson street; that he proceeded into the intersection at a speed of from 8 to 10 miles per hour; that, after he crossed the medial line of Jackson street, he heard the whir of the engine of the truck, and was immediately struck; that he did not see the truck in the intersection until it was immediately upon him; that, as he entered the intersection, he observed the car on his right approaching on Jackson street; that this car slowed down and he proceeded to cross the intersection. This statement of facts, in our judgment, is fully corroborated, not only by relatives of plaintiff, but by disinterested witnesses produced in his behalf.

It was the contention of the appellants that, because of the inherent inconsistencies and contradictions in the testimony, this evidence should have been disregarded and a nonsuit granted. In this behalf, appellants enter into an elaborate analysis of the evidence covering some 65 pages of their brief. We do not feel disposed to follow the appellants in this exhaustive analysis of the evidence. They had an opportunity to fully discuss and present their views on this matter to the jury and to the trial court, and, having failed to convince either, they cannot expect this court to go over the same ground. After a careful reading of the entire record, we are satisfied that there is no merit in this contention of the appellants and, had the trial court granted a nonsuit, its ruling would have been clearly erroneous.

[2, 3] The point more earnestly presented by the appellants is that it was the duty of the plaintiff, after entering the intersection, to have again looked in the direction of the approaching truck, and his failure to do so constituted contributory negligence as a matter of law. Under the facts above set out, and they are the facts as found by the jury and approved by the trial court, this contention cannot be sustained. If the intersection was clear at the time the plaintiff entered, he had a right to assume that no car would enter the intersection from the south and collide with him south of the medial line of Jackson street, or, in fact, attempt to cross his line of traffic at any point in the intersection, unless the crossing could be safely made. Ordinary prudence and common sense would dictate this if there were no law on the subject. We are inclined to believe that, even had the plaintiff looked again in the direction of the truck, and observed the driver indicating an intention to turn into Jackson street, he might still have assumed that the truck driver would not have cut in on his line of traffic, unless he could do so with safety. Motor Vehicle Act, § 129 (Stats. 1923, p. 517).

The conduct of the plaintiff in this action places him in a more favorable aspect than that of the plaintiff in the case of Simonsen v. L. J. Christopher Co., 186 Cal. 786, 200 P. 615. We quote:

> "In this case, according to the plaintiffs' evidence, the plaintiffs had passed beyond the center of the street-crossing without accident and were presumably out of the zone of danger from any vehicle approaching from the east. We do not think they can be held guilty of negligence as a matter of law or under their version of the facts because they failed to keep further watch for defendant's truck. It is claimed that they did not keep a sufficient lookout while entering upon the street-crossing and that they were driving beyond the prescribed speed limit, but obviously neither of these circumstances contributed to the accident, as the collision did not occur on the side of the street in defendant's line of travel, and the greater speed at which they made the crossing lessened the danger of their being overtaken by defendant's truck."

To the same effect is Towne v. Godeau, 70 Cal. App. 148, 232 P. 1010. We quote:

> "It is now contended by appellants that the evidence conclusively shows that the plaintiff was guilty of contributory negligence. The jury, in returning a verdict for the plaintiff, and the court, in denying a motion for a new trial, impliedly found in favor of the plaintiff upon that issue. The burden of proof was on the defendants to show contributory negligence. To sustain such burden and to overcome the implied finding of the jury and of the trial court would require very clear proof. * * *
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> "While nearing and entering the intersection, ordinary care required plaintiff to look to the left for approaching vehicles. Having satisfied himself of the absence of danger from that direction, it was natural for him to look to the right for eastbound vehicles. He had the right to assume that no vehicle would approach him from the left beyond the medial line of the intersecting street. Of course, this does not mean that he had the right to proceed blindly, in reckless disregard of obvious danger, for it was his duty to exercise ordinary care, even though the negligence of another caused the danger. In this connection the court instructed the jury that the plaintiff 'had a right to assume that any person driving from the south on Eldorado street and desiring to turn to the left or west on Poplar street would obey the law and run beyond the center of the intersection of said streets passing to the right thereof, before making such turn.' Appellant contends that the effect of this instruction upon the minds of the jurors was 'that the plaintiff did not and was not required to see that which he could have seen with the exercise of ordinary care.' There is no merit in the contention."

[4] We quote the foregoing instruction because of its applicability to objections made by appellant in this case to an instruction given by the trial court. Appellant complains

of the instructions of the trial court, and in this connection makes objection to approximately every instruction given. At the oral argument counsel contented himself with calling the attention of the court to only two of the instructions complained of by him. One of these instructions as given by the court reads as follows:

> "I further instruct you that it was the duty of the driver of the truck in question before turning such vehicle from Thirteenth street into Jackson street to first see that said movement could be made in safety, and if it could not be made in safety then it was his duty to stop until he could make such turn in safety."

Appellants object to the use of the word "stop" in this connection. When considered in connection with the context, this objection does not appear to warrant any argument whatever. Counsel states that there is nothing in the law making it the duty of the operator of a motor vehicle to "stop." There is something in the law requiring him to "wait" and the difference in the meaning of the words—in the connection in which they are used—is infinitesimal.

It certainly was Walker's duty before making this turn with his truck "to see that it could be made in safety, and, if it could not be made in safety, wait until it could be made in safety." Lexicographers define the word "wait": "To rest patiently in expectation; remain inactive or stay in one place in anticipation of an arrival or an event, or until the proper time comes for action." Webster. Among the definitions by the same author of the word "stop" we find: "To bring from motion to rest; arrest the course, progress, or movement." Applied to the facts of the instant case we are of the opinion that the trial court, in using the word "stop," did not go beyond the clear import of the law as laid down in the Motor Vehicle Act, and that the appellants' objection thereto is without merit.

[5] The next instruction which the appellant calls especially to the court's attention, as already above set out, was as follows:

> "I instruct you that, if the plaintiff here was at and immediately prior to the time of the accident in question riding his motorcycle across the intersection of Thirteenth and Jackson street in a lawful and proper manner, and there was nothing in the situation then present to warn him as a reasonably prudent person of an impending danger, he might rely upon the presumption that others using the public highway would use reasonable care and prudence, and would obey the traffic laws, in their use of the highways, and he would not be guilty of contributory negligence under such circumstances in acting on such presumption."

This instruction is criticized as in effect stating to the jury that the plaintiff could close his eyes in crossing the intersection, and could rely upon the presumption that defendants would use reasonable care and prudence, and would obey the traffic laws. We think that this instruction is not susceptible in any respect to the objection made to it by the appellants, and that the citation hereinbefore made in the case of Towne v. Godeau is applicable to the present situation.

In the case of Simonsen v. L. J. Christopher Co., supra, the Supreme Court says:

> "As has been frequently said by this court and the district courts of appeal, a person crossing a street in front of an approaching vehicle cannot close his eyes to threatening danger, relying upon the presumption that the other party will use reasonable care and prudence and obey the traffic laws, but if there is nothing in the situation to warn him of impending danger, he is not guilty of negligence in relying upon such assumption. McPhee v. Lavin, 183 Cal. 264 (191 P. 23); Commonwealth Bonding & C. Ins. Co. v. Pacific Elec. Ry. Co., 42 Cal. App. 573 (184 P. 29); Baker v. Western Auto Stage Co. [48] Cal. App. [283] 192 P. 73; Harris v. Johnson, 174 Cal. 55 (Ann. Cas. 1918E, 560, L. R. A. 1917C, 477, 161 P. 1155)."

We have examined all of the instructions given on behalf of the respective parties by the trial court in this case, and are of the opinion that they fully and fairly instruct the jury upon the law applicable to the facts disclosed by the record.

[6] Some contention is made that the damages awarded by the jury in this case are excessive. In view of the fact that it is disclosed by the record that this question was not argued in the trial court on the motion for a new trial, we do not feel disposed to enter upon a discussion of the same in this opinion. Williams v. A. R. G. Bus Co., 47 Cal. App. 568, 190 P. 1036.

The judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

91 Cal. App. 98

BALESTRERE v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5871.)

District Court of Appeal, First District, Division 1, California. April 18, 1928.

1. Admiralty ⚷21—Commerce ⚷22—Claim for death of fisherman drowned in Monterey Bay held within Workmen's Compensation Act, employment not involving interstate or foreign commerce; application of state Compensation Act to seamen employed in local commerce held not violative of federal Constitution giving federal courts admiralty jurisdiction (Workmen's Compensation Act; Const. U. S. art. 3, § 2).

Claim for death of seaman, drowned while engaged in fish-catching employment in Monterey Bay and adjacent waters, *held* within scope of Workmen's Compensation Act (St. 1913, p. 279, as amended), and taking of jurisdiction under such act not violative of Const. U. S., art. 3, § 2, where the employment did not involve interstate or foreign commerce, although it was of a maritime nature.

2. Master and servant ⚷417(7)—Dependency of employee's parents held fact question for commission (Workmen's Compensation Act).

In a proceeding under the Workmen's Compensation Act (St. 1913, p. 279, as amended), question of dependency of deceased employee's parents *held* a question of fact for the commission.

Application by Manuel Balestrere for certiorari to review an order of the Industrial Accident Commission awarding compensation to Marie Recoy Prego and Andrew Prego, represented by their guardian ad litem, John Thompson, for the death of their son, Antonio Prego. Award affirmed.

Robert D. Duke and Lawrence A. Cowen, both of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

KNIGHT, J. The petitioner seeks by this proceeding in certiorari to have reviewed and annulled an award made by the Industrial Accident Commission directing the payment of the sum of $630 to the father and mother of Antonio Prego, who was drowned in the harbor of Monterey while attempting to moor a lighter.

The following are the facts: Prego was employed as seaman and fisherman on a small vessel engaged in the business of catching fish in the waters of Monterey Bay and those adjacent thereto. On the day of the accident, the vessel returned to Monterey with a load of sardines which it had discharged into the lighter. Prego and another man were in a skiff carrying a line from the lighter to the end of a cable anchored 50 or 100 feet from shore, to which the lighter was about to be fastened and the fish then hoisted in the bucket and conveyed by means of a trolley to the end of the pier for delivery to a cannery. Prego was rowing the skiff, and the other man holding the line, and, as they neared the end of the cable, a heavy sea capsized the skiff, and Prego was drowned.

[1] Petitioner contends that, on account of the character of Prego's employment and the nature of the services he was performing at the time he was drowned, any claim arising out of his death came exclusively within the admiralty jurisdiction of the federal courts, and that consequently the attempted application of the provisions of the Workmen's Compensation Act (St. 1913, p. 279, as amended) was in violation of section 2 of article 3 of the federal Constitution.

The Supreme Court of this state has had occasion recently, in two proceedings of this kind, to deal with the very questions here presented, wherein the decisions of the Supreme Court of the United States upon which petitioner herein relies as supporting his contentions were reviewed and summarized. In the first proceeding, Alaska Packers' Association v. Industrial Accident Commission, 200 Cal. 579, 253 P. 926, it was held that, notwithstanding a contract of employment may be maritime in its nature, still, as to certain local matters, regulation of which will work no material prejudice to the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations, the rules of the maritime law may be modified or supplemented by state regulation, and that, when a compensation act supersedes other state laws touching a liability for damages which depended upon the common law and state statutes, it does not come into conflict with any superior maritime law. In the second proceeding, London Guarantee & Accident Co. v. Industrial Accident Commission, 263 P. 196, an apprentice navigator employed by a company engaged in the business of operating a small fleet of fishing vessels from Santa Monica to the ocean fishing grounds, for the accommodation of the public seeking recreation in deep sea fishing, was drowned while on his way in a small boat from the pier to one of the larger boats which had gone adrift, for the purpose of returning her to her anchorage. After again reviewing the federal cases and restating the rule, it was held that, inasmuch as the employment had no such direct relation to interstate or foreign commerce or navigation, the Industrial Accident Commission was not deprived of jurisdiction to hear and determine the claim.

It will be observed that the facts of the latter case are almost identical with those of the present one, for here the evidence shows, in addition to the facts already set forth, that both employer and employee were residents of Monterey, that Prego's employment did not involve interstate or foreign commerce, and

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

that neither the employment nor the vessel on which the decedent was employed had any connection with the carrier of interstate or foreign commerce; moreover, as stated, the accident occurred within the waters of this state and within 100 feet of shore. We are of the opinion, therefore, that, under the authority of the recently adjudicated cases above cited, and for the reasons therein given, the claim for compensation arising out of Prego's death came properly within the scope of the Workmen's Compensation Act of this state.

[2] The question of the dependency of Prego's parents was one of fact to be determined by the commission, and there is sufficient evidence in the record to support its finding on such issue.

The award is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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91 Cal. App. 143

RECLAMATION DIST. NO. 684 v. EAST BAY MUNICIPAL UTILITY DIST.★

(Civ. 3352.)

District Court of Appeal, Third District, California. April 19, 1928.

Hearing Denied by Supreme Court June 18, 1928.

1. Constitutional law ⇐70(1)—Courts cannot read into statute what Legislature has apparently purposely omitted relative to levying special assessments against municipal property (Const. art. 13, § 1).

The judicial branch cannot read into the law what the legislative branch has apparently purposely and deliberately omitted in Const. art. 13, § 1, relative to exemption of municipally owned property from levy of special assessments.

2. Drains ⇐70—Property of municipal corporation is exempt from special assessments only if it is actually devoted to public use.

The property of a municipal corporation is exempt from special assessments only where such property is actually devoted to a public use.

3. Drains ⇐70—Assessment by reclamation district of property of municipal utility district lying within reclamation district held invalid, in absence of showing utility district property was not devoted to public use (St. 1921, p. 245).

In proceeding by reclamation district to compel a municipal utility district, founded pursuant to St. 1921, p. 245, whose property lay within reclamation district, to pay special assessments levied for reclamation district purposes, assessment by reclamation district of municipal utility district's property lying within reclamation district *held* invalid, in absence of showing that utility district's property was not devoted to a public use.

Application by Reclamation District No. 684 for writ of mandate, prayed to be directed to East Bay Municipal Utility District, to compel payment of a claim for assessment for reclamation purposes. Writ denied.

Case & Forslund, of Stockton, for petitioner.

T. P. Wittschen, of Oakland (L. W. Irving, of San Francisco, and Harold Raines, of Berkeley, of counsel), for relator.

PULLEN, Justice pro tem. The East Bay Municipal Utility District comprises nine cities on the easterly side of San Francisco bay, and was organized to perform certain municipal functions, one of which was to bring a publicly owned water supply from the Mokelumne river in Amador county to the utility district for the use of the district and its inhabitants. It was founded pursuant to the provisions of the Municipal Utility District Act (Stats. 1921, p. 245), and it is conceded by the parties to this proceeding that it is a public agency. The utility district has lands within Reclamation District No. 684, upon which its pipe, conduits and other works are constructed for the purpose of conveying water to the East Bay cities.

Long prior to the acquisition of the lands above mentioned by the utility district in Reclamation District No. 684, the district was organized and was existing by virtue of certain reclamation district laws of the state of California. It embraced within its exterior boundaries approximately 10,000 acres, all lying from 6 to 14 feet below the level of the waters flowing in the adjacent San Joaquin river and its tributaries. The lands within the district were formerly what is known as swamp and overflowed lands consisting of vast wastes of tule and other water grasses. Owing to its elevation with reference to the adjacent water, levees were constructed and are maintained at great expense, and by reason of the rainfall, surface and irrigation waters, it is necessary to maintain drainage canals and pumps to conduct the surplus waters off of the lands and back into the river.

To obtain funds necessary to protect the lands within the district, assessments are duly and lawfully levied upon such lands pursuant to law, and it will be necessary to continue to do so in the future. After the utility district acquired the land within the district, and while still the owner thereof, an assessment in proportion to the benefits was levied by the reclamation district and spread upon all lands in the reclamation district, including those of the utility district.

A claim for its proportion of this amount was presented to the board of directors of the utility district and payment refused; thereafter this action was brought to compel by writ of mandate the allowance of the claim of the reclamation district by the utility district.

To the petition of the reclamation district

★Hearing denied by Supreme Court.

the utility district filed both a demurrer and answer, which by its terms admits practically all of the allegations of the petition, except the allegations to the effect that without the reclamation works maintained by the district the lands would be useless for the purposes for which the utility district seeks to use its right of way; and while traversing this allegation, it is admitted that the reclamation has benefited the utility district, in that it can more cheaply and conveniently maintain its work under existing conditions than the same could be maintained if the lands were permitted to revert to their natural condition.

The only issue here raised is to the validity of the assessment as applied to the lands of the utility district, the district contending that its property being actually used for a public purpose is exempt from such assessment as here attempted to be levied.

Respondent contends that it is the general rule of the state to exempt publicly owned property from taxation, and, that being true, the general principles, which exempt publicly owned property from taxation, also exempt the same from an assessment, where the property is actually being put to use by the public body for a public use.

The Constitution of 1849 contained no express exemption of public property from general taxation, but by judicial construction it early became a recognized principle of taxation. The Constitution (article 11, § 13) provided: "Taxation shall be equal and uniform throughout the state. All property in this state shall be taxed, * * *" etc. The Supreme Court, through Mr. Justice Rhodes, said in the case of People v. McCreery, 34 Cal. 432, in construing this section:

> "The meaning of taxation must be kept in view, and that is: A charge levied by the sovereign power upon the property of its subject. It is not a charge upon its own property, nor upon property over which it has no dominion. This excludes the property of the State. * * *"

In the Constitution of 1879, section 1, art. 13, provided:

> "All property in the state * * * shall be taxed * * * provided, that * * * property used exclusively for public schools, and such as may belong to the United States, this state, or to any county or municipal corporation within this state, shall be exempt from taxation."

Thus stood the law in 1913 when the city of San Francisco filed a petition for a writ of mandate to compel certain officers of the county of Tuolumne to cancel an assessment for taxes levied by Tuolumne county upon certain property belonging to the city of San Francisco, lying in the county of Tuolumne, the property having been acquired for its purpose of constructing and operating a municipal waterworks and supply for the benefit of the city of San Francisco and the inhabitants thereof. Upon the hearing of said writ, the trial court directed that the writ issue, and in affirming the order this court held in San Francisco v. McGovern, 28 Cal. App. 491, 152 P. 980, that the constitutional provision exempting municipally-owned property was plain and unambiguous and therefore was not subject to judicial interpretation.

To remedy this apparent injustice, section 1 of article 13 was amended in 1914, by adding the following:

> "All property in the state except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; provided, that a mortgage, deed of trust, contract, or other obligation by which a debt is secured when land is pledged as security for the payment thereof, together with the money represented by such debt, shall not be considered property subject to taxation; and further provided, that property used for free public libraries and free museums, growing crops, property used exclusively for public schools, and such as may belong to the United States, this state, or to any county, city and county, or municipal corporation within this state shall be exempt from taxation, except such lands and the improvements thereon located outside of the county, city and county, or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation; provided, that no improvements of any character whatever constructed by any county, city and county, or municipal corporation shall be subject to taxation. All lands or improvements thereon, belonging to any county, city and county, or municipal corporation, not exempt from taxation, shall be assessed by the assessor of the county, city and county, or municipal corporation in which said lands or improvements are located, and said assessment shall be subject to review, equalization and adjustment by the state board of equalization. The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this state."

It will be noted that the proviso relates only to taxation, and upon examination of the Constitution we find no provision pertaining to assessments, as distinguished from taxation, although such distinction has long been clearly and definitely pointed out. In an early California case, Taylor v. Palmer, 31 Cal. 241, the court said:

> "It is not a power to tax all the property within the corporation for general purposes, but a power to tax specific property for a specific purpose. It is not a power to tax property generally founded upon the benefits supposed to be derived from the organization of a government for the protection of life, liberty, and property, but a power to tax specific property

founded upon the benefits supposed to be derived by the property itself from the expenditure of the tax in its immediate vicinity."

[1] This court having before it the plain distinction pointed out in the many opinions of the courts of California, and the appropriate use of the words "taxation" and "assessments," as used by the Legislature itself in the various laws it had enacted pertaining to those respective subjects, we cannot say that it deliberately and intentionally omitted assessment from the exceptions contained in section 1 of article 13 of the Constitution, and the judicial branch cannot read into the law what the legislative branch has, apparently, purposely and deliberately omitted.

It is true that our cities have grown in population and that questions of acquiring property for water supply, sewage disposal, light and power, playgrounds, cemetery sites, and airplane fields are becoming increasingly prominent, and, as time goes on, the development of these municipal interests, as well as others, will tend more and more to cause cities to seek beyond the confines of their corporate limits for such benefits; but such questions must be addressed to the Legislature and not to the courts.

Petitioner recognizes that the utility district here affected is a public corporation engaged in a municipal function, and that there is no direct constitutional provision in point, but it attempts to distinguish the cases relating to the question, upon the ground that if a special assessment is levied for the improvement of property the public agency is not liable, but if for the actual preservation of the property it is liable, and attempts to establish as the rule of law that publicly owned and used property is exempt from assessment where the assessment benefits the entire public and not alone the particular public entity that owns the property. We do not believe that such a rule can be formulated, or that the cases bear out such conclusion as petitioner contends.

[2, 3] The question seems to be whether or not the property of the governmental agency is actually devoted to a public use; if so, it is exempt, otherwise not. Perhaps the leading case announcing this principle is that of City of San Diego v. Linda Vista Irrigation Dist., 108 Cal. 189, 41 P. 291, decided in 1895, and several years prior to the amendment of section 1 of article 13 of the Constitution. That was a case where the city of San Diego owned certain public lands. These were included within an irrigation district. The question before the court was the liability of the lands of the city to pay the irrigation district assessments. The complaint described the nature of the lands and alleged the facts that they were not used for any public purpose, but were "dry, vacant, unoccupied, and uncultivated agricultural lands." In the course of its opinion the court pointed out that the assessment of the irrigation district was not a tax, that the city could not claim exemption by virtue of the provisions of section 1 of article 13; that, on the contrary, section 1 of article 13 dealt with exemption from taxation and had no application to an assessment which was for the immediate benefit of the property. After citing cases showing the difference between a tax and an assessment, the court concluded that the lands in question, not being held for any public or municipal purpose, were liable to assessment.

The next case which arose was Witter v. Mission School Dist., 121 Cal. 350, 53 P. 905, 66 Am. St. Rep. 33, decided in 1898, also long prior to the constitutional amendment referred to. This was a case of a street assessment. The complaint did not specifically allege that the property which it was sought to subject to the lien of the assessment was not used for public purposes. After discussing the Linda Vista Case and pointing out the difference between a tax and an assessment, the court said:

> "So far as shown the lots in question may have school buildings upon them and may be used and occupied exclusively for school purposes, in which case we do not think this action could be maintained. As a private owner, however, of land not used exclusively for school purposes, but held as an investment or from which to derive rentals, as property of an individual is held and owned, we see no reason why the lands of a school district should not be assessed for improvements the same as those of any other private owner. But we think, as land belonging to school districts is liable for such assessments only when it is not used for school purposes, the complaint should allege the facts necessary to bring the case within the exception."

Accordingly, because of the fact that it did not clearly appear in the complaint that the land was not used for public school purposes, the ruling of the court below sustaining the demurrer to the complaint was affirmed.

The next case to consider the question is City Street Imp. Co. v. Regents of the University of Cal., 153 Cal. 776, 96 P. 801, 18 L. R. A. (N. S.) 451, decided in 1908, and several years prior to the constitutional amendment before referred to. It was sought in this case to impress a street assessment lien against certain real property, the legal title to which stood in the name of the Regents of the State University. The court, through Mr. Justice Henshaw, in the course of its opinion, cited with approval the cases of San Diego v. Linda Vista Irr. Dist., supra, and Witter v. Mission School Dist., supra, and reaffirmed the rule of those cases, and held that the complaint stated a cause of action because the property in question was not used for any public purpose.

Subsequently, in the case of Raisch v. Regent of the U. of C., 37 Cal. App. 697, 174 P. 943, and upon the authority of the cases above cited, it was held that the complaint failed to state a cause of action, and that the land in question being used in part for a public purpose was not subject to assessment.

The latest case on the subject is City of Fresno v. Fresno Irrig. Dist., 72 Cal. App. 503, 237 P. 772. The city of Fresno owned a sewer farm, which was outside the limits of the city and within the boundaries of the Fresno irrigation district. Upon this land the defendant irrigation district levied an assessment for irrigation district purposes and was about to sell the property of the city to satisfy the lien of that assessment. The action was brought to enjoin such sale and to quiet the title of plaintiff to the lands in question. After reviewing the previous cases, the court said, quoting from the case of City Street Imp. Co. v. Regent, supra:

> "The rule in this state is, as above indicated, that such property when actually devoted to the public use is exempt; otherwise not."

The above authorities appear decisive on the question, and it is ordered that the writ of mandate commanding the utility district to pay to the proper authorities an amount sufficient to discharge the assessment levied by the reclamation district be hereby denied.

We concur: FINCH, P. J.; HART, J.

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91 Cal. App. 189

PEOPLE v. BRYAN et al. (Cr. 1020.)

District Court of Appeal, Third District, California. April 21, 1928.

1. Criminal law ⇨622(2)—Court held not to have abused discretion in refusing separate trial to defendant jointly charged with robbery (Pen. Code, § 1098).

Court *held* not to have abused discretion, exercised pursuant to Pen. Code, § 1098, in refusing separate trial to defendant jointly indicted with another for robbery.

2. Jury ⇨131(1)—Holding that questions propounded to jury by defendant's attorney were for court's determination and submission held not refusal to permit examination of prospective jurors by defendant's counsel (Pen. Code, § 1078, as amended by St. 1927, p. 1039).

In prosecution for robbery, court's holding that certain questions propounded to the jury by defendant's attorney were questions of law to be determined by the court and submitted to the jury by way of instructions *held*, not a refusal by the court to permit, as required by Pen. Code, § 1078, as amended by St. 1927, p. 1039, reasonable examination of the prospective jurors by defendant's counsel.

3. Criminal law ⇨696(7)—Striking answer to entire question whether witness knew defendant's general reputation for truth, honesty, integrity, peace, and quiet, where witness answered, "Very good," held proper, where reputation for truth had not been attacked.

In prosecution for robbery, court's striking answer as to entire question put by defendant's attorney to a witness whether witness knew the general reputation of defendant in the community in which he lived for truth, honesty, integrity, peace, and quiet, to which the witness had answered, "Very good," *held* proper, where defendant's reputation for truth had not been attacked.

4. Witnesses ⇨318—Witness' reputation for truth cannot, until attacked, be supported by evidence that it is good.

It is a well-recognized rule that the reputation of a witness for truth cannot be supported by evidence that it is good until it has been attacked.

5. Assault and battery ⇨96(1)—Refusing charge on assault held not error, where evidence conclusively showed defendant guilty of robbery, unless coerced (Pen. Code, § 26, subd. 8).

In prosecution for robbery, court's refusal to charge, as requested by defendant, on assault and possibility of finding defendant guilty of assault instead of robbery, *held* not error, where the evidence conclusively showed that defendant was guilty of robbery, unless it was found, as provided by Pen. Code, § 26, subd. 8, that he had participated in robbery through coercion.

6. Robbery ⇨27(5)—Where evidence tends to prove defendant, if guilty, is guilty of robbery, court may instruct that verdict should be guilty or not guilty.

Where, in prosecution for robbery, the evidence all tends to prove that defendant, if guilty at all, is guilty of robbery, the jury may be instructed that their verdict should be guilty or not guilty.

7. Criminal law ⇨719(1)—Refusing to permit counsel to argue question of defendant's insanity held not error, where plea of not guilty by reason of insanity was not made, and there was no evidence of insanity.

In prosecution for robbery, court's refusing to permit defendant's attorney to argue to jury the question of defendant's insanity *held* not error, where no plea of not guilty by reason of insanity had been made by defendant, and no evidence whatever that his mind was otherwise than normal had been produced.

8. Robbery ⇨24(1)—Evidence held sufficient to sustain conviction of robbery in second degree.

Evidence *held* sufficient to sustain conviction of defendant of robbery in second degree.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Harry A. Pierce, alias H. A. Rogers, was convicted of robbery in the second degree, and he appeals. Affirmed.

Harry Donnelly, of Redding, Ernest Spagnoli, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

JAMISON, Justice pro tem. Defendant and appellant Harry A. Pierce, alias H. A. Rogers, was jointly charged with Daniel Webster Bryan with the crime of robbery by an information filed by the district attorney of Shasta county, and upon their trial upon said charge Bryan was found guilty of robbery in the first degree, and Pierce was found guilty of robbery in the second degree. From the judgment rendered thereon, Pierce has appealed.

Briefly stated, the facts surrounding the said robbery are about as follows: On the evening of November 9, 1927, Aaron C. Benjamin spent a considerable part of his time in the pool room of Lee and McKee in Redding, engaging in card playing. During that time, and when he left for home, shortly after 1 o'clock a. m. on the 10th of November, he had several hundred dollars on his person, at least a portion of which was open to the view of the people collected in said pool room.

Benjamin, accompanied by a neighbor named Fish, left said pool room shortly after 1 o'clock on the morning of November 10, 1927, and, after getting a lunch in a nearby café they left Redding, traveling north on a public road known as the Pacific Highway, Benjamin in front in his own car and Fish following in a car of his own. When Benjamin had traveled about eight miles from Redding on said highway, he was overtaken by defendants, who were traveling in a Pontiac coupé. Defendants were each armed with a revolver, and, after compelling Benjamin to stop his car, they forced him out of it, and proceeded to rob him of his purse and keys. They did not succeed in getting the bulk of his money, for the reason that the moment he realized that he was about to be robbed, he threw it out on the roadside, and it escaped their search.

Defendants, believing that the purse they had taken from Benjamin contained all his money, permitted him, after a short delay, to proceed on his way. Fish, who was following Benjamin, passed the defendants and Benjamin just after they had stopped Benjamin, and, as he passed, saw one of the defendants pointing a revolver at him. Fish did not stop, but continued on to his home about two miles from the scene of the holdup. When defendants permitted Benjamin to depart, he went on to the home of Fish, and he and Fish telephoned Sheriff Sublett at Redding the facts of the holdup, giving him the number of the car defendants were using. Sublett immediately got in touch with his Deputy Stevenson, and together they began a search for defendants.

About 2 o'clock on the morning of November 10, 1927, they discovered defendants, who had stopped the car in an alley in Redding. When approached by the officers, Bryan had a revolver in his hand, and, upon command of the sheriff, and after some hesitation, he dropped it and surrendered. The officers arrested both of the defendants, and later in the day appellant made a confession to the sheriff in which he admitted that he and Bryan had both participated in the robbery of Benjamin, and were each armed with a revolver. Benjamin identified Bryan as the one who pointed the gun at him and told him to get out of the car. He did not recognize Pierce, but said that this one whom he did not recognize had a gun, but did not point it at him. However, he was the one who took the purse from Benjamin.

Appellant was sworn as a witness, and testified, in substance, that he first met his codefendant Bryan in Salinas about September 15, 1927, where appellant was working, that on November 6th he and Bryan left Salinas, traveling in a Pontiac coupé owned by appellant, and, after stopping at several places looking for work, finally arrived at Redding in the evening of November 9th.

At Bryan's suggestion they went to the pool room of Lee and McKee, and, after remaining there an hour or so, Bryan called appellant outside, and told him to go back in the pool room and watch a certain man whom they had seen playing cards in there, and who appellant later learned was Benjamin, until he "cashed in," as he, Bryan, wanted to borrow money from him. Appellant did as required, and, after Benjamin "cashed in," appellant returned to Bryan, and informed him that Benjamin had $400 or $500; that Bryan thereupon informed appellant that he had not intended to try to borrow any money from Benjamin, but did intend to follow and rob him, and that appellant must drive him and follow Benjamin so that he (Bryan) could rob him.

Appellant stated that he refused to do this for a long time, but that, after Bryan insisted and made threats, he finally consented, but with the intention of not overtaking Benjamin or taking any part in the robbery; that he and Bryan followed Fish and Benjamin in appellant's car, appellant driving, and, when they had gone about a mile, appellant stopped his car, and said he was out of gas; that Bryan got out of the car, and looked at the gas register, and then got back in the car, and shoved a gun against appellant's body and threatened to shoot him, and thereby forced appellant to speed up and overtake Benjamin, and that thereafter everything he did in assisting in said robbery was done through the fears excited by the threats of Bryan.

[1] The first point urged by appellant for a reversal of this case is that the court abused its discretion in refusing his demand for a separate trial.

Section 1098 of the Penal Code provides

that, when two or more defendants are jointly charged with the commission of a crime they must be tried jointly, unless the court orders separate trials, and that in its discretion the court may order a separate trial for one or more of the defendants.

We cannot see from the showing made by the appellant that there was any abuse of discretion by the trial court in refusing appellant a separate trial.

[2] The next point raised by appellant was that the trial court refused to allow counsel to examine talesman. Section 1078 of the Penal Code, as amended by act of the Legislature in 1927 (St. 1927, p. 1039), reads as follows:

> "It shall be the duty of the trial court to examine the prospective jurors to select a fair and impartial jury. He shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant."

It does not appear that the trial court refused to permit Mr. Spagnoli, the attorney for appellant, to examine prospective jurors. The court merely held that some two or three questions propounded to the jury by Mr. Spagnoli were questions of law to be determined by the court and submitted to the jury by way of instructions.

Appellant's next contention is that the trial court erred in the admission and rejection of evidence. He calls attention to the alleged refusal of the court to permit appellant, when testifying as a witness in his own behalf, to state whether or not he followed Benjamin with the intention of committing a robbery. An inspection of the reporter's transcript shows that the court did not so rule, but, on the contrary, shows that appellant was permitted to answer the question. We find no error in the admission or rejection of testimony.

[3] Appellant assigns as error the refusal of the court to permit appellant to prove that his character for truth, honesty, and integrity was good. C. W. Edmindsen, a witness for defendant, testified that he had known appellant for the past ten years. He was then asked by Mr. Spagnoli, appellant's attorney, if he knew the general reputation of appellant in the community in which he lived for truth, honesty, integrity, peace, and quiet. The witness answered, "Very good." The court struck out this answer, and stated that a witness is presumed to speak the truth, that this presumption goes with him until it is attacked by the other side to show that his reputation for truth, honesty, and integrity is bad; when so attacked, he may rebut it, but that appellant has the right to show his reputation for peace and quiet.

[4] The question propounded by plaintiff to said witness was objectionable, in that it included truth with the other traits of character. It is a well-recognized rule that the reputation of a witness for truth cannot be supported by evidence that it is good until it has been attacked. People v. Cowgill, 93 Cal. 596, 29 P. 228. Had the character for truth been eliminated from the question, the trial court would have erred in refusing to permit the witness to answer it.

[5, 6] It is claimed that the court erred in refusing certain instructions requested by appellant defining assault; that assault is included in a charge of robbery; and that the jury could find appellant guilty of assault. The evidence in this case conclusively shows that appellant was guilty of robbery, unless it was found that appellant participated in said robbery through coercion as provided by subdivision 8 of section 26 of the Penal Code. Where the evidence all tends to prove that the defendant, if guilty at all, is guilty of robbery, the jury may be instructed that their verdict should be guilty or not guilty. People v. O'Brien, 88 Cal. 483, 26 P. 362.

[7] There certainly was no error in the refusal of the court to permit the attorney for appellant to argue to the jury the question of appellant's sanity. No plea of not guilty by reason of insanity had been made by appellant, and no evidence whatever that his mind was otherwise than normal had been produced. Appellant admitted that he participated in the robbery with a loaded pistol in his hand. His only defense was that he did this by reason of the threats and menaces of his codefendant, which caused him to believe that his life would be endangered if he refused. He testified at the trial that, when his codefendant said to him that he was going to rob Benjamin, and that appellant must drive him to where he could commit the robbery, appellant refused for a long time, but that he finally consented, after his codefendant had insisted and made threats. When asked what threats were made, he said "he didn't know, that he would get him later and stuff like that." In his affidavit filed with motion for a separate trial, he did not make any mention of any threats when his codefendant insisted upon his taking his car and following Benjamin for the purpose of robbing him. Appellant there stated "that at his (codefendant's) insistent request I finally consented to drive him out and follow Benjamin and intended not to overtake Benjamin's car if I could do so." Nor did appellant, when he made the confession to the sheriff, just after his arrest, make any mention of his later claim that he had been coerced into assisting in said robbery.

[8] We are of the opinion that the appellant had a fair trial, and that the evidence was amply sufficient to justify the jury in returning a verdict of guilty against him.

The judgment is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

91 Cal. App. 206

DEAN v. McNERNEY et al. (Civ. 3500.)★

District Court of Appeal, Third District, California. April 23, 1928.

Rehearing Denied May 23, 1928. Hearing denied by Supreme Court June 21, 1928.

1. Contracts ⚷138(6)—Where defendant does not set up defense of illegality of contract, but evidence shows illegality, court must refuse to entertain action.

Where defendant does not set up defense of illegality of contract, but case made by plaintiff or defendant shows illegality, it becomes duty of the court sua sponte to refuse to entertain action.

2. Contracts ⚷138(6)—Where testimony showing alleged illegality of contract appeared in record, it was court's duty to pass on it as though refused amended answer was filed and testimony again admitted into record.

In action by administrator to recover money alleged to belong to deceased, but deposited in bank in defendant's name, in which defendant claimed that transaction by which money came into her possession was illegal, where testimony alleged to show illegality and which defendant sought to reintroduce in connection with her amended answer, which court refused her permission to file, appeared in record, it was duty of court to pass on it just as though amended answer had been filed, and testimony in relation thereto again admitted into record.

3. Appeal and error ⚷1041(3)—Where evidence showing alleged illegality of transaction whereby defendant obtained money from deceased was in record, refusal to permit amended answer alleging illegality held harmless.

In suit by administrator to recover money which it was alleged belonged to deceased's estate, but which was deposited in bank in defendant's name, where defendant's evidence regarding illegality of transaction by which money came into her possession was in record, refusal to permit filing of an amended answer pleading facts showing illegality *held* not prejudicial, since, if case presents one of illegality of contract, it must be considered by court, whether pleaded or not.

4. Appeal and error ⚷1042(2)—Striking out part of testimony regarding alleged illegal transaction whereby defendant obtained money sued for held not reversible error.

In suit by administrator to recover money which it was alleged belonged to deceased, but which was deposited in bank in name of defendant, court's granting of motion striking out part of evidence relating to defense of alleged illegality of transaction whereby defendant obtained money *held* not reversible error, where trial court had before it all of testimony claimed to show illegality of transaction.

5. Appeal and error ⚷1011(1)—Court's finding on conflicting evidence being supported by evidence, judgment must be affirmed.

Court's finding that money sued for was placed in defendant's custody for purposes of safe-keeping only, being supported by evidence, judgment for plaintiff must be affirmed, even though evidence was sufficient to support gift to defendant, and also sufficient to show illegality of whole transaction.

On Petition for Rehearing.

6. Appeal and error ⚷662(4)—Final ruling and findings of fact in transcript, and not statements of judge to counsel, held controlling on appeal.

Final ruling of court and findings of fact as set forth in transcript *held* determinative on appeal; what trial judge may have said in colloquy with counsel not being controlling.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action for money on deposit by P. M. Dean, as administrator of the estate of Peter W. Dean, also known as P. W. Dean, and also known as Peter Dean, deceased, against Nell McNerney, also known as Mrs. G. W. McNerney, and another. From a judgment for plaintiff, defendant named appeals. Affirmed.

Fred B. Mellman and Fitzgerald, Abbott & Beardsley, all of Oakland, for appellant.

Philip M. Carey, of Oakland (Marvin B. Sherwin, of Oakland, of counsel), for respondent.

PLUMMER, J. On the 27th day of January, 1925, Peter W. Dean died intestate in the city of Oakland, leaving an estate of the value of about $8,000. This estate consisted of certain jewelry and also of the sum of $7,720.66 on deposit with the American Bank in the city of Oakland. This deposit, at the time of the death of said Peter W. Dean, was standing in the name of appellant, Nell McNerney. After the death of said Peter W. Dean, P. M. Dean was appointed the administrator of his estate, and after such appointment the appellant, who then had possession of the jewelry referred to, delivered possession of the same to the plaintiff, but refused to deliver to the plaintiff or to turn over to the plaintiff the passbooks in which was entered the sum of money referred to as on deposit with the American Bank. The plaintiff had judgment for the sum above mentioned, and the defendant Nell McNerney appeals.

The appellant interposed two defenses to the plaintiff's action: First, that the money on deposit with the American Bank was what was left of the sum of $8,000 theretofore given to the appellant by the deceased, Peter W. Dean; and, second, that the transaction by which the money came into the possession of the appellant, Nell McNerney, was illegal, and that therefore the court would leave the parties where it found them and would grant no relief to the plaintiff herein.

[1, 2] The original answer of the appellant did not plead illegality of the transaction, but, after certain testimony had been admitted tending to support such defense, appellant asked leave to file an amended answer pleading, in substance, the facts shown by the testimony as establishing the illegality of the transaction. The trial court refused permis-

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★Rehearing denied. Hearing denied by Supreme Court.

sion to file such amended answer, and this action is assigned as error. The trial court also refused the appellant permission to reintroduce testimony which the record shows in substance and effect to be the same as the testimony that had already been introduced into the record. This testimony was sought to be introduced in support of the allegations of the amended answer as tendered to the court. The trial court found that there was no gift made by Peter W. Dean, deceased, to the appellant of the $8,000 mentioned in the record, and also found against the contention of the illegality of the contract. Upon this appeal it is conceded by the appellant that there is sufficient testimony in the record to support the finding of the court that there was no gift, while at the same time insisting that the record shows sufficient testimony to support a gift, in the event that the court had accepted such testimony as true. Upon this appeal we have only to do with the question of illegality of the contract. The law is very well settled that, where the defendant does not set up the defense of illegality, but that the case made by the plaintiff or the defendant shows illegality, it becomes the duty of the court sua sponte to refuse to entertain the action. 6 Cal. Jur. p. 162, § 111, and cases there cited. The testimony in this case which the appellant claims to show illegality and which the appellant sought to reintroduce in connection with her amended answer, appearing in the record, it was the duty of the court to pass upon it just the same as though the amended answer had been filed and the testimony in relation thereto again admitted into the record. The finding of the court in relation to the transaction is as follows:

> "That on the 15th day of October, 1922, said Peter W. Dean, deceased, delivered to the defendant Nell McNerney in trust for safe-keeping, and for no other purpose, the sum of $8,000.66, and that said defendant Nell McNerney promised to repay said sum to the said Peter W. Dean, deceased, upon his request or demand; that there remained on January 27, 1925, in the possession of the defendant Nell McNerney from the said sum of $8,000.66 the sum of $7,720.66, which amount is now on deposit with the defendant the American Bank, a corporation, in the name of and to the credit of the defendant Nell McNerney, together with interest thereon at 4 per cent. per annum from January 1, 1925."

This finding is to the effect that the money in question was delivered by the deceased to the appellant for safe-keeping, and for no other purpose, and therefore was not delivered in accordance with the claim of the appellant that it was for the purpose of protecting her as a house owner consenting to the use of the premises belonging to her, for illegal purposes. The record shows that prior to the delivery of the $8,000 by Peter W. Dean, deceased, to the appellant on August 15, 1922, the deceased had previously intrusted with the appellant the custody of a sum of money aggregating $4,264.19; that this money had all been deposited in the Hibernia Bank of San Francisco by the appellant in her own name, and the account representing such money was all the time carried in the name of the appellant.

[3] The record also contains the testimony of a number of witnesses, which, if believed by the trial court, tended to show, if not to establish beyond controversy, that the claim of the appellant in this case that the money was either given to her outright or was given to her for the purposes of protection was an afterthought. The testimony of these witnesses, if believed by the trial court, necessitated the setting aside and absolute disregarding of all the testimony of the appellant as to there ever having been any gift of the money to her by Peter W. Dean, deceased, or having been placed in her care, custody, and control for any other purpose than for safe-keeping, just as moneys had previously been placed in her care, custody, and control by the deceased. It being admitted by the appellant that the testimony is sufficient to support the judgment of the trial court, it only remains for us to consider the alleged error in the ruling of the court in relation to the amended answer and the testimony sought to be introduced thereunder. As we have said, if the case presents one of illegality of the contract, it must be considered by the court, whether pleaded or unpleaded. Hence the refusal of the trial court to permit the filing of an amended answer could work no prejudice to the appellant.

[4] Before going further into the question as to the testimony stricken out by the trial court and not allowed to stand in support of the amended answer, we may state that the record shows that the deceased, Peter W. Dean, was for a considerable period of time engaged in the business of bootlegging; that he had stored liquors in a garage situate on the premises belonging to the appellant, and later on stored some of the liquors used by him in his business as a bootlegger in one of the rooms in the residence occupied by the appellant. The proposed amended answer recites the use of the garage by the deceased for storing liquors, and, further, that some time during the latter part of the month of July or the early part of the month of August, 1922, the appellant, upon returning to her home, discovered that the deceased had stored some of the illicit liquors in one of the rooms in the dwelling house occupied by the appellant; that the appellant spoke to the deceased concerning the same, and the deceased stated to the appellant that he would see that she would suffer no loss by reason of his use of her premises for the purpose of storing said liquors, and would see that she was protected; that thereafter, and on the 15th day of August, 1922, said deceased delivered to the appellant $8,000.66; that said deceased paid said sum of money to said appellant for the purpose of protecting the appellant against

any loss by reason of the use of her premises for the storing of liquors; and that said deceased continued thereafter, until the 27th day of January, 1925, to store illicit liquors on premises belonging to the appellant. When the testimony was sought to be reintroduced by the appellant in relation to the defense so tendered, a short colloquy ensued between the trial court and counsel for appellant as to just what was claimed by the appellant in relation to the transaction. In this colloquy we find the direct questions and answers:

> "By the Court: Do you claim he paid it to her for running a bootlegging establishment?
>
> "Mr. Mellman (counsel for appellant): We do not. We rest on two propositions, you might say a gift of money, he made her a gift of the money; that he intended and actually did transfer the title to it; that he was moved by certain considerations."

These considerations it would appear were claimed to be protection of the appellant. The trial court then heard the testimony of the appellant in relation to the claim of illegality, but, so far as the record shows, it can only be determined that the following portion of such testimony was stricken out. It is the answer of the appellant which is in the following words:

> "I was afraid, when I saw the liquor, to have it in the house. I said, 'Pete, I don't want liquor in the house.' I didn't mean when I saw it in the garage; I didn't want it in the house. He said to me, Pete said, 'You don't need to worry; you haven't the evidence. Don't think for a minute that I will put your home or yourself in a bad position to hurt you. I will see that you are taken care of.'"

A motion to strike out this answer was interposed by counsel for the plaintiff, and appears to be the only motion granted in relation to the testimony. The question then arises, Did the court commit reversible error by granting this motion? A reference to the record shows that the following testimony was introduced and allowed to remain therein after the character of the business in which the deceased had been engaged had been established (testimony by the appellant; questions by counsel for appellant):

> "Q. Was he at that time (referring to the deceased) engaged in the bootlegging business? A. Yes.
>
> "Q. You remember at that time he stored liquor in your house? A. Yes.
>
> "Q. Was he at that time storing liquor in your garage? A. Yes.
>
> "Q. Did he ever, at any time, state to you what his reason was for protecting you? A. Yes.
>
> "Q. At any time before this did he state to you anything about it? A. Only one day I said —I began to get nervous on account of the liquor in the house, and I said, 'Pete, I don't want you to put liquor in the house; I am afraid they will take my home if I get caught.' And he said, 'Don't worry; I will show you I will take care of you.'
>
> "Q. How many days before the day he actually gave you this money was this? A. He said it to me at different times.
>
> "Q. When was the last conversation before he gave you the money or check on that subject? A. The night I came home and found the liquor stored there.
>
> "Q. When was that? A. Maybe a week before that, one week before that.
>
> "Q. When did Dean give you the money? A. He gave it to me on the morning I deposited it.
>
> "Q. Who was present besides you and Peter Dean? A. Nobody.
>
> "Q. What did he say to you? A. 'Nell, take this; put it in the bank for yourself for your protection, and if anything happens to me, and in case I am knocked over, it will help bail me out.' That is a slang phrase of saying it.
>
> "Q. In case I am knocked over, this was to help bail me out? A. Not all of it. If he, personally, in case I am knocked over, use it that way.
>
> "Q. By knocked over, what did you understand it to mean? A. If arrested.
>
> "Q. For bootlegging? A. Yes."

[5] It is thus apparent that the trial court had before it all of the testimony claimed to show the illegality of the transaction, and the purpose for which it is claimed the $8,000 was given by the deceased to the appellant. The court found that the money was placed in the custody of the appellant for purposes of safe-keeping, and for no other purpose, which directly contradicts the theory that the money was paid to the appellant for her protection, and the statement of counsel is direct to the effect that no claim is made that the money was paid by the deceased to the appellant for permission to run a bootlegging establishment on the premises belonging to her.

Had the court found in accordance with the testimony of the appellant as it appears in the record, it may be admitted that the testimony is sufficient to support a gift, and also sufficient to show illegality of the whole transaction; but, as the finding of the trial court to the contrary is sufficiently supported, the judgment must be affirmed, and it is so ordered.

We concur: HART, Acting P. J.; JAMISON, Justice pro tem.

On Petition for Rehearing.

PER CURIAM. [6] The final ruling of the court and the findings of fact as set forth in the transcript are determinative upon this appeal. What the trial judge may have said in a somewhat extended colloquy with counsel is not controlling.

Rehearing denied.

91 Cal. App. 369

BULLOCK v. WESTERN WHOLESALE DRUG CO. et al. (two cases).★
(Civ. 5101.)

District Court of Appeal, Second District, Division 2, California. April 26, 1928.

Hearing Denied by Supreme Court June 25, 1928.

Automobiles 🔑245(91)—In action for damages resulting from automobile collision at street intersection, evidence as to last clear chance presented question for jury.

In action for damages for personal injuries resulting from collision, at street intersection, of plaintiffs' automobile with defendant's truck, approaching from left, evidence as to last clear chance *held* sufficient to present question of fact as to liability of defendants, and court erred in directing verdict for defendants.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Actions for damages for personal injuries by W. P. Bullock and by Dora Bullock against the Western Wholesale Drug Company and another. The cases were consolidated for trial by stipulation, and, from a judgment for defendants in each case, plaintiffs appeal. Reversed.

Arnold Praeger, of Los Angeles, for appellants.

Jennings & Belcher, of Los Angeles, for respondents.

VALENTINE, Justice pro tem. These two actions were brought by husband and wife for damages resulting from an automobile accident. The facts are further stated in the opinion. The two cases were consolidated for trial by stipulation.

At the conclusion of the taking of testimony, the trial court, upon motion of defendants, directed the jury to find a verdict for defendants, and, from the judgment entered upon such verdict in each case, the plaintiffs take this appeal.

The appellants contend that the proximate cause of the accident was the negligence of the defendant Crittenden, who was driving the truck which belonged to the defendant Western Wholesale Drug Company.

The defendants pleaded contributory negligence, and, at the close of the trial made the motion for an instructed verdict on the following grounds:

"Mr. Jennings: If the court please, on behalf of the defendants we move for an instructed verdict, and move that the court instruct the jury to return a verdict for the defendants in each of these cases, on the ground that the evidence shows as a matter of law that the plaintiffs were guilty of contributory negligence proximately causing the accident, and that that negligence was continuing, concurrent, and contemporaneous with any negligence, if any, on the part of the defendant, and on the further ground that the doctrine of the last clear chance, which has been put forward as an excuse why the case should go to the jury, has no application in this case,"

—which the court granted.

The appellants assign as error on the part of the court: (1) In refusing to permit said cases to be submitted to the jury on the doctrine of the last clear chance; (2) in granting the motion of the defendants for an instructed verdict; (3) in instructing the jury to bring in a verdict for the defendants in each of said cases.

It appears from the evidence that on the 6th day of November, 1923, at about 1:30 o'clock p. m., the plaintiff W. P. Bullock was driving his Lexington automobile easterly on Second street in the city of Los Angeles, and that the plaintiff Dora Bullock, his wife, was sitting beside him on his right side; that, as they approached the intersection of Second street and Beaudry avenue, proceeding easterly on the southerly side of Second street at about 10 or 12 miles an hour, they both looked to the right up the hill on Beaudry avenue, and did not look to the left until their machine was opposite the button or the center of the point of intersection of Second street and Beaudry avenue, when for the first time they looked to the left and saw the truck approaching, and at the same place the rear end of their machine was struck by the Ford truck driven by the defendant Crittenden, who was driving south on Beaudry avenue. Crittenden and other witnesses testified that he was sounding his horn before he entered the intersection.

We will consider appellants' second and third points first, and, as they are closely interrelated, we may consider them together.

Respondents state that they do not claim that the evidence was not sufficient to warrant a finding that the defendant Crittenden was guilty of negligence, but do contend that the plaintiffs were guilty of contributory negligence as a matter of law. The plaintiff W. P. Bullock, on cross-examination testified:

"Q. Now you never saw this truck, as I understand you, until you were about in the middle of Beaudry? A. Yes, sir.

"Q. As I understand you, you said that when you got to the intersection you looked up the hill to the south? A. Yes, sir.

"Q. And saw that there was nothing coming down there? A. Yes, sir.

"Q. Well, now, that hill to the south was to your right as you approached the intersection, wasn't it? A. Yes, sir.

"Q. And you did not look to the left until you got out there into the center of Beaudry? A. That is right.

"Q. That is correct? A. Yes, sir."

The plaintiff Dora Bullock, on cross-examination, testified as follows:

"Q. Did you look to the right when you got to Beaudry street, to see if any machine was

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★Hearing denied by Supreme Court.

coming down that hill there? A. I think I did. I looked to the right and then to the left.

"Q. And when was the first time that you looked to the left? A. After looking to the right.

"Q. You looked to the right first, and saw there was no machine coming down the hill, did you? A. Yes, sir.

"Q. And then looked to the left? A. Yes, sir.

"Q. How far out into Beaudry street had you gotten at that time, when you looked to the left? A. About the center.

"Q. That is the first time you looked to the left? A. Yes, sir."

The testimony of both Mr. and Mrs. Bullock is substantially the same on the conditions and happenings preceding and at the time of the accident. He testified that he was going 10 miles an hour; that his brakes were in good condition; that he could have stopped within 15 feet; that he did not see defendants' truck until he reached the center of Beaudry avenue, when he looked to the left for the first time; that his car was about 16 feet long.

Respondents cite many authorities on the proposition that, even if the defendant Crittenden was guilty of negligence in failing to observe the right of way rule in entering the intersection, it does not excuse the plaintiffs for their contributory negligence.

There is conflicting testimony on various other points, but without further discussion we think the above, in connection with what is stated later in this opinion, shows the material facts which the trial court felt justified its conclusion that there was contributory negligence on the part of the plaintiffs as matter of law. Respondents, among other authorities, cite Gary South Coast Agency v. Pacific Elec. Ry. Co., 56 Cal. App. 469, 472, 205 P. 883, Finkle v. Tait, 55 Cal. App. 425, 203 P. 1031, and Moss v. H. R. Boynton Co., 44 Cal. App. 474, 186 P. 631, in which case the court says:

> "It was a duty devolving upon plaintiff, as the act of an ordinarily prudent man, immediately before placing himself in a position of danger, to look in the direction from which danger was to be anticipated. This was a continuing duty and was not met by looking once and then looking away."

In the instant case both plaintiffs admitted that they did not look to the left at all, until they reached about the center of the intersection, which was the direction from which the danger was to be anticipated. Admitting, for the sake of argument, but without deciding, that the trial court may have been justified in its conclusion that the plaintiffs were guilty of contributory negligence as matter of law, we will consider the remaining contention of appellants that, however this may be, and if Bullock is chargeable with contributory negligence, nevertheless it appears from the evidence that the defendant Crittenden had the last clear chance to avoid the accident.

Appellants and respondents both agree that, where the negligence of the plaintiff continues to the moment of the accident, the doctrine of the last clear chance does not apply. Rowe v. So. Cal. Ry. Co., 4 Cal. App. 1, 87 P. 220. But the evidence is conflicting on this point, and as to how far from the intersection defendant Crittenden was when he first saw Bullock's car, and the interval which elapsed before the impact. Crittenden testified:

> "I was coming down Beaudry. I saw Mr. Bullock's car just in the neighborhood of the curb line, and I attempted to stop. My foot brake would not work; it had not worked. I used my reverse and that slowed me down some, and used my emergency brake, and also threw it in low. I turned my car to the right as much as possible. If I had turned to the left I would have hit them amidships or in the front end of the car. I turned as much as I could to turn in behind them."

Mrs. Bullock testified as follows:

"Q. When you got to the crossing of Beaudry, you did not see the truck until you were out in the center of the street, as I understand it? A. Yes, sir.

"Q. Is that right? A. I said, 'Yes, sir.'

"Q. And it was then, according to your recollection, about 100 feet away? A. Yes."

Mr. Bullock testified as follows:

"Q. (by Mr. Praeger): Where were you, Mr Bullock, when you first noticed this truck? A I was about the middle of Beaudry.

"Q. Well, now, what part of your car was about in the middle of Beaudry? A. Well, my seat was right about in the center, as near as I know.

"Q. And where was the truck driver? A. He was 100 feet back, about.

"Q. And how fast do you think he was going? A. About 30 miles an hour.

"Q. The Court: Locate that truck, 100 feet back there. What does that mean?

"Q. (by Mr. Praeger): You say that the truck was about here (indicating). Where was he with respect to the center line of Beaudry avenue? A. About the center of the street —of Beaudry.

"Q. That would be about here (indicating)? A. He was right in the center. That is not the center.

"Q. You say he was right in the center? A. Yes, sir.

"The Court: You mean north of Second street? A. Yes, sir.

"Q. (by Mr. Praeger): In which direction was he proceeding? A. He was coming south.

"Q. Now, then, tell me where you were when you first saw this truck? A. Well, I was in between the curb and sitting right alongside of the button, just about the middle of the street, of Beaudry.

"Q. Will you put that car where you say you were when you first saw the truck, Mr. Bullock? (Witness indicates.)"

On cross-examination he testified:

"Q. And you say, do you, and repeat now, that that truck was 100 feet away at the time you were in the position marked by the letter 'B' there on the blackboard? A. Yes, sir."

The diagram or map referred to appears in the transcript as a part of Mr. Bullock's testimony. The witness Eickmeyer testified that the truck was about 132 feet from the corner at the time the plaintiff's car was about 15 feet from the intersection, although he apparently had previously testified differently in a deposition.

We believe that the evidence, quoted and referred to in part above, was sufficient to present a question of fact, which of course should have gone to the jury, and that the trial court erred in directing a verdict for defendants.

Judgment reversed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

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91 Cal. App. 310

PRENTICE v. WEAVER et ux. (Civ. 5146.)

District Court of Appeal, Second District, Division 2, California. April 25, 1928.

1. Appeal and error ⚷1011(1)—Appellate court will not disturb trial court's findings on conflicting evidence.

Where evidence is strongly conflicting, appellate court, on appeal, will not disturb findings of trial court.

2. Contracts ⚷346(3)—Evidence in action for labor and services in building house relative to agreement held not inadmissible as proof of affirmative defense not pleaded (Code Civ. Proc. § 2055).

In action for money alleged due for labor and services in building of house, evidence relative to arrangement or verbal agreement for building of house, adduced after plaintiff had called defendant, under Code Civ. Proc. § 2055, for testimony relative to such conversation, *held* not inadmissible as in support of affirmative defense or new matter not pleaded; issue as to whether terms of verbal agreement were as alleged having been raised by original pleadings.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by A. S. Prentice against R. D. Weaver and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

Davis & Thorne, of Los Angeles, for appellant.

G. C. De Garmo and H. B. Cornell, both of Los Angeles, for respondents.

VALENTINE, Justice pro tem. This is an action for money alleged to be due from defendants for certain labor and services in the building of a house by plaintiff's assignor. There was no written contract. The complaint contains three counts or alleged causes of action: (1) Upon an express contract for services rendered; (2) for the reasonable value of services rendered; and (3) for money had and received. The answer contains a specific denial of all the allegations of the complaint.

The plaintiff contended that defendants had agreed to pay plaintiff's assignor 10 per cent. of the agreed price of construction for his labor and services. Defendants contended that plaintiff's assignor had agreed to construct the house for the sum of $4,248, named by him. The court found for the defendants, and from the judgment entered thereon plaintiff takes this appeal.

Appellant specifies two grounds of appeal, viz.: First, that the findings of fact and judgment are not supported by the evidence; and second, that the court erred in permitting any evidence supporting an affirmative defense or new matter when said affirmative defense or new matter was not pleaded.

[1] The evidence is quoted at some length by both appellant and respondents. It seems unnecessary here to discuss it farther than to say that a careful examination of the transcript discloses that the evidence was strongly conflicting throughout, and that it is a well-settled rule that this court will not disturb the findings of the trial court under those circumstances.

[2] As to appellant's second point, an examination of the record discloses that the evidence which was admitted over plaintiff's objection was evidence as to the conversation between plaintiff and defendants, at which the arrangement or verbal agreement for the building of the house by plaintiff's assignor was made. Plaintiff had called defendant R. D. Weaver, under section 2055 of the Code of Civil Procedure, at the opening of his case, and he had then testified in part to this conversation, and he was later called and examined by his own counsel, but only as to the matters testified to by him on such examination; i. e., his previous examination by the adverse party under section 2055 of the Code of Civil Procedure. When we consider also that the issue raised by the pleadings was whether the terms of the verbal agreement were as alleged by the plaintiff, the defendant's testimony as to this conversation would have been material even if he had not been previously examined under section 2055. The evidence developed by respondents did not operate to prove an affirmative defense which was not alleged. It tended to show that the one contract pleaded in the complaint was never made, and the trial court was right in so considering it.

The findings of the trial court, based on all the testimony, are only that the allegations of the complaint are not true, and the judgment rendered was that plaintiff take nothing. No affirmative relief was asked by or granted to the defendants.

There is no merit in either of appellant's contentions.

Judgment affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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91 Cal. App. 246

HENNING v. AKIN et al. (Civ. 5811.)

District Court of Appeal, Second District, Division 1. California. April 24, 1928.

1. Pledges 🔑46—Generally, on payment of debt, pledgee must return identical property pledged as collateral.

The general rule is that a pledgee must return, on payment of debt, the identical property pledged as collateral security.

2. Pledges 🔑28—Pledgee will be held as trustee for conduct relating to property pledged.

The relation between pledgor and pledgee of personal property is in nature of a trust relation, and pledgee will be held strictly to account as trustee for his conduct in relation to trust property.

3. Joint-stock companies and business trusts 🔑8—Pledgees of syndicate units would be liable to account for improperly selling units where they had no units of their own which could be delivered on payment of debt.

If pledgees of units in syndicate, pledged to secure loan note, sold units without pledgor's knowledge or authority and contrary to provisions of note authorizing sale only after maker's default, and were unable to show that at time of sale they had any units of their own which they could deliver to pledgor on payment of obligation, they would be liable to account to pledgor for excess of proceeds of sale over balance due on note, though they had subsequently purchased units in syndicate for sole purpose of delivery to pledgor.

4. Joint-stock companies and business trusts 🔑8—Pledgor, whose syndicate units pledged to secure loan were improperly sold, held entitled to sue for accounting.

Pledgor, whose syndicate units pledged to secure loan note were improperly sold by pledgees before pledgor was in default, *held* entitled to maintain action for accounting of excess of proceeds of sale over balance due on debt, as against contention that pledgor's remedy was for conversion; prayer for accounting being mere incident to purpose of action to recover money.

5. Usury 🔑52—Note bearing 1 per cent. interest monthly, plus commission or bonus, held usurious.

Note for $4,120, representing $4,000 actually received by borrower and $120 bonus or commission, and bearing 1 per cent. interest per month, *held* usurious, and judgment thereon, which included interest and bonus for commission, was therefore erroneous.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Louis Henning against Charles C. Akin and another, copartners doing business under the fictitious name of the Akin-Lambert Company. Judgment for defendants, and plaintiff appeals. Reversed.

James L. Davis and James L. Allen, both of Santa Ana, for appellant.

Randall & Bartlett, of Los Angeles, for respondents.

HAHN, Justice pro tem. It is alleged in the complaint in this action that on or about the 25th day of June, 1923, plaintiff borrowed from the defendants the sum of $4,000, evidencing this loan with his promissory note for said sum, payable in 30 days, with interest at the rate of 1 per cent. per month; that as security for the payment of said sum plaintiff indorsed and delivered to the defendants a certificate for 78.6 units of the White Star Oil Syndicate, the reasonable market value of which at that time was about $15,000. It is further alleged that on or about the 27th day of July, 1923, plaintiff arranged with defendants for a renewal of said loan for a period of 90 days, and executed a new note for the principal sum of $4,000, wherein interest was made payable at the rate of 1 per cent. per month; that, as security for said new note, the defendants retained the hereinabove referred to certificate for 78.6 units of the White Star Oil Syndicate.

The complaint then alleges, upon information and belief, that prior to the maturity of the said renewal note, the defendants sold the said White Star Oil Syndicate units for a sum considerably in excess of $4,000, the exact amount unknown to the plaintiff, that the defendants have not paid over to the plaintiff the excess received by them for the sale of said units over and above the indebtedness owing by plaintiff to the defendants, but that said defendants are still demanding of plaintiff the payment of the amount of said note. The prayer of the complaint is that defendants be required to make an accounting of the proceeds derived by them from the sale of said units, and that plaintiff have judgment for the excess amount received by the defendants from said sale over the indebtedness due on account of said promissory note, and for general relief.

The defendants in their answer admit the execution of the note and the receipt by them of the units of the White Star Oil Syndicate, but deny that the units were received by them only as collateral security, alleging in addition that they were to have the right to use and handle said units as provided in the note executed by plaintiff at the time that the loan was made. The answer further denied that the said units so delivered by plaintiff to the defendants, or any of them, were sold. It should be noted that there is no provision in the pledge agreement authorizing the defendants to sell the units except in the event of default on the part of the maker of the note.

Defendants in addition filed a cross-complaint alleging the execution of the note and the delivery by plaintiff to the defendants of the units of the White Star Oil Syndicate, but allege that the renewal note was for the principal sum of $4,120. The defendants further allege that the said note became due, and that, after maturity, they tendered to the plaintiff "78.6 units of the White Star Oil Syndicate No. 1," and demanded payment of the note, but that plaintiff failed and refused to pay the note or any part thereof; that defendants tendered into court 78.6 units of the White Star Oil Syndicate to be delivered to plaintiff upon payment of the sum due on the note. The prayer in the cross-complaint is for judgment for the full sum of $4,120, as principal, with interest thereon at the rate of 1 per cent. per month from July 27, 1923, and for attorneys' fees and costs.

The plaintiff, answering defendants' cross-complaint, denies that he has not paid the principal and interest of said promissory note, and denies further that there is any part thereof remaining unpaid or due. He admits that he refused to accept the tender of the units of the White Star Oil Syndicate, for the reason that they were not the same units which had been delivered by the plaintiff to the defendants. It is also alleged, in answer to the cross-complaint, that the note is usurious.

The note set up in the answer and cross-complaint is in the usual form exacted by brokers where clients purchase stock on margin. Among other things therein contained is the following provision:

> "It is further agreed that the above-named security or any part thereof may be loaned by the Akin-Lambert Company or may be pledged by it either separately or together with other securities, either for the sum loaned thereon, or for a lesser or greater sum, or may be used by it in making deliveries or making substitutions in its business, all without further notice to the undersigned. * * * The Akin-Lumber Company shall not be obliged, however, to return to the maker the specific collateral deposited, but may deliver in place thereof a like amount of the same securities."

Provision is made in the note for the sale of the units only in the event the maker is in default.

There seems to be no controversy over the fact, as testified to by plaintiff, that he actually received only $4,000 as a loan for which he executed the note for $4,120. When the note became due, defendants demanded payment, but plaintiff contended that the note had been paid by reason of the unauthorized sale by defendants of his oil units, the proceeds from which were retained by the defendants.

It also appears that, at some time between the date of delivery of the units by the plaintiff to the defendants and the date of the trial, defendants received as dividends declared upon the 78.6 units the sum of $1,222.58, which amount was credited upon the note.

When during the trial plaintiff undertook to elicit testimony in support of his allegation that the defendants had without authority sold his collateral units, defendants objected to this line of evidence, contending that it was wholly immaterial, for the reason that they were tendering into court the same number of units which they had received from the plaintiff as collateral. This objection was sustained by the court, and the plaintiff was refused an opportunity to offer any testimony on this issue.

Judgment was rendered against the plaintiff on his complaint and in favor of the defendants on their cross-complaint for the sum of $2,897.42, being the amount which the court found due and unpaid on account of the principal and interest of the note. The credit allowed was due to dividends paid to defendants on the units while held by them.

Two points are raised by appellant in seeking a reversal of the judgment:

First. That the court erred in sustaining the defendants' objections to plaintiff's offer of testimony to prove that the defendants had, prior to the maturity of the note and contrary to its provisions, sold the 78.6 units of the White Star Oil Syndicate, which the plaintiff had delivered to the defendant as collateral security for said note.

Second. That the contract being usurious, the court erred in including in its judgment the $120 which was added to the $4,000 actually loaned to constitute the principal of the note, and interest thereon at the rate of 1 per cent per month.

The first point involves the question as to whether or not the holder of a promissory not, with units or shares of a commercial enterprise pledged as collateral security, may, contrary to the terms of the pledge agreement, sell the units without the owner's consent and avoid the owner's subsequent demand for an accounting of the proceeds derived from such sale, by tendering to the owner other units of similar character. In considering this question we will regard the units herein involved as similar in character to the shares of stock of a corporation.

Although the answer denies that the units which were delivered by appellant as collateral security were sold, in the trial of the case, the defendants did not rest their case upon this allegation, but relied upon the proposition that the defendants had a right to sell the collateral, so long as they tendered back, when the note became due, the same number of units of the White Star Oil Syndicate as were originally pledged with them. This position respondents endeavor to maintain largely upon the authority of the case of Atkins v. Gamble, 42 Cal. 86, 10 Am. Rep. 282, and upon subsequent cases approving the rule as therein laid down.

[1] It is well established as a general proposition that a pledgee must return upon the payment of the debt the identical property pledged as collateral security. Hudgens v. Chamberlain, 161 Cal. 715, 120 P. 422; Atkins v. Gamble, 42 Cal. 86, 10 Am. Rep. 282. There is, however, an exception to this general rule where shares of stock of a corporation have been pledged as collateral and certain conditions exist, and also in cases where certain commodities are delivered in pledge, such as wheat, which in the handling becomes so mixed with other commodities of similar character that it may become impossible to return the identical commodity which was originally pledged. The case of Atkins v. Gamble is the earliest decision in this state noting the exception, and contains a rather extended discussion of the considerations involved in justifying the establishing and recognition of this exception to the general rule. We deem it important to have clearly in mind the facts in that case and the important considerations which form the basis for the court's conclusion.

Atkins, the plaintiff, was a stockholder in a mining company of which Gamble, the defendant, was the president and a large stock owner. Atkins borrowed some money from Gamble, and as collateral security for the payment of this obligation pledged with Gamble 6 certificates for a total of 33⅓ shares of the stock of the mining company in question. Gamble desired to sell 10 shares of his own stock to one Martin, and contracted to do so. Fearing that publicity of the fact that the president of the company was selling some of his stock might be injurious to the company's interests, he conceived the idea of avoiding this undesirable consequence by using one of Atkins' certificates of stock which he held as collateral for the purpose of making delivery to Martin. Subsequently plaintiff paid in full his indebtedness to the defendant, whereupon the defendant tendered back to him certificates for the full number of shares which were pledged, 10 shares of which were substituted out of defendants' own stock to take the place of the 10 shares transferred to Martin. When Atkins discovered that Gamble had used one of his certificates of stock in consummating a sale at a price considerably in excess of the market price of the stock at the time Gamble returned the collateral to him, Atkins brought suit to recover the amount which Gamble had received for the sale of the stock, on the theory that there had been a conversion by Gamble of the Atkins stock. The court, in considering this situation, and announcing, so far as California was concerned for the first time, an exception to the general rule, said:

> "Whilst stock in corporations is denominated personal property, and is subject to seizure and sale under execution, and whilst a particular certificate may be capable of complete identification, by its numbers or otherwise, the certificate is but the evidence that the holder of it is entitled to an undivided share in the assets and business of the corporation. The stockholders are the joint owners of the franchise and property of the corporation, each being entitled to an undivided share thereof, and the only office of the certificate is to furnish the evidence of the quantum of interest held by the owner of the certificate."

After discussing and considering a number of cases wherein a similar question was under consideration, the court says:

> "We hold, therefore, both upon reason and authority, that by the delivery to Martin of ten shares of the plaintiff's stock, the defendant, *on the facts proved and found* [italics ours], did not become responsible to the plaintiff for the proceeds of the sale. * * * *The defendant was at all times able, and ready, and willing to transfer to the plaintiff the same number of shares of similar stock of the same company,* and which had precisely the same value." (Italics ours.)

It will be noted that the court, in declaring its conclusion, deemed it important to preface it with the statement, "on the facts proved and found." These facts as stated clearly show:

First. That defendant at the time he used plaintiff's certificate for 10 shares and at all times thereafter was the owner and in control of more than 10 shares of stock of the mining company in question.

Second. That he intended to and did sell 10 shares of his own stock.

Third. That, in delivering one of plaintiff's certificates for 10 shares to Martin, he made use of this evidence of ownership of 10 shares as a mere convenience.

Fourth. That at all times he was ready and able to deliver to plaintiff a certificate evidencing the ownership of 10 shares of the same stock.

Following the Atkins v. Gamble decision, our Supreme Court next had occasion to express itself on this subject in Thompson v. Toland, 48 Cal. 99. The court, in citing with approval the rule as laid down in Atkins v. Gamble, emphasizes as a necessary condition for the application of the rule that the pledgee be at all times ready and able to return upon demand shares of stock equal in number to those of the pledged stock used by him.

In the case of Hayward v. Rogers, 62 Cal. 348, it appears that the defendant had borrowed considerable sums of money from the plaintiff, and, as security for the payment of these sums, had pledged certain certificates of stock. Prior to the maturity of the obligation Hayward made several sales of stock of the corporation, certificates for shares of which he held as collateral to Rogers' note. In completing these sales, Hayward used several of Rogers' certificates of stock. Subsequently, the debt not being paid when due, Hayward brought action upon the notes, and Rogers set up in his defense the fact that Hayward had sold part of his pledged stock, and demanded that the proceeds derived from said sale be credited upon his indebtedness to Hayward. It appears that, at the time Hayward sold the stock, the market value was greatly in excess of the market value when the suit was brought. In relation to the question as to whether or not Hayward was liable to Rogers for the proceeds of the sale, the court instructed the jury that if Hayward, at the time that he used the certificates of stock belonging to Rogers, was actually intending to sell his own interest in the corporation, and had merely used Rogers' certificates for the purpose of conveying the same to the purchaser, and was at that time and at all times ready, able, and willing to deliver to Rogers an equal number of shares of stock, then Rogers was not injured by Hayward's act in using the pledged certificates, and the court instructed the jury further that, "if they found that Hayward had sold the identical 690 shares, and that he was not at the time of such sale able, willing, and ready to deliver to Rogers a similar number of shares," then Hayward would not be relieved from the obligation to make an accounting of the proceeds to Rogers. It is interesting to note that the court, in instructing the jury, in order to emphasize and make clear the line of demarcation between a pledgee's conduct with the pledged property that would require him to return the identical property pledged, and a situation where he could return other similar property, points out the case where a warehouseman takes wheat as a pledge security and commingles it with other wheat, owned and controlled by the warehouseman, of the same character. In such cases the court pointed out that the warehouseman is required to return, upon the payment of the debt, not the identical wheat he received in pledge, but he fulfills his obligation when he returns the same amount of wheat of similar quality. Upon appeal, our Supreme Court held these instructions correctly stated the rule applicable where pledged certificates of stock were used without authority by the pledgee.

In a later case, that of Bell v. Bank of California, 153 Cal. 234, 94 P. 889, the same considerations were pointed out in the following language:

> "It is true that, in the case of a pledge of shares of stock in a corporation, the identity of the particular certificates delivered and pledged is not important. Atkins v. Gamble, 42 Cal. 86, 10 Am. Rep. 282. A sale of these certificates will not constitute a conversion, if the pledgee has at all times had in his possession, ready for delivery to the pledgor upon redemption, similar certificates evidencing a right to the same number of shares. Thompson v. Toland, 48 Cal. 99; Hayward v. Rogers, 62 Cal. 348. * * * But there is no presumption that the pledgee has such certificates," etc.

We have pointed out with some detail and at length the views of the court as expressed in the foregoing cases, for the purpose of making clear the line of demarcation, and more particularly to note that in all of these cases the courts have recognized the right of a pledgee of certificates of stock to use them only when he is in fact the owner of stock himself in the corporation and is attempting to make a sale of his own stock, using the pledgee's certificates merely as a convenience in consummating his own transaction. We have nowhere found this rule made applicable to a situation where the pledgee of corporate stock, not being the owner himself of shares of stock in the same corporation, makes a sale of such pledged stock, and subsequently, upon the maturity of the debt, repurchases a similar number of shares of stock for the purpose of returning them to the pledgor. To apply the rule to such a state of facts would be to undermine the well-established principles and considerations that are recognized as necessarily controlling the use by a trustee of the trust estate committed to him.

[2] It is well established that the relation existing between a pledgor and a pledgee of the personal property is in the nature of a trust relation. The responsibility of the pledgee is that of the trustee. He will be held strictly to account for his conduct in relation to the trust property. Hudgens v. Chamberlain, 161 Cal. 710, 120 P. 422.

[3] In the instant case the complaint directly charges the misuse by the pledgee of plaintiff's pledged stock by making a sale of it without plaintiff's knowledge or authority. The answer directly denies this charge. It thus became a material issue in the case. If plaintiff is able to support his allegation, the burden would then fall upon the defendants to show that they came within the exception rule; i. e., that, when they improperly used plaintiff's certificates, they were then and at all times thereafter ready, willing, and able to deliver to plaintiff on the payment of the obligation an equal number of units of the White Star Oil Syndicate. If the evidence would then disclose that at the time that the sale was made defendants had no units of their own, but subsequently purchased units for the sole purpose of making return to the plaintiff, defendants clearly would not come within the rule that entitled them to be relieved from making an accounting to the plaintiff, for, under such circumstances, it

would appear that the defendants sold plaintiff's units, and immediately upon such sale plaintiff had a cause of action against the defendants to compel an accounting. It would then be well within the province of a court of equity to require the defendants, upon crediting the full amount remaining unpaid on the plaintiff's indebtedness to them, to pay over the excess proceeds to the plaintiff.

Another pertinent question arises in the instant case from the fact that dividends were declared by the syndicate upon the various units. It appears that plaintiff himself received some of these dividends, and the defendants also received dividends. Defendants testified that they had credited upon plaintiff's note all the dividends they received, but it nowhere appears in the record that the dividends which the defendants did receive and those which the plaintiff received constituted all of the dividends that were declared upon the units of the syndicate between the time that plaintiff pledged his units with the defendants and the date of the trial. If, forsooth, several weeks or months elapsed between the time of sale and transfer of the pledged units by the defendants, and the time when they repurchased units to return to the plaintiff, dividends had been declared by the syndicate, none of such dividends would have been paid to the defendants, for the reason that during such interim the dividends would have been paid to the actual owner or holder of the 78.6 units which had been sold.

[4] Respondents urge that, even if there is merit in appellant's contention that under his offer of proof evidence might have been adduced that would entitle him to recover by reason of the unauthorized sale, he may not do so in this case, for the reason that his remedy under such circumstances would be in an action for conversion; that the instant action is one for an accounting and not for conversion. We can see no merit in this contention. Plaintiff clearly had a right of action to recover from the defendants, if he could show that defendants had unlawfully used his property, and that he had been damaged thereby. Whether we call the action one in conversion or one in assumpsit is of little consequence. The prayer for an accounting is a mere incident to the main purpose of the action; namely, the recovery of money. The effect of the action is that plaintiff ratifies the sale made by defendants of his stock, and demands that the proceeds be applied on his indebtedness. He was well within his rights in filing the instant action. Bell v. Bank of California, 153 Cal. 243, 94 P. 889.

[5] The second point raised by appellant, that the note in question is usurious and that therefore the court erred in rendering a judgment that included the interest and the bonus or commission included in the principal of the note, must be sustained.

Respondents in their brief virtually concede appellant's contention. It is not denied that appellant received but $4,000, for which he executed a note for $4,120. The only conclusion that can be drawn from the evidence is that the $120 was in the nature of a bonus or commission to respondents. The note in addition provides for 1 per cent. per month interest. This clearly stamps the document as a usurious note. Wallace v. Zinman, 200 Cal. 585, 254 P. 946; Haines v. Commercial Mortgage Co., 200 Cal. 609, 254 P. 956, 255 P. 805; Blodgett v. Rheinschild, 56 Cal. App. 728, 206 P. 674.

Judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

91 Cal. App. 195

FILMER v. DAVIS. (Civ. 6296.) ★

District Court of Appeal, First District, Division 2, California. April 23, 1928.

Rehearing Denied May 23, 1928. Hearing Denied by Supreme Court June 21, 1928.

1. Appeal and error ⚷757(1)—Appellant must print in brief enough of record to enable reviewing court to determine appeal on merits without examination of transcript (Code Civ. Proc. § 953c).

Appellant, under Code Civ. Proc. § 953c, requiring printing in brief of "such portions of the record as they desire to call to the attention of the court," must print enough of the record to enable the appellate court to determine the merits of the appeal without examination of the transcript, except possibly where dispute arises as to contents of official record.

2. Appeal and error ⚷757(1)—Where respondent prints some of record or challenges appellant's statements concerning it, appellant should print in brief matters relied on to overcome respondent's contentions (Code Civ. Proc. § 953c).

If respondent prints some of the record in support of the judgment, or challenges appellant's statements concerning the record, appellant should, under Code Civ. Proc. § 953c, print what he relies on to overcome the contentions of his adversary.

3. Appeal and error ⚷901—Burden of showing error is on appellant (Code Civ. Proc. § 953c).

Burden of showing error is on appellant, even where appeal is taken under the alternative method, under Code Civ. Proc. § 953c.

4. Appeal and error ⚷766—Failure of appellant to print in brief portions of record essential to merits of controversy after challenge to sufficiency of brief required affirmance of judgment (Code Civ. Proc. § 953c).

In action for money received in connection with sale of stock, in which plaintiff recovered judgment, and defendant appealed, failure of

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★Rehearing denied. Hearing denied by Supreme Court.

appellant's brief to set out essential portions of testimony in first instance, or after filing of respondent's brief, which challenged sufficiency of matters set out, *held* to require affirmance of judgment under Code Civ. Proc. § 953c, requiring printing of such portions of record as appellant desires to call to court's attention; matters raised in appellant's brief relating only to form of action, and not to merits.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by William P. Filmer against George M. Davis. Judgment for plaintiff, and defendant appeals. On motion to affirm the judgment under Code Civ. Proc. § 953c. Motion granted, and judgment affirmed.

Ford, Johnson & Bourquin, of San Francisco, for appellant.

John H. Crabbe and Bradford Webster, both of San Francisco, for respondent.

PER CURIAM. Respondent made a motion herein to affirm the judgment appealed from upon the ground that appellant has failed to comply with the requirements of Code of Civil Procedure section 953c, by failing to print in his brief or in a supplement thereto "such portions of the record as they desire (he desires) to call to the attention of the court." Pearson v. Parsons, 173 Cal. 331, 159 P. 1171; Estate of Berry, 195 Cal. 354, 233 P. 330; Jeffords v. Young, 197 Cal. 224, 239 P. 1054, and other cases are cited and relied on by respondent. In the last-cited case the Supreme Court's opinion contains the following:

> "It has been reiterated approximately one hundred times in the decisions of this court and of the district courts of appeal that it is incumbent upon an appellant who relies upon a typewritten transcript to print in his brief or in a printed supplement thereto sufficient of the record to justify a reversal of the judgment or order appealed from. 2 Cal. Jur. 643 et seq. Furthermore, as we pointed out some months ago (Estate of Berry, 195 Cal. 354, 233 P. 330), since the 1923 amendment to the section last cited, an appellant who fails to do this incurs thereby the risk that the order or judgment appealed from may be affirmed upon motion."

In Dahlberg v. Dahlberg (Cal. Sup.) 260 P. 290, a motion to affirm for failure to comply with section 953c, Code of Civil Procedure, was granted.

[1] While the precise wording of the section requires the appellant to print such parts of the record as he *desires* to call attention to, the decisions above referred to, as well as the very nature of the matter, require that appellant print enough of the record to enable the appellate court to determine the merits of the appeal without examination of the typewritten transcript, except perhaps in case of a dispute developed in the briefs as to what the official record actually contains.

In this case appellant has printed a small part of the testimony and only of that part which is favorable to his contention. He prints none of the pleadings, findings, or judgment. Respondent's brief challenges the sufficiency of the printed matter of appellant's brief, and specifies that certain evidence omitted from appellant's brief supports the judgment. This brief was filed October 16, 1926. Appellant's time to reply has expired, and he has filed no reply brief nor made any attempt to amplify the printed part of the record. He rather assumes that his statements of the record are unchallenged. This is true with respect to some parts, but, with respect to the vital points in the case, respondent is not so complaisant.

Although this appeal has not yet been reached in the regular course so as to be put upon the calendar for argument and submission upon its merits, this motion requires us to examine the briefs and the subject-matter of the appeal in order to ascertain whether the motion should be granted or denied.

John C. Colburn held an option on a large block of shares of the capital stock of the General Research Company, a corporation, which held patents supposed to be essential to the wireless telephone. Colburn interested appellant, Davis, in the project. Davis, through friendship and fraternal ties, induced several friends to put up money for stock in the company. Colburn's option expired, the company forfeited its charter, and the whole project was a failure. The respondent is the assignee of the friends who, together with himself, put up sums of money aggregating $5,000, and this action was brought to recover the money.

We will refer to the plaintiff in the plural number to indicate the plaintiff and his assignors.

The complaint, not printed, contains two counts for each of the plaintiffs. One count is in debt for money had and received which defendant is alleged to have promised in writing to repay and one count is for debt upon an account stated which defendant is alleged to have promised in writing to repay. The findings and judgment, also not printed, were in favor of the plaintiffs upon the counts for money received, but not upon the counts upon an account stated.

Appellant's points on appeal are that the evidence shows that Colburn, and not Davis, received the money, and for that reason an action for money received will not lie against Davis, even though he were proved guilty of fraud. When it came time for plaintiffs to pay over the money, Davis had them sign a written contract, which was a contract for the purchase and sale of shares of capital stock in the General Research Company. This contract, also not printed, names Colburn instead of Davis as the seller and the party of the first part. Appellant relies on this contract, together with some small excerpts of testimony of Davis and Filmer, and other testimony not printed but simply referred to by citing the page of the typewritten transcript, to show that the money was not paid to Davis in such a way to support a judgment upon a complaint for money received.

Respondent's brief first attacks the sufficiency of the certification of the transcript on the ground that more than one-half is not certified, but this is not involved upon this motion. The following facts are said by respondent to be disclosed by the typewritten record supporting the judgment as for money received: That the company was defunct, and not authorized to issue stock in California, and cites facts in this connection showing fraud upon the part of defendant in obtaining the money; that in each case the money or checks were paid or delivered to Davis; that none of the plaintiffs knew Colburn; that they were not informed that he was interested in the matter until Davis declared at the time the contract was signed that it was made in the name of Colburn purely for convenience; that Davis and Colburn had a secret agreement to equally divide the proceeds of the entire transaction between themselves; that a form of receipt prepared by Davis was made in his own name as his personal receipt and as his personal agreement to deliver the shares of stock for the money; that plaintiffs' dealings were with Davis alone; that Davis gave to Colburn a part of the money without authority from plaintiffs, and in direct violation of his assurances and promises that he would personally account to plaintiffs therefor; that no share of stock was received in exchange for the money; that Davis assigned his one-fifth interest in a $55,000 estate to his wife; that two letters were written by Davis in which he acknowledges his responsibility to plaintiffs, although he calls it a moral responsibility, and in which letters he acknowledges and declares that the plaintiffs parted with their money upon his credit, personality, and promises, and not upon those of Colburn; that other facts in the record show that Davis received the money for the purpose of buying shares of stock, but converted it by giving most of it to Colburn without receiving any stock therefor; that letters from Davis to respondent's counsel refer to an offer by appellant to give an unsecured promissory note for the amount advanced by plaintiffs; that Davis had testified that he would discharge his moral obligation by paying back the $5,000 if he got in a position to do so; that he was now able to pay all his debts, including any judgment in this case; that he nevertheless now refused to repay. Respondent prints some of the documentary evidence, but most of the facts claimed by him are merely stated with page references to the reporter's transcript.

Having thus outlined the evidence as it is claimed by the respective parties, it is apparent that this court is not able to decide this appeal upon its merits from such fragmentary portions of the record as have been printed. Granting all of appellant's contentions of law, nevertheless, if only certain parts of the evidence claimed by respondent was before the trial court, the duty devolves upon this court to determine whether the judgment is supported by the evidence. The facts as claimed by respondent when examined may show a conversion or misappropriation of the money for which an action for money would lie. 41 Cor. Jur. § 45. Despite the form of the contract naming Colburn as the party of the first part, there is still a question to be determined only from the evidence, whether Davis received the money under such circumstances that he should be answerable in an action for money received as distinguished from an action for damages for fraud and deceit. For example, did Davis receive the money from the plaintiffs for a purpose which became impossible of performance because the stock could not issue? Gray v. Ellis, 164 Cal. 481, at page 485, 129 P. 791; Hallidie v. Enginger, 175 Cal. 505, at page 508, 166 P. 1.

[2, 3] It may no doubt be difficult in some cases for an appellant to know just how much of the record he should print in his opening brief, where he claims an absence of evidence on certain issues of fact; but, where counsel for appellant has gone through the trial of the case, it should be quite seldom that he is unable to anticipate what evidence respondent relies upon. At any rate, and at the latest, appellant should be able to know this after reading respondent's brief. If respondent prints some of the record in support of the judgment, or challenges appellant's statements concerning the record, appellant should then print what he relies upon to overcome the contentions of his adversary. Failing to do so, he has not complied with the requirement of the Code of Civil Procedure, § 953c. The burden of showing error is on the appellant, even where the appeal is taken under the alternative method.

[4] Some hesitancy is frequently and properly expressed by courts in disposing of an appeal upon a motion not involving the real merits of the controversy. In this case, however, no reason exists for this attitude. The appellant's position before this court is, not that he should in no event be required to pay plaintiffs the amount of money sued for, but only that the form of action should be other than the one set up in the complaint.

It is therefore ordered that the motion be, and the same is hereby, granted, and the said judgment is affirmed.

91 Cal. App. 304

COMMERCIAL CASUALTY INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5967.)

District Court of Appeal, Second District, Division 1, California. April 25, 1928.

1. Master and servant ⚷417(7)—In reviewing decision of Industrial Accident commission, appellate court cannot weigh conflicting evidence (Workmen's Compensation Law).

Under Workmen's Compensation Law (St. 1913, p. 279, as amended), in reviewing decision of Industrial Accident Commission, appellate court has no power to weigh conflicting evidence for purpose of determining on which side preponderance lies.

2. Insurance ⚷665(3)—Evidence supported Industrial Accident Commission's finding that employer did not take partner after issuance of policy and before employee was injured, without assignment of policy or consent of insurer.

Evidence *held* to support finding of Industrial Accident Commission that employer had not taken partner into business after issuance of liability policy and before employee was injured without assignment of policy or consent of insurance carrier to change so as to relieve insurance carrier from liability for employee's injuries.

3. Insurance ⚷435—Workmen's compensation policy held to cover business operations at other place than that specified in policy.

Workmen's compensation insurance policy, containing provision that it should apply to injuries sustained by reason of business operation described, whether conducted at work place described, or else in connection with, or in relation to, such work places, *held* to cover accident during business operations at place other than that specified in policy.

Proceedings under the Workmen's Compensation Law by Antonio Solis, a minor, by his guardian ad litem, Thomas Solis, and others for compensation for injuries, opposed by Joe Uribe, employer, and Commercial Casualty Insurance Company, insurance carrier. The Industrial Accident Commission made an award against the insurance carrier and in favor of applicant, dismissed the employer from the case, and the insurance carrier brings certiorari. Affirmed, and writ discharged.

Harry D. Parker, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

SHAW, Justice pro tem. This proceeding brings before us on a writ of review a decision of the Industrial Accident Commission. The case was brought before that commission by Antonio Solis, who filed an application stating that he was in the employ of American Cleaners & Dyers; that he had sustained injuries arising out of his employment; and that the petitioner was the insurance carrier of his employer. Petitioner filed an answer admitting that it had issued a policy to one Joe Uribe, but denying that he was the applicant's employer, and denying generally that it was the insurance carrier of such employer, and alleging that the policy issued by it did not cover the place where the injuries to the applicant occurred. After a hearing, the Industrial Accident Commission found against petitioner on both of these defenses, and made an award against it in favor of the applicant, dismissing the employer from the case. The petitioner now claims that the findings above mentioned are without support in the evidence.

[1, 2] On the first point, it was conceded that on November 4, 1926, petitioner had issued to Joe Uribe, doing business as American Cleaners & Dyers, a policy insuring him under the Workmen's Compensation Law (St. 1913, p. 279, as amended). The applicant was injured on April 21, 1927, and petitioner's contention is that, after the issuance of the policy, and before the applicant was injured, Joe Uribe had taken a partner named Beldon; that at the date of the injuries the business formerly carried on by Uribe alone was being carried on by Uribe and Beldon as partners, but under the same fictitious name as before; that no assignment of the policy or consent of petitioner to such change was shown; and that the necessary conclusion from these facts is that, at the time of the applicant's injuries, petitioner was not the insurance carrier for the employer.

The evidence on this point was given by Uribe alone. He testified, in substance, that Beldon was with him from the first of the year following the issuance of the policy, but working on commission; that in February Beldon was a partner; and that the place where the applicant was injured was operated by himself and Beldon in partnership. He further testified as follows:

"Q. You went into partnership with him on January 1st? A. Well, in February we talked about partnership, but we never sign no agreement. He was there and left in April. We didn't really sign nothing because we couldn't come to an agreement, so he just left.

"Q. So you never did come to an agreement on partnership? A. No, sir.

"Q. But you talked about a partnership? A. Yes.

"Q. And then in April he left, did he? A. Yes; trouble came up; there was too much trouble.

"Q. By trouble you mean when this man got hurt? A. Sure.

"Q. And the place got burned down? A. Yes, sir. * * *

"Q. And in talking with Mr. Beldon about going into partnership with you, was the talk that he would go into partnership in the cleaning business, in just the part of the business of cleaning, or was he to go into partners with you? A. In the two businesses.

"Q. Both businesses together? A. Yes, sir.

"Q. But that was never finished up? A. That wasn't finished."

He also testified that the funds of the business were kept at all times in a bank in his own name; that he had a lot of machinery in one of the places of business; and that Beldon was not drawing any salary from February, but got one-half of the profits of the business from that time until the place was burned up (which happened at the same time that applicant was injured).

From this evidence we think conflicting inferences may be drawn. The division of the profits between Uribe and Beldon is one of the indicia of a partnership, but, on the other hand, it appears that the plant used in the business was owned by Uribe, and apparently Beldon had contributed nothing to it, and that, when disaster came, Beldon simply stepped out without the necessity of any settlement of partnership accounts between them. Negativing the existence of a partnership is also Uribe's testimony that they talked about a partnership, but never came to an agreement about it. It is true that he also testified in so many words that they were partners, but this general statement was not conclusive against his testimony of circumstances from which a contrary inference could be drawn. In reviewing the decisions of the Industrial Accident Commission, we have no power to weigh conflicting evidence for the purpose of determining on which side the preponderance lies. If, on any reasonable view that can be taken of the evidence, we find its decision supported by substantial evidence, even though there may be evidence in conflict therewith, our inquiry is at an end. In this case we discover such support for the finding under consideration.

[3] Petitioner's other point is based on the fact that the place of business at which the applicant was injured was not that specified in the policy, although the policy declared as one of its conditions that the employer was conducting business operations at no other place than that so specified. But the policy also contained a provision that it should apply to injuries sustained by reason of the business operations described, whether conducted at the work places described "or elsewhere in connection with, or in relation to, such work places," and in its description of the business operations covered by it, which immediately follows the specification of the place of business, it includes "operations not on the premises." This question is decided against the petitioner in Associated Theatres v. Ind. Acc. Com., 57 Cal. App. 105, 206 P. 665, where it was held that a policy identical in terms with that now under consideration covered business operations at other places than that specified in the policy.

The award is affirmed, and the writ is discharged.

We concur: CONREY, P. J.; YORK, J.

91 Cal. App. 307

CAMPBELL v. SUMMAR. (Civ. 4692.)

District Court of Appeal, Second District, Division 2, California. April 25, 1928.

1. Appeal and error 🔑1071(6)—Trial court's failure to find on defendant's counterclaims, where there was evidence to support them, held prejudicial error.

In action on counts for money had and received and on promise to pay stated sum, wherein defendant filed counterclaims, trial court's failure to make any finding on the issues presented in defendant's answer *held* prejudicial error, where reporter's transcript showed that evidence was produced by the defendant tending to support his counterclaims.

2. Evidence 🔑450(12)—Written instrument, merely receipt on its face, but stating money was borrowed, held sufficiently doubtful to warrant evidence to determine parties' intention.

In suit on written instrument, which was merely a receipt on its face, and which read in part, "Received of C. $716 borrowed money and office money," the words "borrowed money" *held* to make the meaning of the instrument sufficiently doubtful to warrant reception of evidence to determine intention of parties, and particularly of signer of instrument, at time of execution.

3. Contracts 🔑175(3)—Evidence held not to support finding that defendant, by writing sued on, promised to pay plaintiff stated sum.

In suit on written instrument reading in part, "Received of C. $716 borrowed money and office money," wherein plaintiff alleged that instrument was written promise and agreement by defendant to pay plaintiff the sum of $716, evidence *held* not sufficient to support the finding that defendant, by such writing, promised and agreed to pay plaintiff the stated sum.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Elizabeth M. Campbell against C. S. Summar, in which defendant filed counterclaims. Judgment for plaintiff, and defendant appeals. Reversed.

Holcomb & Holcomb, of Los Angeles, for appellant.

Seth B. Smith and Lucas F. Smith, both of Los Angeles, for respondent.

CRAIG, J. In this action the plaintiff's complaint contains two counts, the first for money had and received by the defendant in the sum of $716, and the second alleging a written promise and agreement by defendant to pay the plaintiff the sum of $716. The answer, in addition to denying the material allegations of the complaint, asks affirmative relief by way of two counterclaims, one for $125 and the other for $253.95. It also alleges the existence of a partnership between the parties, and asks for an accounting by the plaintiff. Judgment was given for the full sum demanded, $716.

[1] The trial court made but one finding, which was:

> "That on or about November 1, 1921, defendant made his certain instrument in writing, whereby he promised and agreed to pay to plaintiff the sum of seven hundred and sixteen ($716) dollars; that no part of said sum has been paid to plaintiff."

The court, probably inadvertently, failed to make any finding upon the issues presented in the defendant's answer; but, since an examination of the reporter's transcript shows that evidence was produced by the defendant tending to support his counterclaims, the failure to find thereon was erroneous, and prejudicially so.

[2, 3] The instrument executed on November 1, 1921, by the defendant and by which the court finds that the defendant promised to pay the plaintiff the sum of $716, reads as follows:

> "C. S. Summar Co., Real Estate.
> "1705 So. Vermont Ave., Los Angeles.
>
> "Received of Elizabeth M. Campbell $716 borrowed money and office money.
> "[Signed] C. S. Summar."

This writing, on its face, is a mere receipt. However, since the words "borrowed money" are used, it is of sufficiently doubtful meaning to warrant the reception of evidence to determine the intention of the parties, and particularly of the signer of the instrument at the time he executed it. Yet, from the testimony offered in that behalf most favorable to the plaintiff and respondent, it cannot be said that the intent was to promise to pay Mrs. Campbell the entire $716 at any time. She said in her testimony that $440 of the $716, which she claimed was given by her to Summar, was to erect a building. When asked if she loaned this money she said: "I did not loan it to him." "I put it up for a half for my son-in-law, Mr. F. A. Ryker." "It was to be half of what the building cost, and he was to put up a like sum." She then detailed the business relations of the parties; her claim concerning the $440 being that she had advanced it under an arrangement by which her son-in-law was to become a partner of the defendant, and the money was to be used to construct a building, which the defendant never built. From this statement it is apparent that the evidence does not support the finding that the defendant by this writing promised and agreed to pay the plaintiff $716. As to the amount not included in the $440, it may be that the writing was so intended.

The judgment is reversed.

We concur: WORKS, P. J.; HAZLETT, Justice pro tem.

91 Cal. App. 242

CASSOU v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 6360.)

District Court of Appeal, First District, Division 2, California. April 24, 1928.

1. Depositions ⚷56(4)—Court may shorten notice for deposition on oral interrogatories, after notice of motion to have deposition taken on written interrogatories (Code Civ. Proc. §§ 1005, 2025, 2025½).

Where plaintiff gave notice of motion for permission to take deposition in foreign state on written interrogatories, and defendant moved to have deposition taken on oral interrogatories after giving one day's notice of such motion, *held*, that court had power to order deposition taken on oral interrogatories, under provisions of Code Civ. Proc. § 1005, empowering court to shorten time in which notices must be given, notwithstanding provisions of sections 2025, 2025½, prescribing two and three days' notices, respectively, in such event.

2. Depositions ⚷39—Opposite party need not elect to have deposition taken on oral interrogatories before date specified in notice to have deposition taken on written interrogatories (Code Civ. Proc. §§ 2025, 2025½).

Where notice of motion to have deposition taken on written interrogatories is made, opposite party need not make election to have deposition taken on an oral interrogatory before date specified in original notice of motion, since neither Code Civ. Proc. § 2025, nor section 2025½, contains language which creates such strict limitations, but they simply require either two or three days' notice, and do not specify that it cannot be given after date specified in original notice of motion, if that motion is continued for hearing by court to another day.

Petition for writ of mandate by Celine Cassou, to be directed to the Superior Court of the State of California in and for the City and County of San Francisco and Hon. Thomas F. Graham, Judge, to require respondents to issue commission to take a deposition. Denied.

George D. Collins, Jr., of San Francisco, for petitioner.

Daniel A. Ryan, of San Francisco, for respondents.

KOFORD, P. J. This is an original application for a writ of mandamus to compel the respondent to issue a commission to take

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

a deposition in a foreign state upon written interrogatories, instead of upon oral interrogatories as ordered by the court. The petitioner is plaintiff in a divorce action pending in said superior court. She gave to the defendant in that action five days' written notice of motion to take the deposition of a witness in the state of Illinois upon written interrogatories. The verified petition filed in this court stated:

> "That thereafter, and on the hearing of the petitioner's motion in said action for the issuance of the said commission upon said written interrogatories, the said defendant did not propose any cross-interrogatories, but instead and without giving your petitioner three days' notice in writing, or any other notice, of his election so to do, applied to said superior court * * * for an order directing that said deposition be taken on interrogatories to be propounded to the witness orally."

The court, over the objection of the petitioner, ordered the deposition to be taken on oral interrogatories. The objections which the court thus overruled, besides specifying the inconvenience of taking the deposition orally, specified that the defendant had not given petitioner three days' notice of his election to have the deposition taken orally in accordance with section 2025½, Code of Civil Procedure.

The answer of respondent, filed on the return date of the alternative writ issued herein, set up the fact that the petitioner was in fact given notice by the defendant in said action of his motion to have the said deposition taken orally. A certified copy of said notice of motion was filed in this court on the argument. The notice was served one day before the day to which the hearing of petitioner's original motion had been continued, and the notice was accompanied by an order of said superior court, shortening the time for the service of the same to one day.

It is now the contention of the petitioner that defendant's one-day notice was ineffectual to give the court power to order the deposition to be taken orally. Petitioner contends that the case is governed by the provisions of section 2025½, Code of Civil Procedure, wherein is found the following expression:

> "(Or where notice shall have been given that a commission to take the testimony of nonresident witness will be applied for, the opposite party, upon giving the other three days' notice in writing of his election so to do), may have a commission * * * orally."

Petitioner recognizes a conflict, as he must, between this section and section 2025 of the Code of Civil Procedure. That section provides the method of obtaining a commission to take the deposition of a nonresident witness upon written interrogatories and concludes with the following expression:

> "When the parties agree to that mode, or the court on the application of either party, after a hearing had upon two days' notice to the opposite party, so directs, the examination must be without written interrogatories."

Petitioner, in attempting to reconcile these two sections, claims that the three days' notice provision of section 2025½ is applicable exclusively to where the proceedings to obtain a commission for a deposition is inaugurated by a notice of motion to take the same upon written interrogatories. She contends that the two days' notice of motion mentioned in section 2025 is applicable only where the proceedings are inaugurated by a notice to take an oral deposition. With this we cannot agree. If the original notice specified oral interrogatories, there would be no need for the opposing party to give two days' notice that he also wished the deposition to be taken orally. If petitioner means to contend that a proceeding for an oral deposition may be commenced by giving only a two days' notice, under section 2025 of the Code of Civil Procedure, that construction would conflict with section 2024 of the Code of Civil Procedure, which requires five days' notice of motion for a commission to take a deposition of a nonresident witness, and which last-named section, in the absence of any words of limitation, applies both to oral and written depositions.

This contention, however, does not seem to us to be very material in this proceeding, for, aside from the difference between two and three days, we can see little difference between the language of section 2025½ of the Code of Civil Procedure, prescribing three days' notice of election, and the language of section 2025, "after hearing had upon two days' notice to the opposite party." In this case the defendant gave neither a three days' nor a two days' notice, but only a one day's notice, together with an order shortening time to one day.

[1, 2] The only point involved in this proceeding, therefore, is whether the superior court has power to shorten the time of the notice which the opposite party is required to give in case he wishes to have the deposition taken orally, whether it be two days or three days. No authorities are cited on this point, but no reason has been suggested, and we can think of none, why the provisions of section 1005 of the Code of Civil Procedure do not give the court the power to prescribe a shorter time. This section deals with all written notices of motion. It prescribes the time in which notices must be given and concludes with the expression, "but in all cases the court, or a judge thereof, may prescribe a shorter time." It has been held that the required five days' notice of motion to take a deposition may be shortened by an order of court. Dambmann v. White, 48 Cal. 439 at 451. If this five days' time may be shortened by an order of court then it must necessarily follow that the two or three

days' time which is given the opposite party to make a counter motion can also be shortened. Normally and in general these two or three days are embraced within the five days following the original notice of motion to take a deposition. If the five days is considerably shortened by an order of court, in many cases there would not be sufficient time left for the opposite party to give the two or three days' notice of his counter motion.

We see no force to petitioner's claim that the opposite party must make an election before the date specified in the original notice of motion. Neither section 2025 nor section 2025½ of the Code of Civil Procedure contains any language which could create such a strict limitation. They simply require either a two days' or three days' notice, and do not specify in any way that it cannot be given after the date specified in the original notice of motion, if that motion is continued for hearing by the court to another day.

We conclude that the trial court was not without power to order the deposition to be taken upon oral interrogatories, and that it had the power to decide upon the hearing, according to the evidence and its sound discretion, whether written or oral interrogatories should be used in the taking of the deposition.

A peremptory writ of mandate is therefore denied, and the proceeding dismissed.

We concur: STURTEVANT, J.; NOURSE, J.

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91 Cal. App. 347

GLOBE INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.
(Civ. 5988.)

District Court of Appeal, First District, Division 1, California. April 26, 1928.

Master and servant ⚿419—Industrial Commission could, seven months after denying rehearing, amend original award by awarding continuing compensation indemnity and medical care (Workmen's Compensation Act 1917, § 20, subd. d).

Under Workmen's Compensation Act 1917, § 20, subd. d (St. 1917, p. 850), enlarging the continuing jurisdiction of Industrial Accident Commission beyond that theretofore existing, the commission had jurisdiction seven months after denying petition for rehearing to amend original award and make award for continuing compensation indemnity and for hospital and medical care.

Proceeding under the Workmen's Compensation Act by Albert Leo, employee, opposed by the Globe Indemnity Company, insurance carrier. From an order of the Industrial Accident Commission amending an award, the insurance carrier brings certiorari. Affirmed.

R. O. Purvis, of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

TYLER, P. J. Certiorari to review an award of the Industrial Accident Commission. The petition sets forth that respondent, Albert Leo, was a carpenter in the employ of one H. J. Christensen. He was injured in the course of his employment when he strained his back while lifting a joist. After the injury he was furnished treatment by Globe Indemnity Company, the insurance carrier of said Christensen, and was also paid compensation indemnity until on or about May 20, 1926, at which time he was advised because of the progress in his convalescence from his injuries he was able to do light work and therefore compensation indemnity would be paid for the balance of his disability at a partial rate. Thereafter, being dissatisfied with this action on the part of the insurance carrier, Leo filed an application for the adjustment of his claim with the Industrial Accident Commission. At the time of the hearing Leo informed the referee of the commission that he had been examined by doctors of his own selection and had been advised that a radical operation upon his back was necessary for the relief and cure of his condition. Leo was thereafter examined by a physician appointed by the medical department of the commission, who filed a report as evidence in the case. Thereafter, on or about July 27, 1926, the commission made its findings and award and ordered that the insurance carrier should pay to Leo partial compensation indemnity. The award was silent in respect to the operative procedure requested by the applicant. Leo petitioned for a rehearing, in which it was recited that he had been operated upon. This petition for rehearing was not upon the grounds nor in the form required by the Workmen's Compensation Act, and it was denied by the commission September 20, 1926. Thereafter and some time prior to March 4, 1927, Leo filed a petition for the reopening of the case and for the allowance of further compensation. He set forth in his petition the fact that he had been operated upon and that by reason thereof he had incurred certain expenses; that he was totally disabled and could not perform labor, and requested the commission to make an award for continuing compensation indemnity and for his hospital and medical care. Hearing was had by the commission upon this application over the objection of petitioner herein, it being claimed that the issue of the operation was res adjudicata, the commission having already passed upon the question. On May 3, 1927, the commission made its order amending the original findings and award and granting to Leo the medical expense and indemnity he applied for in his petition to reopen the case. Petitioner herein filed a petition for rehearing from said last-mentioned order, which petition was denied.

It is here claimed that, by reason of the original award and the order of the commission denying Leo's petition for a rehearing, the matter had become res adjudicata for which reason the commission was without jurisdiction to make the order amending the original findings and award granting the medical expenses and compensation indemnity above referred to. The question here presented is disposed of by the recent decision of Bartlett Hayward Co. v. Ind. Acc. Com. (Cal. Sup.) 265 P. 195, where it is held that the Legislature, by the enactment of section 20 (d) of the Workmen's Compensation Act of 1917 (St. 1917, p. 850), enlarged the continuing jurisdiction of the Industrial Accident Commission beyond that theretofore existing so as to embrace the power of the commission to rescind, alter, or amend its orders, decisions, and awards within the period of 245 weeks upon good cause appearing, without the necessity of any showing that the applicant's disability had recurred, increased, diminished, or terminated.

Upon the authority of that decision, the award is affirmed.

We concur: CASHIN, J.; KNIGHT, J.

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91 Cal. App. 312

ALEXANDER v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 5976.)★

District Court of Appeal, Second District, Division 2, California. April 25, 1928.

Hearing Denied by Supreme Court June 21, 1928.

1. Attachment ⚷133—Plaintiff cannot be own surety; hence undertaking signed only by plaintiffs held insufficient (Code Civ. Proc. § 539; Civ. Code, § 2831).

Under Code Civ. Proc. § 539, relative to written undertaking on part of plaintiff in attachment, an undertaking signed only by plaintiffs in action was insufficient as adding nothing to security of defendant against an improper attachment; Civ. Code, § 2831, establishing fact that plaintiffs could not act as own sureties.

2. Attachment ⚷136—New undertaking by way of amendment cannot be filed, where original undertaking was void because signed only by plaintiffs (Code Civ. Proc. §§ 539, 558).

Where undertaking in attachment was invalid under Code Civ. Proc. § 539, because signed only by plaintiffs, new undertaking could not be filed by way of amendment under section 558, since undertaking was not only irregular in form, but absolutely void.

3. Mandamus ⚷3(2)—Mandamus will not issue in case there is speedy and adequate remedy at law.

Writ of mandate will not issue in case there is a speedy and adequate remedy at law, though, if remedy is not both speedy and adequate, remedy by mandamus will not be denied.

4. Mandamus ⚷4(3)—Mandamus lies to require discharge of void attachment of special equipment used in manufacturing typewriters resulting in paralyzing business; remedy by appeal being inadequate (Code Civ. Proc. §§ 554, 555).

Where property attached consisted of special tools and equipment used in manufacture of typewriters, and would have required at least a year to be replaced, so that business was paralyzed by attachment, defendant was entitled to writ of mandate to secure discharge of attachment because of invalidity of undertaking, in that remedy by appeal would not be adequate, and Code Civ. Proc. §§ 554, 555, providing for filing undertaking for release of attachment, presuppose existence of valid writ, and do not provide remedy against a void writ of attachment.

Original application for a writ of mandate by Jesse Alexander, prayed to be directed to the Superior Court of the State of California in and for the County of Los Angeles and L. B. Lampton, County Clerk of Los Angeles County and ex officio Clerk of said Court. Writ granted.

Hearing denied by Supreme Court: RICHARDS and PRESTON, JJ., dissenting.

Faucett & Ring, of Los Angeles (William C. Ring, of Los Angeles, of counsel), for petitioner.

John J. Wilson, of Los Angeles, for respondents.

THOMPSON, J. There is pending in respondent court an action wherein Max B. Jamison, Lloyd J. Killian, and others are plaintiffs and Jesse Alexander and others are defendants. The plaintiffs therein, desiring to procure the issuance of a writ of attachment, made application to respondent clerk therefor, and among other things, submitted to him a so-called undertaking on attachment, but signed only by Jamison and Killian. The body of this paper, after stating the conditions of the obligation it was intended to evidence, concludes, "In testimony whereof, the said sureties, and each of them," have affixed their hands and seals on a given date. This statement is followed by the signatures of the two plaintiffs mentioned above. The so-called undertaking was accepted as such by the clerk, and he issued a writ of attachment on December 5, 1927. On December 7 the defendant Jesse Alexander (the petitioner here) served and filed a notice of motion to dissolve and discharge the attachment on the

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★Hearing denied by Supreme Court.

ground, among others, that the writ was improperly and unlawfully issued because the purported undertaking was a nullity. At the time the motion was set for hearing, the plaintiffs filed an undertaking in a sufficient amount executed by the Fidelity & Deposit Company of Maryland. The hearing of the motion was continued until December 20, 1927, at which time plaintiffs again filed an undertaking executed by the same company, and the court made its order denying the motion. A writ of mandate is sought directing the respondent court to enter an order discharging the attachment. We are presented with the questions whether the original purported undertaking was in fact an undertaking under section 539 of the Code of Civil Procedure, and, if not, whether a new undertaking may be filed by way of amendment under section 558 of the same Code. If both of those questions are answered in the negative, it will be unnecessary for us to discuss the other procedural problems argued in the briefs of counsel other than to determine that the situation is one in which it is proper to make use of the writ of mandate.

[1] It cannot be successfully or earnestly urged that the so-called undertaking was sufficient. Section 539, Code of Civil Procedure, requires "a written undertaking on the part of the plaintiff * * * with sufficient sureties, * * *" before the writ may be issued, to the effect that plaintiff will pay all damages resulting from an improper levy. It is immediately obvious that the section requires, as a prerequisite to the issuance of the writ, that some company or persons other than the plaintiff shall become bound to the defendant to guarantee him against loss under the contingency mentioned. Section 2831 of the Civil Code at once eliminates the thought that the plaintiff by any strained process of reasoning might act as his own surety. It defines the term as "one who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person. * * *" It has been determined that the distinction between a bond and an undertaking is that the principal should sign the former and that he need not sign the latter. Russell v. Chicago, B. & O. R. Co., 37 Mont. 1, 94 P. 501. It would be sufficient to observe that the paper filed, signed by two of the plaintiffs, added nothing to the security of the defendant against an improper attachment.

[2] Could this purported undertaking be amended? It is difficult to conceive how something which does not and never did exist may be amended. The word "amended" presupposes the existence of something which has been inartificially or irregularly drawn or constructed. It may be corrected and righted, but nothing remains nothing when amended. Respondent argues that the statutes giving the right of attachment have been liberally construed since the amendment of 1909 to section 558, Code of Civil Procedure. It reads:

> "If upon such application" (a motion for discharge) "it satisfactorily appears that the writ of attachment was improperly or irregularly issued it must be discharged; provided that such attachment shall not be discharged if at or before the hearing of such application, the writ of attachment, or the affidavit, or undertaking upon which such attachment was based shall be amended and made to conform to the provisions of this chapter."

Subsequent to the amendment of this section, the case of Fairbanks, Morse & Co. v. Getchell, 13 Cal. App. 458, 110 P. 331, was decided, in which it was determined that an affidavit which was void might not be amended under its provisions. In that case the affidavit was void because the affiant endeavored to swear to the affidavit over the telephone; he being in Los Angeles county and the notary public being in and a notary of Kern county. The court, after quoting the language of section 558, Code of Civil Procedure, in calling attention to the fact that it had been amended in 1909, based its decision upon the ground as it stated, that "there could be no irregularity in that which had no existence." An effort was apparently made in that case to make an affidavit. In this case no effort was made to execute an undertaking with sureties. Had an undertaking irregular in form been filed, we would have been presented with an entirely different problem, and one which the amendment to section 558, Code of Civil Procedure, was intended to reach.

[3, 4] The only remaining question is whether the writ of mandate is a proper remedy. It must be apparent that the exercise of judicial discretion was not involved in the problem presented to the respondent court. It was its duty to discharge the attachment under the language we have quoted. In this particular the application is governed by such authorities as Pacific P. Assn. v. Huntington Beach, 196 Cal. 211–222, 237 P. 538, 40 A. L. R. 782, wherein it is declared that, where the discretion ceases and the duty becomes absolute, the writ will lie. However, petitioner did not have a remedy by an appeal from the order. If that remedy is speedy and adequate, we cannot make use of this high prerogative writ. On the other hand, if the remedy at law is not both speedy and adequate, the remedy by mandamus will not be denied. Dufton v. Daniels, 190 Cal. 577, 213 P. 949, and cases there cited. It is made to appear by the petition (and not denied by the return thereto) that the property under attachment consists of special dies, tools, equipment, and typewriter parts used in the manufacture of patented typewriters and of approximately 2,000 typewriters from 80 per cent. to 95 per cent. completed; that it would take at least a year to replace the dies, tools, and equipment necessary to carry on the business of

manufacturing the typewriters; that the business is paralyzed by the attachment; and that its continuance will greatly and irreparably damage the business by making it impossible to meet the demand of customers and prospective customers. Under this admitted state of facts the remedy by appeal is obviously neither speedy nor adequate. We are of the opinion that in this regard we should adhere to the rule announced in Dufton v. Daniels, supra. Respondents assert that petitioner also has the remedy of filing an undertaking with sufficient sureties for the release of the attachment as provided for in sections 554 and 555, Code of Civil Procedure. Those sections presuppose the existence of a valid writ of attachment, and cannot be said to provide a remedy against a void writ of attachment.

In this proceeding one of the judges of the respondent court was erroneously named as a party respondent, and this has occurred so often in the past that we deem it proper to make mention of the fact in the hope that it will not be repeated in the future. We have accordingly omitted his name from the title in this opinion.

The peremptory writ will issue.

We concur: WORKS, P. J.; CRAIG, J.

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91 Cal. App. 287

Ex parte WALKER. (Cr. 1470.)

District Court of Appeal, First District, Division 2, California. April 25, 1928.

1. Criminal law 🔑1211—Order of prison directors for confinement two years for false pretenses and five years for prior conviction held void as to prisoner seeking habeas corpus (Pen. Code, §§ 484, 487, 489, 552, 667, 1168).

In prosecution for obtaining money under false pretenses, order of board of prison directors for confinement for two years for false pretenses and for five years on count charging prior conviction *held* ineffective as to any rights of prisoner seeking habeas corpus, since, under Pen. Code, §§ 484, 487, 489, 552, and 667, only possible term was maximum term of ten years, and case did not come within provisions of indeterminate sentence statute (Pen. Code, § 1168).

2. Criminal law 🔑1211—Sentence under repeater statute for false pretenses imposed ten year penalty unimpaired by subsequent order of prison directors (Pen. Code, §§ 484, 487, 489, 552, 667, 1168).

Sentence imposed by court on conviction under criminal repeater statute for obtaining money under false pretenses was maximum term of ten years, under Pen. Code, §§ 484, 487, 489, 552, 667, and was not affected by subsequent order of prison directors under indeterminate sentence statute (Pen. Code, § 1168), attempting to impose a consecutive term of two and five years each, since order of prison directors was unauthorized.

Application by Vivian Walker for a writ of habeas corpus, prayed to be directed to the Warden of San Quentin prison to secure petitioner's release from custody. Prisoner remanded, and writ discharged.

James P. Montgomery, of Oakland, and Edward J. Kelly, of San Diego, for petitioner.
U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for respondent.

STURTEVANT, J. This is an application for a writ of habeas corpus. From the petition it appears that the petitioner was found guilty of obtaining money under false pretenses. The information in the ordinary form pleaded that offense, and in the ordinary form pleaded a prior conviction. The latter fact was not put in issue but was admitted by the petitioner, and she went to trial on the offense charged in the information. The jury returned a verdict of guilty as charged. Thereafter she was sentenced to imprisonment in the state prison. She was received at the prison on January 21, 1926. On the 21st day of January, 1927, the board of prison directors proceeded to determine the length of time the petitioner should be confined in the prison. In doing so it made an order as alleged in the petition that the petitioner be confined "* * * two years on the first count of said information and five years on the second count of said information running consecutively." The petitioner asserts that the meaning of the order is that she be confined two years from January 21, 1926, on the charge of obtaining money under false pretenses, and that she be confined five years from January 21, 1928, as and for the prior conviction. Thereupon she argues that she served her time as and for the prior conviction, and that the order as made by the board of prison directors is in effect putting her twice in jeopardy for that offense. The petitioner further argues that she has served two years as and for the term of imprisonment for obtaining money under false pretenses, and that she is therefore entitled to be discharged.

[1] We think the foregoing arguments are based on a misconception of the law. One must read together the provisions of sections 484, 487, 489, 552, and 667 of the Penal Code to ascertain what under the facts was the term prescribed by law. Doing so, it appears at once that the only possible term was a maximum term of ten years, and that the statute does not prescribe any minimum term. That being the provision of the statute, the petitioner's case does not come within the provisions of the indeterminate sen-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tence statute (Pen. Code, § 1168), and therefore no power existed which authorized the board of prison directors to make any order under the last-mentioned statute on January 21, 1927. It follows that the purported order made by the board on that date was nugatory as to any rights of the petitioner.

[2] When the petitioner was sentenced by the trial court, the legal effect of that sentence was to impose the maximum term prescribed by law—ten years from the date she was received at the prison. In re Lee, 177 Cal. 690, 171 P. 958. That term has not expired. She is not entitled at this time to be discharged.

The prisoner is remanded, and the writ is discharged.

We concur: KOFORD, P. J.; NOURSE, J.

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91 Cal. App. 222

WEIR et al. v. NEW YORK LIFE INS. CO. (Civ. 5973.)★

District Court of Appeal, First District, Division 2, California. April 24, 1928.

Rehearing Denied May 24, 1928. Hearing Denied by Supreme Court June 21, 1928.

1. Insurance ⟹665(3)—Finding that insurer relied on false representations in application, as to applicant's habits respecting liquor, health, and previous medical treatment held against weight of evidence.

In action on life insurance policy, finding that company relied on false representations in application as to applicant's habits in reference to using intoxicating liquor and false statements in answering questions respecting his physical condition, health, and previous medical treatment, *held* against weight of evidence.

2. Evidence ⟹591—Plaintiffs, introducing in evidence depositions taken by defendant, held not bound thereby (Code Civ. Proc. § 2055).

Under Code Civ. Proc. § 2055, plaintiffs suing on life insurance policy, who introduced in evidence depositions of five officers of defendant insurance company's officers taken by defendant before trial, together with accompanying exhibits, *held* not bound thereby on theory that they produced witnesses whose depositions were taken and put them on stand as their witnesses, though they did not, in advance or during proceeding, announce reliance on such statute.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by William B. Weir and others, as trustees of the trust created by the will and under the decree of distribution in the matter of the estate of W. Frank Whittier, deceased, against the New York Life Insurance Company. Judgment for defendant, and plaintiffs appeal. Reversed.

Hunsaker, Britt & Cosgrove and John M. Clayton, all of Los Angeles, for appellants.

Meserve & Meserve, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for respondent.

KING, Presiding Justice pro tem. Action for recovery on a life insurance policy. Judgment was given for defendant, and plaintiffs appeal.

William R. Whittier applied October 1, 1920, for a policy of life insurance in the sum of $25,000. The application was accompanied by a document in two parts, the first consisting of questions asked by the local examining physician and answers by the applicant, signed by both, and the second a "medical examiner's report," signed by the physician alone.

They were received by the company November 11, 1920, and by the company's medical examiner November 12, 1920. Because the applicant stated that he had applied to "Travelers 1917 and 1920" for other insurance which had been declined, and because of his answers to questions regarding his use of intoxicants that he uses wine moderately, had used it moderately in the past, and had not used intoxicants to excess within the past five years, this medical examiner sent a communication November 12, 1920, "to the examining physician with regard to the applicant's habits and calling for an investigation of the applicant as an insurance risk and calling for an insurance report."

He received a report from one H. C. Wilson, living at Hemet, Cal., near the applicant, who had known the applicant eight or ten years, and who reported that the applicant uses intoxicating drinks, becomes intoxicated, "generally lasts a number of days," and, in response to a question as to when this last occurred, answered, "As far as I can learn it has been some time ago," and under the head of "Remarks" adds:

> "Think he is healthy enough but likes liquor too well; but still he puts in quite a large amount of his time at the ranch here, which keeps him in good condition."

On the examiner's recommendation, a policy was written for $5,000 only with a premium rating increased to 190 because of increased risk, as compared with a standard rating of 100, which policy was forwarded to the San Francisco office dated November 18, 1920.

On November 20th the company received a second report from one O. L. Comings of San Francisco, "some information" from the Travelers' Insurance Company with respect to Whittier's application to that company, and a reply from the doctor who had examined the applicant. These were examined by the company's medical examiner November 26th and a new policy written and delivered for $10,000 with a rating of 140; the $5,000

★Rehearing denied. Hearing denied by Supreme Court.

policy being withdrawn. This new policy, dated December 3, 1920, is the basis of the suit.

The inspection report of O. L. Comings stated that he had known applicant 20 years; that he uses intoxicating drinks moderately; that he became intoxicated "in the nature of a few hours' hilarity," which occurred not since 1906; that he had never taken a cure for the liquor habit; and under the head of "Remarks," stated: "He followed in the line of rich men's sons."

The reply from the doctor who examined the applicant was to the effect that he had seen Whittier under the influence of liquor eight years ago; has heard of his being under the influence of liquor "several years ago"; does not know how frequently he has been under its influence; answers "not to my knowledge" in response to a question as to applicant's ever taking a cure; and that there is no present indication of the use of alcohol. He adds:

> "Some years ago I understood Mr. Whittier drank considerable, but of late years he seems to attend to business promptly, and I have no knowledge of him taking liquor excessively."

A report was also received by the company from one M. S. Scott, who reports that applicant does not use intoxicating drinks to excess, if at all; that he cannot learn of his ever becoming intoxicated; has not taken a cure for the liquor habit.

The medical examiner and the company also received information from the Travelers' Insurance Company that Whittier had applied to that company twice, in 1917 and 1920; that, when examined, he admitted having used alcoholic stimulants to excess in 1890, and having taken the liquor cure in 1890, and in the later application admitted that he used alcoholic beverages to excess up to about 1916.

Whittier died at Hemet, Cal., March 1, 1921. Proofs of death were filed with the company, and on May 16, 1921, the company rejected the claim, and tendered to appellants a check for $658.20, the amount of the one premium paid, with interest. Respondent (defendant) took depositions of five officers of defendant —and at the beginning of the trial appellants read these into the record.

Upon a controversy regarding this matter, the court held that appellants were not entitled to the benefit of section 2055, Code of Civil Procedure, so far as the depositions then in evidence were concerned, and that appellants were bound by the testimony contained in the depositions upon the theory that appellants had produced the witnesses and had put them upon the stand as appellants' witnesses without having distinctly announced their reliance on section 2055, Code of Civil Procedure.

Appellants contend this was error, and the refusal of the court to allow contradiction of these witnesses warrants a new trial.

Attached to these depositions were the following exhibits, each of which was introduced by plaintiffs:

Ballard's Exhibit A, the application for insurance, answers made to examining physician.

Ballard's Exhibit B, the proof of death.

Harrison's Exhibit A, inspection report by H. C. Wilson, above mentioned.

Harrison's Exhibit B, inspection report by O. L. Comings, before mentioned.

Harrison's Exhibit C, inspection report by examining physician, above mentioned.

Harrison's Exhibit D, inspection report by M. S. Scott, before referred to.

Ballard's Exhibits:

C—Letter by one of the plaintiffs accompanying the proofs of death.

D—Letter from the company rejecting claim.

E—Check for $658.20—above referred to.

F—Letters returning check to company.

G—Letters from counsel for company denying liability.

The only other documentary evidence was: Plaintiffs' No. 3, the policy; Plaintiffs' No. 4, the assignment of policy to plaintiffs: Plaintiffs' No. 5, a letter from the company; and plaintiffs' No. 6, a letter from a plaintiff to the company; Defendant's Exhibit A, the certificate of death, and Defendant's Exhibit B, a paper signed by Dr. H. O. Miller—who had signed the death certificate.

The findings by the trial court are full and voluminous, and many of them are attacked by appellants.

[1] Finding III is to the effect that the policy was issued by defendant "relying on the representations and statements so made (that is in the application and the medical application accompanying it), and each and every of them, and said defendant corporation would not have executed or delivered said policy of life insurance but for said representations and statements, and its reliance thereon, and, had it known that any of said representations were not true, but were false and untrue, defendant corporation would not have executed nor would it have delivered said policy."

However, it appears from the testimony of the company defendant's medical examiner, Dr. Harrison, of W. F. Rohlffs, its assistant secretary, and of T. A. Buckner, a member of its classification committee, the three officials before whom the application for the policy came, and on whose approval it was issued, that before the policy was issued they had before them the report of H. C. Wilson, of O. L. Comings, from M. S. Scott, the further report from the examining physician, and the information given them by the Travelers' Insurance Company.

This evidence is uncontradicted, and from it the conclusion is irresistible that the company did know that some of the applicant's representations were untrue, and that it issued the policy for a reduced amount in spite of that fact.

In finding VI it is found that each and every of the questions and the answers thereto in the application and in the medical examination "was and were and each is material to the risk, and" that upon said answers "defendant, believing the same to be true, executed" the policy. Also that "defendant would not have executed, signed, or delivered said policy, * * * but for said statements and representations so made, and because of the same being material, and because of its reliance thereon and its belief in the truth of the same."

It is also found in paragraph VI of the findings that in the medical examination are the following questions and answers:

> 8. Have you ever suffered from any ailment or disease of
> (a) The brain or nervous system? A. No.
> (b) The heart or lungs? A. No.
> (c) The stomach or intestines, liver, kidneys or bladder? A. No.
> 9. (e) What physician or physicians, if any, not named above, have you consulted or been treated by, within the last five years, and for what illness or ailment? A. Dr. Garnard Grant; three months ago; cold; complete recovery.

And it is found that "the answers in this finding above set forth, to each and every of the questions above set forth, were, and each of said answers was, false and untrue," and, at the time the "same were made, * * * were known by him to be false and untrue, and were made by him for the purpose of deceiving defendant and causing it to issue the policy."

Yet, as before stated, it is in evidence that the officials of the respondent company did not "believe the same to be true"; and did not execute the policy "because of its reliance thereon"; and there is only the slightest, if any, evidence that any of the answers listed were not true.

It is further found in finding VI that decedent "had taken what is known as the Keely cure."

The sole reference to this subject in the evidence is to be found in the testimony of Harrison, the medical examiner of the company, who states that November 26, 1920, he had before him certain information from the Travelers' Insurance Company received by his company November 20th, showing that deceased had applied to that company and had admitted "having used alcoholic stimulants to excess in 1890, and having taken the liquor cure in 1890."

It will be noticed then (1) that this is not evidence that decedent took the cure; (2) that, if he did, it was 30 years before; and (3) that the medical examiner had the information before him when the policy was written, and the company did not issue the policy in reliance on the applicant's statement.

It is further found in finding VI "that decedent had suffered from an ailment of the heart, of the kidneys and of the bladder and of the nervous system. That in 1920 * * * he was attended by Dr. Miller * * * for nervousness, sleeplessness, pains in the heart and heart region, somnolence and urinary disorders of the kidneys and bladder."

The testimony of Dr. Miller shows that in July and August of 1920, the trouble for which he treated the deceased was drunkenness. He states that deceased mentioned "trouble with his bladder—frequency of urination," but explicitly states that no medicine was given for this; that the treatments were entirely for acute troubles, and not for chronic illness.

None of this forms a basis for the finding.

Later in this same paragraph is a finding again that Dr. Miller treated the decedent for "acute nervousness, chronic nephritis, pains in the heart, somnolence, and diseases of the kidneys and bladder and of the urinary tract." Yet the testimony of the several physicians examined distinctly shows the man never had chronic nephritis, and fails to show any treatment for this disorder.

Again in this paragraph are findings that one Dr. Grant had treated the deceased for at least two years for various and different ailments and illnesses other than a cold, and for an ailment that caused one of his arms to be partially useless, as well as for sleeplessness and nervousness.

The uncontradicted evidence of Dr. Grant, however, is to the effect that, while he examined Mr. Whittier many times over a period of two or three years, the only treatments he ever gave were for a bronchitis or cold at one time, and that he irrigated decedent's eye with a little borax solution for an eye ulcer.

It appeared from the evidence that in 1918 Whittier had a phagedenic ulcer of the cornea of the eye, which is described by the physician as "a slight abrasion of the skin and an infection of the superficial layers of the cornea." He recovered in a relatively short period of time, and the doctor states that it was a temporary ailment of rather a minor type. In the treatment Whittier's tonsils were removed as a possible source of infection, but it did not distinctly appear that they were infected or the removal necessary.

Based upon the above facts, findings are made that the cause of the ulcer of the cornea of the eye was some disease of the blood; and that deceased had some disease of the blood, the cause of which none of said physicians could give. This finding is made in the face of evidence of Dr. Grant and Dr. Stoner, who repeatedly and frequently made examinations of Whittier—Grant a dozen times in a period of two or three years—always doing a urinalysis and taking a blood pressure; ran a blood chemistry determination, did a blood count, and ran a Wassermann test. They reported everything normal and the Wassermann negative.

The finding also is not supported by evidence.

The certificate of death gives the cause of death as uræmic poisoning, and the contributing cause as chronic interstitial nephritis, and certifies the disease was incurred "during past several years." Dr. H. O. Miller, who issued the death certificate, also made an affidavit in which he recites that he treated decedent for "various complaints. Nephritis was a gradual development becoming acute six months ago"; that he treated Whittier for "nephritis and other complaints" in July and August, 1920; that he treated him prior to last sickness for "such symptoms as nervousness, sleeplessness, pains in heart region, somnolence, and urinary disorders"—gives "uræmic poisoning due to chronic nephritis" as the immediate cause of death, and states his opinion that deceased suffered from the disease several years. Based upon these two documents, the court finds that the immediate cause of death was uræmic poisoning due to chronic nephritis.

However, this statement was practically repudiated by Dr. Miller when called as a witness. He substantially testified that Whittier died of alcoholism, although admitting the possibility of death occurring from a hypodermic administered by himself, and states that he gave the certificate of death from uræmic poisoning to avoid certifying to alcoholism as the cause of death.

Dr. Grant and Dr. Stoner testify that it was impossible that nephritis could have been the cause of death. Dr. Grant states he examined Whittier in 1918, when he "had no symptom of either uræmic poisoning or nephritis, either acute or chronic"; that in November, 1920, he examined Whittier, and took his blood pressure in December close to the holidays (ten weeks before death), and that neither chronic uræmic poisoning nor chronic nephritis could have been the cause of death. Dr. Stoner "don't see how it was possible" for either disease to have caused death. Dr. Strasser, who as representative of the respondent examined Whittier for the insurance, states that he "was not at the time suffering" from either. And, finally, the officials of the company who testified stated that they did not consider deceased died of these diseases.

Dr. Miller, who gave the medical certificate of death, and who was the only person even suggesting uræmic poisoning or nephritis (Bright's disease) as the cause of death, so thoroughly repudiates his statement that we feel justified in holding that this finding of the cause of death as chronic nephritis is not sustained by the evidence.

The trial court in its finding numbered VIII declares that the company did not find out that Whittier's answers to questions hereinbefore quoted were untrue until after the death of Whittier; and that, upon being advised of said false and fraudulent misrepresentations (after the death of the insured), it repudiated and canceled the policy.

The fact is, however, that the company knew of the dissipated habits of deceased before issuing the policy, and issued it in a reduced amount and at an increased premium rate because of its knowledge.

Feeling that there is in some instances a total want of evidence, and in others no substantial evidence to support the findings, it is the duty of the court to set aside the findings above noted and other parts of the findings to the same effect.

While we have disagreed with the trial judge on many of the findings made, we are not disposed to criticize his action in any particular for signing the findings as presented. It has required long and careful search and scanning of the record to find the evidence bearing upon them respectively, an effort which a busy trial judge should not be required to make. Counsel are prone in many cases, after a favorable decision is announced, to draft and present for signature by the judge a mass of findings favorable to their contentions without a proper scrutiny of the record to see if they are well founded. Thus we find in the instant case an answer covering eighteen pages of the transcript, and findings even longer.

[2] The question as to plaintiffs being bound by the introduction into evidence by them of the depositions of the officers of defendant corporation with the accompanying exhibits is novel and interesting. It will be noted that the depositions were taken on defendant's motion.

The trial judge, in ruling upon the question said:

> "Unless he states in advance or during some part of his examination, that he is acting under section 2055, Code of Civil Procedure, it would seem to me he ought to be bound upon the theory that he has produced that witness and has put him upon the stand as his witness."

Many lawyers and judges will agree with this theory.

However, we find the case of Grantham v. Ordway, 40 Cal. App. 758, 764, 182 P. 73, 76, an action for damages against a corporation and Ordway, one of its employees. In anticipation of the trial the defendant took the deposition of Ordway, a defendant and its employee, and plaintiff as a part of his case read this deposition to the jury. Mr. Presiding Justice Waste in the decision says: "Furthermore, plaintiff is not bound by Ordway's testimony," and quotes the provisions of section 2055, Code of Civil Procedure. This seems squarely in point. See, also, Figari v. Olcese, 184 Cal. 775, at page 782, 195 P. 425, 15 A. L. R. 192.

For the reasons herein stated, the judgment should be reversed.

We concur: STURTEVANT, J.; NOURSE, J.

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91 Cal. App. 290

PEOPLE v. KINKICHI WATANEBE.
(Cr. 1459.)

District Court of Appeal, First District, Division 2, California. April 25, 1928.

1. Witnesses ⟹277(2)—Cross-examination of defendant, accused of performing illegal operation, as to conversation with proprietress of beauty shop, held not improper, in view of other testimony concerning transactions there.

In prosecution for second degree murder on account of defendant's alleged commission of illegal operation, cross-examination of defendant as to conversations had with proprietress of beauty shop *held* not improper, where mother of deceased testified that she and her daughter went to the shop on the day before daughter's illness, and that daughter left shop with piece of paper given her by the proprietress.

2. Witnesses ⟹406—Admission in rebuttal of testimony that witness sent deceased girl to defendant's store held not error as improper impeachment of defendant, in prosecution for murder by performance of illegal operation (Code Civ. Proc. § 2051).

In prosecution for second degree murder for alleged commission of illegal operation, admission in rebuttal of testimony of proprietress of beauty shop as to having sent deceased girl to defendant's store *held* not error as improper impeachment of defendant who testified in his own behalf, since witness may be impeached by calling other contradicting witnesses under Code Civ. Proc. § 2051.

3. Criminal law ⟹404(3)—Cervix dilator found in possession of another Japanese nearby held admissible in prosecution of Japanese for murder on account of illegal operation.

In prosecution of Japanese for second degree murder for alleged performance of illegal operation, admission of evidence of "cervix dilator" taken from possession of another Japanese, one-half block away, *held* not error, where admitted for purpose of showing that defendant had access to instruments and apparatus with which he could perform the operation, and where there was considerable evidence that defendant had purchased a similar article of a similar manufacture; weight of evidence being question for the jury.

4. Criminal law ⟹1159(1)—Findings and jury's verdict are controlling on appeal.

Findings of the trial court or jury are controlling on appeal.

5. Homicide ⟹254—Conviction for second degree murder by performance of illegal operation, resulting in death, held sustained by evidence.

In prosecution of druggist for commission of alleged illegal operation resulting in death, evidence which showed defendant was equipped with requisite surgical apparatus *held* sufficient to sustain conviction for second degree murder.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Kinkichi Watanebe was convicted of second degree murder, and he appeals. Affirmed.

Morgan A. Sanborn and Harry A. Encell, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

STURTEVANT, J. The district attorney filed an information against the defendant charging him with the crime of murder. The defendant pleaded not guilty. A trial was had before the court sitting with a jury. The jury returned a verdict finding the defendant guilty of murder in the second degree. The defendant made a motion for a new trial. The motion was denied, and the defendant appealed from the judgment and the order denying his motion. He has brought up a typewritten record of all the proceedings.

The record discloses that the above-mentioned trial was the second trial of the defendant for the alleged offense.

It was the theory of the prosecution that the defendant performed an illegal operation on the body of Beatrice Newland, and as a result of that operation she died. The defendant was at the time of the alleged offense a licensed druggist conducting a drug store near the corner of Eighth and Franklin streets in the city of Oakland. The decedent resided in the same city.

On the trial, the prosecution called a large number of witnesses, and each one was examined and cross-examined. It introduced a large number of exhibits. Among others, it introduced a number of pieces of surgical apparatus which the prosecution had obtained from one of the rooms in the flat of the defendant, upstairs over his drug store. It also introduced in evidence some surgical apparatus which it located in a bundle in the possession of C. Kowana, another Japanese, who conducted a candy store around the corner.

[1] Immediately after the prosecution closed its case, the defendant took the stand in his own behalf. He testified to many facts, among others that he did not perform the operation. He did not testify regarding any conversations with Madam Mays, the proprietress of a beauty shop in Oakland. On cross-

examination, the district attorney propounded many questions to the defendant regarding his conversations with Madam Mays. The defendant quotes the record, and claims that numerous errors were committed by the trial court in overruling his objections, based on the ground that the subject-matter was not within proper bounds of cross-examination. The subjects objected to were within the bounds of proper cross-examination of a defendant. People v. Rozelle, 78 Cal. 84, 92–93, 20 P. 36. The decedent's mother testified that the day before her daughter took to her bed she and her daughter went to Madam Mays' shop. After they arrived there, the decedent spoke to Madam Mays, and the latter gave decedent a paper, and decedent then directed her mother to wait, and went out. Later a telephone call was received. Madam Mays answered the call, and then turned to the mother, and told her that the decedent was going to the Southern Pacific Station at Seventh and Broadway, and wanted her mother to meet her there. Among the answers which the defendant claims were not proper cross-examination, the following were included:

> "Madam Mays never said anything to me about a girl that was pregnant. I never gave Madam Mays a slip of paper with 'Kay' written on it. I never told Madam Mays to have the girl that was pregnant come to my store July 12 (the date of the alleged operation)."

[2] After the defense had rested its case, the prosecution called Madam Mays in rebuttal. The defendant objected to all of the evidence given by the witness, contending that the subject-matter was a part of the case in chief of the prosecution and not rebuttal. At this time the defendant concedes that it is not necessarily prejudicial error to allow a party, in a criminal case, to introduce proof out of order. However, the defendant asserts that under the peculiar facts of this case the reception of the evidence of Madam Mays was tantamount to an impeachment of the defendant. But, if that be so, it is not necessarily error. One proper method of impeachment of any witness is to call other witnesses who contradict him. Code Civ. Proc. § 2051. She testified that on Monday (July 11, 1927) the defendant told her to send the decedent to his store at 1 o'clock Tuesday, and that he wrote on a piece of paper "Kay," and handed the paper to her. There is evidence in the record that the decedent was operated on by the defendant in a room upstairs over his drug store. There is evidence that Madam Mays sent her there. There is some evidence that the telephone call, above mentioned, was put in by the defendant.

[3] The defendant claims the trial court erred in receiving in evidence the "cervix dilator." As stated above, a bundle was taken from the possession of C. Kowana, another Japanese, one-block away. The dilator was in that bundle. The evidence introduced included such facts from which the jury might form the inference that the defendant either took or sent the bundle to Kowana's store. There was considerable evidence to the effect that the defendant had purchased a similar article of a similar manufacture. The purpose for which it was introduced was not to show that it was the particular instrument with which the operation was performed, but for the purpose of showing that the defendant had access to instruments and apparatus with which he could have performed the operation. The evidence connecting defendant's possession with the dilator was not insufficient. The real basis of the defendant's objection is a claim that the evidence of possession by the defendant was not strong. That, however, was a question for the jury.

[4, 5] Finally, it is claimed the evidence is insufficient. The defendant does not contend that the evidence fails to show the performance of an illegal operation. But the defendant claims the evidence is insufficient to show that he performed it. There is an abundance of evidence that the defendant was in a position, and was equipped with instruments and apparatus, enabling him to perform the operation. He concedes there are admissions by him that he performed the operation. But he argues that those admissions are of little weight. Conceding such to be true, the argument is not one on which an appellate court can act. The findings of the trial court or jury are controlling in this court. Moreover, on her dying bed, in the presence of the defendant, the decedent accused him of having performed the operation, and the defendant made no denial or other reply to the accusation.

The judgment and order are affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

91 Cal. App. 37

HOGAN et al. v. HORSFALL et al.
(Civ. 6237.)

District Court of Appeal, First District, Division 1, California. April 13, 1928.

1. Pleading 🔑416—Plaintiffs waived failure to grant leave to amend in sustaining demurrer, where they failed to ask such relief.

Where demurrer to complaint was sustained without leave to amend, and no application was made by plaintiffs to amend, *held* that, by failing to ask leave to amend, plaintiffs waived any abuse of discretion on part of court in denying such leave.

2. Judgment 🔑447(1)—Equity would not set aside deficiency judgment, where there was no showing that, in event decree was set aside, different result would ensue.

In suit to set aside deficiency, judgment obtained in foreclosure of mortgage, where there was no allegation in complaint as to value of mortgaged premises over and above senior mortgage, nor anything to show that, in event of decree's being set aside, any different result would ensue, *held* that decree would not be set aside, since equity will not do vain thing of setting aside judgment when no different result would ensue.

3. Equity 🔑15—Equity as such has no supervisory jurisdiction over other tribunals.

Court of equity as such has no supervisory jurisdiction over other tribunals.

4. Equity 🔑15—Equity has no power to sit in judgment on other tribunals to determine whether they have committed error while exercising their authority.

Court of equity as such does not possess power to sit in judgment on acts of other tribunals to determine whether they have committed error either in law or fact while exercising their authority.

5. Judgment 🔑501—Judgment rendered by court having jurisdiction of subject-matter and person, even though it contained error in exercise of jurisdiction, is not void but erroneous.

Judgment rendered by court in cause in which it has jurisdiction of subject-matter and of person, even though it contained error committed in exercise of jurisdiction, is not void, but merely erroneous.

6. Courts 🔑1—Court's jurisdiction is made up from authority to decide question rather than particular decision.

It is not particular decision that makes up court's jurisdiction, but rather authority to decide question at all.

7. Judgment 🔑407(1)—In suit to set aside deficiency judgment, conceding it was erroneous, equity would not take jurisdiction where there was failure to take advantage of adequate remedy for its correction.

In suit to set aside deficiency judgment rendered in action for foreclosure of mortgage, conceding that court committed error in rendering judgment by reason of insufficient description in decree, which would justify it in being set aside under appropriate proceedings, *held* that, since such decree was not void but voidable, and law provided remedy for its correction, equity would not take jurisdiction because of loss of such remedy through failure to take advantage of it when available.

8. Equity 🔑43—Adequate legal remedy defeats resort to equity.

Existence of adequate legal remedy defeats resort to equity.

9. Equity 🔑43—Rule that failure to exercise legal remedy will bar resort to equity applies to all sorts of remedies, whether by motion, appeal, or otherwise.

Rule that loss of adequate legal remedy through failure to take advantage of it when available bars resort to equity is applicable to all sorts of remedies whether by motion, appeal, or otherwise, and is in harmony with general principal which denies relief to any one who has been negligent.

10. Equity 🔑6—Intrinsic mistake is not ground for equitable relief.

Intrinsic mistake, like intrinsic fraud, is not ground for equitable relief.

11. Judgment 🔑316—Clerical misprisions in decree as to property's description may be corrected by court on own motion, in actions to foreclose.

In actions to foreclose, clerical misprisions in decree as to description of property may be corrected by court on its own motion, with or without notice.

12. Equity 🔑54—That which may be amended is not void.

That which may be amended is not void.

13. Judgment 🔑460(3)—Demurrer held properly sustained in suit to set aside deficiency judgment taken on foreclosure of mortgage, where there was entire absence of allegation of any attempt by plaintiffs to obtain relief.

In suit to set aside deficiency judgment taken on foreclosure of mortgage, where there was entire absence of allegation of any attempt by plaintiffs to obtain relief and of any showing by proper recitals that they could not have obtained relief in action for clerical misprision, *held* that demurrer to complaint was properly sustained.

14. Judgment 🔑445—Decree of foreclosure held res judicata in suit to set aside deficiency judgment taken in foreclosure suit.

In suit to set aside deficiency judgment taken on foreclosure of mortgage, where objection was not made to deficiency judgment in foreclosure suit, *held* that it was necessarily adjudicated by decree of foreclosure, and that decree becoming final was res judicata conclusively binding plaintiffs.

15. Mortgages 🔑559(10)—In suit to set aside deficiency judgment on ground of agreement not to take such judgment, complaint held insufficient as not showing consideration for such promise.

In suit to set aside deficiency judgment, where ground alleged was that agreement had been made not to take such judgment, but complaint contained no allegation as to when promise was made nor that there was consideration, *held* that deficiency judgment was proper, since for all that appears agreement was mere nudum pactum.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by Walter L. Hogan and another against William A. Horsfall and others to set aside a deficiency judgment obtained in an action to foreclose a mortgage. Judgment for defendants, and plaintiffs appeal. Affirmed.

See, also, 266 P. 1005.

J. L. Smith, of San Francisco, and Herbert V. Keeling, of Lakeport, for appellants.

Alan H. Critcher, of San Francisco, for respondents.

TYLER, P. J. Suit in equity to set aside a deficiency judgment obtained in an action for the foreclosure of a mortgage. The bill contains three counts: Under the first it is alleged, in substance, that the property sold by the commissioner was, by reason of an error in the description, not the property he was authorized to sell under the foreclosure decree, hence there could be no valid deficiency judgment. The second is the same as the first, with the exception of the statement that the error in the description was intentional, and was therefore a fraud. In the third it was alleged that there was an agreement between the parties not to take a deficiency judgment, and the taking of the same was therefore likewise a fraud on the plaintiffs. A demurrer to the complaint was sustained without leave to amend, and judgment was entered thereon, from which judgment this appeal is taken. No application was made by plaintiffs to amend, and the questions involved in the appeal are whether or not the trial court erred in sustaining the demurrer to the complaint and to each cause of action thereof, with or without leave to amend. In reciting the facts of their cause of action, plaintiffs have set forth that defendant Horsfall was the plaintiff in another certain action in the superior court for the county of Lake, wherein plaintiffs were defendants, which was an action for the foreclosure of a mortgage upon a certain piece of real property given to secure the payment of a promissory note for the sum of $2,000, signed by the plaintiffs herein. The mortgage given contained a recital that it was subject to a first incumbrance of $3,700, payable to one Frederica Meyerstein, which made the mortgage in question a second lien. On the 5th day of November, 1924, the court made a decree of foreclosure in the mortgage foreclosure action, and defendant Crawford was appointed as commissioner to sell the real property described in the decree. Thereafter Crawford, as such commissioner, published a notice of sale and sold said real property to defendant Horsfall for the sum of $10, and thereupon issued a certificate of sale conveying the property to him. On the 8th day of January, 1925, there was entered in said action a deficiency judgment against plaintiffs herein for the sum of $3,287.16. It is then recited that the property sold was not the property Crawford was authorized to sell under the decree of foreclosure, and hence no valid deficiency judgment could have been entered against the plaintiffs in that action. The correct description of the property involved is the southwest quarter and the southeast quarter of the northwest quarter of section 33 in township 12 north, range 6 east, Mount Diablo base and meridian, and lot No. 3, the east half of the southwest quarter and the west half of the southeast quarter of section 4 in township 11 north, range 6 west, Mount Diablo base and meridian, containing in all 393 acres of land, more or less. The complaint shows that the property was correctly described in the mortgage, complaint, lis pendens, order of sale, notice, and return of sale, but was incorrectly described in the decree, in this, that the word "southwest" was substituted for the word "southeast" in the first line of the description. The decree also directed that the mortgaged premises as described in the complaint should be sold, following which is the specific description containing the typographical error complained of. It is appellants' main contention that, by reason of the error contained in the decree with reference to the description of the property, the southeast quarter of the northeast quarter of section 33, township 12, was never sold, for which reason the deficiency judgment entered after the sale was void, for without a sale of the entire property there could be no deficiency judgment. There is no question that all of the property was sold by the commissioner, for the correct description of the property is contained in his notice of sale and also in his certificate as appears from the complaint herein. The question then really is not what he sold, but what he had the authority to sell under the decree. We are of the opinion that the demurrer to the complaint was properly sustained.

[1-6] At the outset it may be stated that appellants, by failing to ask leave to amend, waived any abuse of discretion on the part of the court in denying such leave. Buckley v. Howe, 86 Cal. 596, 25 P. 132; Durrell v. Dooner, 119 Cal. 411, 51 P. 628; Prince v. Lamb, 128 Cal. 120, 60 P. 689; Williamson v. Joyce, 140 Cal. 669, 74 P. 290. We will therefore discuss the complaint as though it contained all matters which possibly could have been alleged by appellant. There is no allegation in the complaint as to the value of the mortgaged premises over and above the senior mortgage; the allegation being merely that the property was of sufficient value to have brought the amount of said mortgage, inter-

est, and costs thereon, upon foreclosure which is an allegation that the property was worth $3,297.16, the amount of the judgment, which is less than the Meyerstein incumbrance; nor is there any allegation of what became of such senior incumbrance, whether it was paid, foreclosed, or is still subsisting, no reference whatsoever being made thereto. Then, again, there is nothing to show that, in the event of the decree being set aside, any different result would ensue. Equity will not do the vain thing of setting aside a judgment when the result would be the same. Painter v. Painter, 133 Cal. 129, 65 P. 311; Hite v. Mercantile Trust Co., 156 Cal. 765, 106 P. 102. Nor has a court of equity, as such, any supervisory jurisdiction over other tribunals; neither does it possess power to sit in judgment on their acts to determine whether they have committed error either in law or fact, while exercising their authority. A judgment rendered by a court in a cause in which it has jurisdiction of the subject-matter and of the person, even though it contain error committed in the exercise of jurisdiction, is not void, but erroneous merely. It is not the particular decision that makes up jurisdiction, but rather the authority to decide the question at all. Chase v. Christianson, 41 Cal. 253; Gray v. Hall (Cal. Sup.) 265 P. 246. The rule is fundamental everywhere prevailing that, where a court has jurisdiction of the res and the parties, error committed in the exercise of jurisdiction renders the judgment erroneous merely and not void.

[7-15] Conceding, therefore, that the court committed error in rendering the deficiency judgment by reason of the insufficient description in the decree, which would justify it being set aside under appropriate proceedings, such decree was not void, but voidable merely, and the law provided a speedy and adequate remedy for its correction. Not only will the existence of an adequate legal remedy defeat a resort to equity, but so, also, will the loss of such a remedy through failure to take advantage of it when available. This rule applies to all sorts of remedies, whether by motion, appeal, or otherwise, and is in harmony with the general principle which denies relief to one who has been negligent. If this were not true, there would be no end to litigation. Intrinsic mistake, like intrinsic fraud, is not ground for equitable relief. Public policy and the interests of litigants alike require that there be an end to litigation, and the peace and order of society demand that litigants and busy courts be relieved from successive suits involving the same matter. It is the only manner in which certainty may be secured to individual rights and dignity and respect to judicial proceedings. In actions to foreclose, clerical misprisions in the decree as to the description of the property may be corrected by the court on its own motion, with or without notice. Dickey v. Gibson, 113 Cal. 26, 45 P. 15, 54 Am. St. Rep. 321; McKeever v. Superior Court (Cal. App.) 259 P. 373. That which may be amended is not void. Newmark v. Chapman, 53 Cal. 557. Here there is an entire absence of allegation of any attempt whatsoever by appellants to obtain the relief they here seek, and likewise of any showing by proper recital that they could not have obtained relief in the action from the clerical misprision. Moreover, as above mentioned, the complaint shows that all of the property was sold as indicated by the notice of sale and the certificate of the commissioner. Under all these circumstances, we are of the opinion that the learned trial court properly sustained the demurrer to the complaint. What we have said applies with equal force to the third cause of action. The decree is made a part of the complaint, and it is there recited that the case came on for trial upon the complaint and answer. Objection could have been made, if warranted, to the entry of the deficiency judgment as it was a matter involved in the foreclosure suit, and, none having been made, it was a question necessarily adjudicated by the decree of foreclosure, and the decree having become final it is res adjudicata, and appellants herein are conclusively bound by it. Hager v. Astorg, 145 Cal. 548, 79 P. 68, 104 Am. St. Rep. 68. Moreover, defendants were entitled to a deficiency judgment in the absence of some showing to the contrary. The complaint contains no allegation when the promise not to take a deficiency judgment was made, nor does it contain any allegation that there was a consideration for such promise. For all that appears, the alleged agreement was a mere nudum pactum. Heim v. Butin, 109 Cal. 500, 42 P. 138, 50 Am. St. Rep. 54.

Respondents urge the additional argument in support of the judgment that the erroneous description contained in the decree may properly be disregarded as surplusage, as reference is made therein to the proper description as recited in the complaint. We are cited to the case of McNair v. Johnson, 95 S. C. 176, 78 S. E. 892, as declaring this rule. The case supports respondents' contention, and is on all fours with the instant one. A discussion of this question, however, is unnecessary, considering the conclusion we have reached that the complaint states no ground for the equitable relief sought, and the learned trial court rightfully so concluded.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

91 Cal. App. 797

Walter L. HOGAN and Louise J. Hogan, Plaintiffs and Appellants, v. William A. HORSFALL et al., Defendants and Respondents. (Civ. 6238.)

District Court of Appeal, First District, Division 1, California. April 13, 1928.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

J. L. Smith, of San Francisco, and Herbert V. Keeling, of Lakeport, for appellants.

Alan H. Critcher, of San Francisco, for respondents.

TYLER, P. J. This is an appeal from an order denying an injunction pendente lite and vacating a restraining order made in the above-entitled action.

Upon the authority of Hogan et al. v. Horsfall et al., Civil No. 6237 (Cal. App.) 266 P. 1002, this day decided, the orders are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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91 Cal. App. 201

DESMOND v. STANDARD BOND & MORTGAGE CO. (Civ. 5115.)

District Court of Appeal, Second District, Division 1, California. April 23, 1928.

1. Appeal and error 🔑989—On appeal, defendant cannot select that part of evidence which does not support findings as basis for request for reversal.

Defendant cannot, on appeal, select that part of evidence which does not support findings and present it as basis for request for reversal of judgment.

2. Appeal and error 🔑1010(1)—Appellate court must affirm judgment, if record contains substantial evidence sustaining findings.

It is duty of appellate court to affirm judgments, if in record there appears substantial evidence to sustain findings.

3. Fraud 🔑58(1)—In action by purchaser for false representations in sale of house, evidence held to sustain finding that statements respecting construction of house were of fact, not opinion.

In purchaser's action for false representations by vendor in sale of house, evidence *held* to justify court's holding that statements made respecting workmanship and foundation of house were statements of fact rather than mere expressions of opinion.

4. Fraud 🔑22(1)—Inexperienced purchaser need not investigate to determine truth of vendor's agent's representations that house was A–1 as regards recovery of damages.

Where vendor, engaged in business of constructing and selling house, having agent who visited premises every day while house was being erected, represented through agent that house was built on solid foundation, and that workmanship was A–1, *held* that no obligation rested on inexperienced purchaser to investigate for the purpose of determining whether statements made by agent were true as regards her right to recover damages, where such representations proved to be untrue.

5. Fraud 🔑62—$1,000 for false representations by vendor in sale of house, which was poorly constructed, held not excessive.

In purchaser's action for damages for false representation of vendor in sale of house which proved to be poorly constructed, finding that purchaser was damaged to extent of $1,000 *held* supported by evidence.

6. Fraud 🔑60—Interest held properly allowed on sum awarded purchaser as damages, in action for false representations in sale of house (Civ. Code, § 3288).

In purchaser's action against vendor for false representations in sale of house, allowance of interest on sum which plaintiff suffered as damages *held* not error under Civ. Code, § 3288, providing, "in every action for fraud, interest may be given in discretion of jury."

7. Fraud 🔑58(4)—Finding that purchaser relied on vendor's false representations in purchasing house which was poorly constructed held supported by evidence.

In action by purchaser for false representation by vendor in sale of house which proved to be poorly constructed, evidence *held* to support finding that purchaser relied on representations.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Eleanor Desmond against the Standard Bond & Mortgage Company for damages for false representation. Judgment for the plaintiff, and the defendant appeals. Affirmed.

C. E. McDowell, of Los Angeles, for appellant.

Eugene C. Campbell, of Long Beach, for respondent.

WOOD, Justice pro tem. Plaintiff purchased from defendant, on March 3, 1920, a lot in the city of Long Beach, upon which there had just been constructed a small dwelling house. Defendant was then engaged in the business of building and selling houses. Plaintiff moved into the house shortly after she purchased it, and soon thereafter the floors buckled and settled, and most of the plastering fell from the walls. Finally she was compelled to move away from the house while repairs were being made. She alleged in her complaint that defendant represented to her before the purchase that the house had been constructed in a first-class manner, with first-class plastering and painting, and with a first-class foundation, having underpinning posts not more than three feet apart. These representations she alleged were false, and were made by defendant with intent to defraud her, and in a manner not warranted by the information defendant had at the time. The trial court found plaintiff's allegations to be true, and rendered judgment in plaintiff's favor for the sum of $1,000, the difference between the actual value of the property at the time of the purchase and the value which the premises would have had if the representations had been true.

Abundant evidence appears in the record to sustain the findings of the court. It was thoroughly established that there was an insufficient number of piers for the house to rest upon, and that these had not been imbedded, but had been placed upon the surface of the ground. Rain water had softened the soil, and the foundations had sunk, thereby causing the floors to buckle and settle. The plastering was admitted to be so poor that replastering was necessary. Even the man who supervised the construction of the house testified that the plaster was not properly prepared, and that it had not been mixed with hair. It would unnecessarily lengthen this opinion to enumerate the many serious defects in the construction of the house.

[1-3] Defendant contends that the statements made to plaintiff concerning the construction of the dwelling were expressions of opinion only, and were not false representations. The statements were made by one Neece, who sold the property as agent for defendant. Neece visited the house every day while it was being constructed, and "O.K'd approximately all the bills." While the record shows that plaintiff did, during the course of her testimony, say that Neece had told her he thought the lumber was good, and that the purchase of the property was a good investment, the record also discloses that Neece made a number of positive statements of facts which cannot be classified as mere opinions. Defendant cannot on appeal select that part of the evidence which does not support the findings and present it as a basis for a request for a reversal of the judgment. It is the duty of this court to affirm the judgment if in the record there appears substantial evidence to sustain the findings. Plaintiff testified:

> "Mr. Neece said, 'The ground under this house is literally dotted with the underpinning.' And I asked him, 'How far apart?' and he said, 'About this far.' Just a bit wider than his own body. * * *
>
> "Q. Did you ask him anything about the general construction of the house, or have any talk with him about the general construction of the house? A. Just what I said, describing the woodwork and the plaster and the painting and papering, were of A-1 workmanship. * * * He spoke then except for that one spot in the ceiling that the plaster and the woodwork and the finish and the flooring and all were A-1 workmanship, and the best that could be had at that time."

Miss Renius, who was assisting Neece in the sale of the house, said to plaintiff:

> "There is one thing that Neece & Wiseman have insisted upon, is a good foundation for those houses out there."

The evidence clearly established that the ground under the house was far from dotted with underpinning. If the statement of Neece had been true, there would have been several times as many piers under the house as were actually placed there. The court was justified in holding that the statements made by Neece amounted to statements of fact rather than mere expressions of opinion. In French v. Freeman, 191 Cal. 579, 217 P. 515, the court said:

> "What amounts to an expression of opinion as compared with a positive statement of fact depends upon all the circumstances of the case, and is a question for the trial court to determine. * * * The trial court here found that defendant stated, as a fact, that the soil was the finest sediment soil, and we are bound by that finding."

[4] No obligation rested upon plaintiff to investigate for the purpose of determining if the statements made by Neece were true. She was inexperienced in matters of this kind, and had never constructed or purchased a house before. Defendant was engaged in the business of constructing and selling houses, and its agent, Neece, had visited the premises every day while the house was being erected. No circumstance was shown in evidence, and nothing appeared from her observation of the premises, which put her on inquiry to make sure that the house had been properly built. In view of the positive statements of Neece on the subject of the foundation, it cannot be said that it was plaintiff's duty to crawl under the house to count the underpinning posts.

[5] In attempting to uphold its contention that the evidence is insufficient to support the findings on the subject of damages, defendant asserts that the actual value of the property at the time of the purchase was not shown. Mr. Neece testified that the value of the property would have been $5,000 at the time of the purchase, if it had been constructed in a first-class manner. Another witness stated that the actual value of the premises six months later was $3,500 or $3,600, while a third witness testified that the property increased in value 7 per cent. during this period. Moreover, the court found upon sufficient evidence that plaintiff had expended the sum of $646.17 in making partial repairs to the house. It was established that to complete the repairs and put the premises in the condition as represented plaintiff would have to expend an additional sum, which would bring the total to more than $1,000. The findings on the subject of damages are amply supported.

[6] The trial court did not err in allowing interest on the sum which plaintiff had suffered as damages. Section 3288 of the Civil Code provides:

"In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury."

In Sutherland on Damages, section 354, this statement is found:

"Money obtained wrongfully or by extortion or fraud is recoverable with interest from the time it is obtained."

[7] Defendant contends that plaintiff "did not rely upon any statements made to her by or on behalf of the defendant, but upon her own investigation." The findings on the point are favorable to the plaintiff and are sustained, as is shown by the following testimony of plaintiff:

"Q. By Mr. Campbell: Did he say it was A-1? A. Yes, A-1.

"Q. Well, did you believe his statement in reference to the construction of the house? A. Yes; I believed him.

"Q. Did you rely upon those statements when you purchased the house? A. Yes; absolutely. Prior to this time I had had no experience in the construction of houses, and I had never bought a house before at all."

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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91 Cal. App. 294

FOLSOM v. BURNS et al. (Civ. 5797.)

District Court of Appeal, Second District, Division 1, California. April 25, 1928.

1. Appeal and error ⊙⟹**204(1)—Appellant cannot for first time on appeal object to introduction of testimony.**

Appellant who had not objected to the introduction of testimony at time it was given could not for the first time raise such point on appeal from judgment.

2. Appeal and error ⊙⟹**843(2)—Where defendant claimed through one whom court found had no interest in property, whether plaintiff was purchaser for value without notice was immaterial in action to quiet title.**

In action to quiet title, wherein defendant claimed rights in land through one whom court found to have had no interest in land when defendant's alleged rights attached, whether plaintiff was purchaser for value without notice was immaterial.

3. Quieting title ⊙⟹**44(4)—Plaintiff held entitled to quiet title against judgment creditor asserting lien on land as debtor's property where debtor never had interest therein.**

Plaintiff *held* entitled to decree quieting title against judgment creditor asserting a lien on land as the property of the judgment debtor, where evidence showed that such judgment debtor never had any interest in the property in question.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action to quiet title by Marion A. Folsom against Virginia B. Burns, A. E. Newton, and others. Judgment for plaintiff, and defendant Newton appeals, C. W. Chamberlain, as executor of the estate of A. E. Newton, deceased, being substituted as appellant on defendant Newton's death. Affirmed.

F. L. Richardson, of San Diego, for appellant.

Lewis J. Utt, of San Diego, for respondent.

HOUSER, J. The action upon which the appeal herein is predicated was brought for the purpose of quieting title in the plaintiff to certain real property as against the claims of each of the several defendants therein named. With the exception of defendant Newton, none of the defendants appeared or in any manner contested the claim of plaintiff to ownership of the property in question. His claim depended upon an asserted lien created by virtue of a certain judgment. Since the filing of the appeal herein, appellant Newton has deceased, and, by order of court, C. W. Chamberlain, as executor of the last will of said Newton, has been substituted in his place as appellant in this proceeding.

Based upon the evidence adduced on the trial of the action, the trial court made findings which, in substance, included the facts that all the allegations contained in the complaint were true, and that none of the allegations contained in the separate answer of defendant Newton was true; that at the time judgment was rendered, and for a long time prior thereto, plaintiff was the owner and in the possession of the real property in question; that on the 21st day of February, 1921, Virginia B. Burns was duly adjudicated a bankrupt in the District Court of the United States for the Southern District of California, and that Carl O. Retsloff was, and at all times since the commencement of the action has been, the duly appointed, qualified and acting trustee for the estate of said bankrupt; that the claims of Virginia B. Burns and Carl O. Retsloff as said trustee in bankruptcy, and A. E. Newton were without any right whatsoever, and that neither of said defendants had any estate, right, title, or interest whatever in the property described in the complaint or any part thereof; that in said bankruptcy proceedings the said Virginia B. Burns disclaimed the ownership of any real property, and both she and her mother, Mrs. M. Agnes Matthews, denied in particular that Virginia B. Burns ever owned any interest in the property in question;

that on March 7, 1921, defendant Newton recovered a judgment against defendant Virginia B. Burns, and that said judgment had never been satisfied, but that it did not constitute a valid or subsisting lien against the property described in the complaint; that on the date that said judgment was rendered the title to said real estate did not stand in the name of said Virginia B. Burns, nor at that time nor ever did she have any right, title, or interest whatsoever therein or thereto. In effect the trial court further found that at a time prior to September 11, 1916, although the record title to the property originally stood in the name of Mrs. M. Agnes Matthews (the mother of plaintiff and her sister, Virginia B. Burns), nevertheless, as at the time the property was purchased plaintiff had paid more than two-thirds of the purchase price of said property, Mrs. Matthews was a trustee of plaintiff's interest therein; that thereafter, to wit, on September 8, 1922, for a good and valuable consideration, Mrs. Matthews caused the entire title to said property to vest in plaintiff; that at all times between September 11, 1916, and September 8, 1922, Mrs. Matthews was in the open, notorious, and exclusive possession of said premises as the owner thereof, and that thereafter plaintiff was in such possession—with all of which facts defendant Virginia B. Burns was entirely familiar; that on the 11th day of September, 1916, the said Mrs. Matthews made a deed in which Virginia B. Burns was named as the grantee of the said property, but that said deed was never delivered—notwithstanding which latter fact, on September 17, 1923, it was duly recorded in the office of the county recorder of the county in which said property was situated; that at all times between September 11, 1916, and September 17, 1923—a period of over seven years—plaintiff paid all expenses of upkeep of said property, including all taxes levied thereon together with all interest at the rate of seven per cent. per annum which became due and payable on a promissory note in the sum of $1,500 secured by a mortgage on said property; that plaintiff also paid a promissory note for the sum of $100, together with interest thereon (also secured by a mortgage on the property in question), which money on September 11, 1916, Mrs. Matthews had borrowed on said property—all of which facts were within the knowledge of said defendant Virginia B. Burns; that during all of said period of time, although plaintiff and Virginia B. Burns were sisters and on friendly terms, said Virginia B. Burns permitted plaintiff to expend said sums of money and acquiesced in everything that plaintiff did with reference to said property, and at all times concealed from plaintiff the signing and existence of the said purported deed made to her by Mrs. Matthews, dated September 11, 1916, and otherwise kept plaintiff in complete ignorance of any claim asserted by defendant Virginia B. Burns against said real property throughout said entire period of time until the recordation of said void deed on September 17, 1923; that at all times after the purchase of the property by plaintiff and her mother, Mrs. Matthews, and up to the time the title was vested in plaintiff on September 8, 1922, plaintiff openly asserted to her sister Virginia B. Burns that plaintiff owned over two-thirds of said property; that plaintiff likewise informed her said sister that the said property was to belong in entirety to plaintiff upon the termination of a certain trust entered into by deed of Mrs. Matthews on April 2, 1920; that plaintiff likewise informed her sister Virginia B. Burns of the terms and conditions of an agreement between plaintiff and her mother, Mrs. Matthews, wherein and whereby plaintiff was to take title to the said property and to receive the interest of Mrs. Matthews therein, and told her said sister that it was agreed between her mother and plaintiff that plaintiff would devote her entire time to taking care of her mother in her sickness, as well as pay for all medical attendance, nursing and extraordinary expenses, in consideration of plaintiff receiving the interest which her mother owned in said property; notwithstanding which, defendant Virginia B. Burns continued to conceal from plaintiff the existence of the deed made to her by her mother, and acquiesced in plaintiff's taking title to said property without calling the attention of plaintiff to any claim which Virginia B. Burns had therein.

[1] Appellant's first specification of error is that on the trial of the action plaintiff should not have been permitted to give certain testimony. It appears that no objection was made by defendant to the introduction of such testimony at the time it was given. In such circumstances, in accordance with the long-established rule, it must be held that appellant may not for the first time raise the point on appeal from the judgment.

[2] It is next urged by appellant that error was committed by the trial court in holding that the plaintiff was a bona fide purchaser for value, without notice of the deed dated September 11, 1916, from Mrs. Matthews to Virginia B. Burns, and recorded on the 17th day of September, 1923. Inasmuch as the fact was found by the trial court that Virginia B. Burns never owned any interest in the property described in the pleadings, the question of whether plaintiff was a purchaser without notice becomes immaterial so far as appellant's claim is concerned.

[3] It is finally suggested by appellant that the trial court erred in decreeing that the plaintiff was the absolute owner of the real estate described in the complaint and in quieting her title thereto against the lien of the judgment of defendant Newton; and that, at any rate, the court should have decreed that said

Virginia B. Burns was the owner of an undivided one-third interest in said property subject to the judgment lien of defendant Newton. As hereinbefore indicated, the evidence introduced on the trial conclusively established the fact that plaintiff was the owner of the property which was the subject of the action, and that Virginia B. Burns never had any interest therein. As the asserted lien of the Newton judgment on said property depended entirely upon the assumed ownership of Virginia B. Burns therein, it follows that no error was committed by the trial court in reaching the conclusion that plaintiff was entitled to a decree quieting her title to the whole of the property in question.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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91 Cal. App. 333

KLEGMAN v. MOYER. (Civ. 6219.)★

District Court of Appeal, First District, Division 1, California. April 26, 1928.

Hearing Denied by Supreme Court June 25, 1928.

1. Mortgages 🔑280(1)—Assumption of mortgage is distinguished from mere taking subject thereto; "assume."

The term "assume" when used with reference to assumption of mortgage or incumbrance has a meaning distinguished from mere taking subject to a mortgage or other lien, there being but little distinction between assumption and execution of mortgage.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assume.]

2. Evidence 🔑450(5)—Parol evidence held admissible to explain provision of contract that defendant should accept property subject to $20,000 incumbrance, payable 2 years from date, to show defendant's execution of mortgage was required.

Provision in contract for exchange of properties, whereby defendant was to accept property "subject to first incumbrance in the sum of $20,000, bearing interest at the rate of 6 per cent. per annum, and due as follows: On or before 2 years from date," *held* subject to explanation by parol evidence as uncertain and ambiguous, in action for damages for breach of contract, to determine whether contract called for defendant's execution of mortgage, in view of escrow instructions relative to defendant's giving or assuming of note and deed of trust.

3. Exchange of property 🔑8(4)—Evidence held to sustain finding that contract for exchange of properties calling for defendant's acceptance of property subject to $20,000 incumbrance required defendant to execute mortgage.

In action for damages for defendant's breach of contract to exchange real properties, evidence *held* to sustain finding that provision of contract which called for defendant's acceptance of property subject to first incumbrance of $20,000, with 6 per cent. interest, payable 2 years from date, required that defendant execute and deliver note and mortgage as part of the exchange, in view of original and amended escrow instructions calling for defendant's execution or assumption of trust deed.

4. Exchange of property 🔑5, 8(3)—Escrow instructions were not modification of exchange contract, and admission thereof in suit for damages for breach of contract was not variance.

In action for damages for breach of contract for exchange of properties, escrow instructions *held* not to constitute new contract between the parties, or modification of original contract for exchange, such as to produce variance as result of introduction of evidence of the escrow instructions which were not pleaded.

5. Exchange of property 🔑8(4)—Plaintiff's instructions to title company, that defendant and wife were to execute mortgage under contract for exchange of properties, held not inadmissible as extending contract to include defendant's wife.

In action for breach of contract to exchange properties instructions of plaintiff to title company that defendant and his wife were to execute mortgage, offered to explain provision in contract concerning defendant's acceptance of property subject to incumbrance, *held* not inadmissible on account of additional requirement that wife should join, where all of instruments executed by defendant were signed by his wife, and deed tendered by plaintiff ran to defendant and his wife as grantees, especially where no objection was made in negotiations to the demand that defendant's wife join, point was not raised in trial court, and defendant did not offer to execute mortgage himself.

6. Trial 🔑280—Objection to escrow instructions as requiring defendant's wife to join in mortgage held not raised by general objection.

General objection to offer of escrow instructions to title company in action for breach of contract for exchange of properties did not raise question that instructions improperly enlarged scope of contract by requiring defendant's wife to join in executing mortgage.

7. Appeal and error 🔑169—Reviewing court need not consider matters not raised in pleadings or presented to trial court.

Points not raised in the pleadings or not presented in trial court need not be passed upon on appeal.

8. Appeal and error 🔑673(2)—Record which merely showed offer of proof of limited portion of complaint in another suit, presented solely for purpose of impeachment, held not to present question of election of remedies.

In action for damages for breach of contract for exchange of properties, offer in evidence of restricted portion of plaintiff's complaint in a specific performance suit for purpose of impeachment only *held* not to present question of plaintiff's election of remedies on appeal; record being insufficient.

★Hearing denied by Supreme Court.

9. Trial ⚷395(1)—Findings which as a whole show that material issues have been fairly determined support judgment.

If sufficient can be gathered from whole of findings of trial court to show that material issues are fairly determined, findings will be *held* to support judgment.

10. Appeal and error ⚷1071(6)—Failure to make additional findings is not ground for reversal, where such findings would have been adverse to appellant.

Where, in the light of the entire record, it is evidence that further findings, if made, would have been adverse to appellant's contention, failure of trial court to find further is not ground for reversal.

11. Appeal and error ⚷931(3)—Necessary inferences may be drawn from findings to support judgment.

Reviewing court is entitled to draw necessary inferences from the findings in order to support judgment.

12. Appeal and error ⚷1071(6)—Failure of trial court to make findings showing process by which it determined damages suffered from breach of contract to exchange properties held not reversible error (Civ. Code, §§ 3306, 3307).

In action for breach of contract to exchange properties, in which court found that plaintiff was damaged in sum of $5,000 as result of defendant's nonperformance, under Civ. Code, §§ 3306, 3307, failure of trial court to make findings as to respective market value of the properties and to show process by which final sum representing damages was arrived at *held* not error requiring reversal, since the statute makes measure for breach of agreement to purchase real property excess amount due seller under contract over the value of the property.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by Samuel Klegman against J. J. Moyer. Judgment for plaintiff, and defendant appeals. Affirmed.

Pierre A. Fontaine, of Oakland, for appellant.

Edward R. Eliassen and C. Leonard Rosenberg, both of Oakland, for respondent.

PARKER, Justice pro tem. This action was brought by plaintiff to recover damages for the alleged breach by defendant of a certain contract to exchange real properties. The case was tried without a jury, and the trial court awarded plaintiff damages in the sum of $5,000. A motion for a new trial was made and denied. Defendant presents this appeal.

Plaintiff and defendant through the same agent signed and delivered separate exchange agreements. Plaintiff was to exchange certain described real property in Oakland for real property of defendant in the same city, and by the terms of the exchange agreement and as an additional consideration the defendant was to transfer to plaintiff a certain note and deed of trust covering property in Madera county, Cal. In the contract of exchange it was provided that plaintiff was to trade his property subject to a first incumbrance in the sum of $20,000, bearing interest at the rate of 6 per cent. per annum and due 2 years from date; that in addition to this first incumbrance the defendant was to execute to plaintiff a note and deed of trust secured by the same property in the sum of $2,500, which should be a second incumbrance.

It plainly appears from the agreements of exchange that if the same had been fully consummated plaintiff would deed to defendant all of the property described and belonging to plaintiff, and would receive from defendant certain real estate encumbered to the extent of $8,000, and also an assignment of a note owned by defendant and secured by deed of trust on certain Madera county real estate, in the amount of $12,500, and in addition thereto plaintiff was to receive back a note, secured by deed of trust on the property by plaintiff conveyed, in the sum of $2,500, and a cash payment of $500. By the terms of the exchange agreements the property thus conveyed by plaintiff was to be conveyed "subject only to first incumbrance of $20,000." It is around this provision of the agreement that much of the present controversy turns. Every other particular of the contemplated exchange was satisfactorily arranged. To present the issue it will be necessary to go further into the facts.

After the execution of the exchange agreements each of the parties proceeded to consummate the deal, and for that purpose initiated an escrow with a title company. The plaintiff, Klegman, on depositing deed executed by himself and wife delivered to the title company his instructions as follows: "J. J. Moyer and wife are to execute a first deed of trust and note for $20,000;" then follow the remaining conditions, concerning which there is no dispute. On the same date defendant, Moyer, upon depositing deed of himself and wife to the property conveyed by him and an assignment of the trust deed for $12,500 on the Madera county property, gave his written instructions as follows:

> "You are to receive for the account of J. J. Moyer good and sufficient deed for that certain property [describing property of plaintiff] on which I am to execute a note and deed of trust as a first lien in the sum of $20,000,"

By the terms of the original exchange agreement the defendant, Moyer, was to guarantee the payment of the note secured by deed of trust on the Madera lands. However, when he delivered the note and deed of trust to the title company the note was indorsed "without recourse," and the guaranty indorsement thereon was canceled. This brought about some discussion, but was final-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ly settled by Moyer executing the guaranty. Then, after copies of Moyer's instructions to the title company had been given plaintiff, Moyer, without the knowledge or consent of Klegman, went to the office of the title company and, taking the original instructions, made a change therein. Where the instructions contained the clause, "I am to execute a note and deed of trust," Moyer struck out the word "execute" and wrote in ink the word "assume," thus making the clause read, "I am to assume a note and deed of trust." The transaction continued. The Hibernia Savings & Loan Society had a mortgage or deed of trust against the Klegman property in the amount of $16,500. Klegman proceeded to have the incumbrance removed and to arrange for the $20,000 incumbrance which was to remain on the property when transferred to Moyer. Accordingly Klegman prepared a first mortgage on his property in the sum of $20,000, which was to be executed by Moyer and wife and given to secure a note for $20,000 payable to Klegman and signed by Moyer and his wife. Then Klegman was to assign said note and mortgage to the bank. When the mortgage thus prepared was presented to Moyer, he made certain objections thereto. He objected to certain clauses pertaining to acceleration of due date upon transfer, and also the provisions thereof specifying the kind of money with which the obligation might be discharged. In the controversy ensuing each party was represented by counsel, and there is a sharp conflict as to just what was said or done at the time. Supporting the judgment there is evidence to the effect that neither Moyer or his counsel objected to the execution of this mortgage as such, provided the objectionable features were eliminated. Klegman did have all of the necessary changes made, and then Moyer took the position that he would prefer to execute the note and mortgage direct to the bank or to whomsoever it was intended should hold it. After further negotiations the whole transaction failed and no exchange was made.

The court below found that the failure to consummate the exchange was due to the acts and conduct of Moyer, and that Klegman at all times was ready, able, and willing to proceed and had done all things legally required of him. The court further found that as the result of the breach on the part of Moyer plaintiff was damaged in the amount of $5,000, for which sum plaintiff was awarded judgment.

Appellant advances many reasons why the judgment should be reversed, but all of these center about a few main contentions. It is contended that the rights and duties of both parties are measured and controlled by the first agreement of exchange; that this agreement expressly provided that the property of plaintiff should be conveyed "subject to an incumbrance of $20,000," and this contemplated a then existing lien; that the demand of plaintiff that defendant Moyer himself execute a mortgage on the premises was a substantial deviation from the terms of this contract, and, if made a condition of the exchange, it would be a new and different agreement and one upon which the minds of the parties had never met, and unenforceable, and if insisted upon, as it was, served as sufficient reason for Moyer's withdrawal from the exchange. Further, it is appellant's claim that in any event, conceding for the argument only that plaintiff might justly demand the execution of the mortgage by Moyer, yet he could not demand such an act from Moyer and his wife. In other words, the wife was not a party to the transaction in any sense.

[1, 2] It will be noted that the first written instruments between the parties were dated January 23, 1924. These instruments comprised two separate agreements of exchange, identical in language, with the difference only in the names of the parties. The contracts ran to Mutual Realty Company, and in each instrument this company was designated as agent of the owner. The contracts of exchange or the offers of exchange provided that if accepted the exchange should be closed by the parties at the office of Mutual Realty Company. This part of the exchange was evidently abandoned. On January 25, 1924, each of the parties signed and delivered his instructions to the title company, which have been hereinbefore referred to. In the offers of exchange as noted, the plaintiff was to convey his property and defendant was to accept this property "subject to first incumbrance in the sum of $20,000, bearing interest at the rate of 6 per cent. per annum, payable and due as follows: On or before 2 years from date." This provision is not clear and unambiguous, and no definite understanding of the exact agreement results from a reading thereof, conceding that the instrument should be read as a whole. It will be noted that it does not, by reference or otherwise, attempt to identify an existing incumbrance. A fair construction would leave the idea that the incumbrance was to be one created for the purpose of the exchange in an attempt to equalize values. The term of the first incumbrance, namely, 2 years *from date*, lends further strength to the inference that no prior incumbrance was in the minds of the parties. The further restriction as to the amount of interest to be charged in the incumbrance doubtless was intended as a specification to be given a lien to be created rather than as descriptive of one already in existence. The defendant and appellant contended that by the wording of the exchange offer it was contemplated that plaintiff should negotiate a loan for $20,000 on the property, and that defendant should take the property subject thereto. However, within 2 days after the signing of the exchange offer the defendant in his written instructions to the title company said, "I am to execute a note and deed of

trust as a first lien upon the property," and then later without the knowledge of plaintiff this was changed on the original to read, "I am to assume a note and deed of trust as a first lien." It will be seen therefrom that the construction adopted by defendant in either case differed from a taking of the property "subject to encumbrance of $20,000." The term "assume" has a meaning distinguished from a mere taking subject to a mortgage or other lien. See 18 California Jurisprudence at pages 44 and 45. From the cases there cited it follows that there is but little distinction between the assumption of a mortgage and the execution of a mortgage, speaking very generally and with particular reference to a case such as this.

The conclusion following the foregoing is that the provision of the contract "subject to first encumbrance of $20,000," etc., was a provision not so free from uncertainty or ambiguity as to preclude the trial court from taking evidence as to the true meaning and intent thereof. This the trial court did, over the objection of defendant. The objection was without merit, as is likewise the assignment of error predicated thereon.

[3] The testimony taken disclosed that before the defendant, Moyer, executed the offer or contract of exchange on January 23, 1924, there was a discussion between Moyer and the agent selected by him to negotiate the deal. Immediately it may be noted that this agent was authorized to act for both of the parties as a broker through whom and through whose efforts the entire transaction was being negotiated. The agent told Moyer that, under the terms of the contract about to be signed, Moyer was to execute the mortgage on the property, and that Klegman was to obtain the loan. To this Moyer made no objection, and understood and was willing to execute the $20,000 mortgage. The testimony further showed that, when the mortgage was presented to Moyer to execute, the ground of his refusal was not that the agreement did not so provide, but his objection went to the form of the mortgage instrument. Moyer said at that time—which was after he had secured the aid of able counsel:

> "When you bring the $20,000 mortgage and modify that language in the note and mortgage, why then we will do business; we will exchange."

However, when the desired changes were made, he refused to execute the mortgage and the contemplated exchange failed.

Appellant throughout is insistent that the escrow instructions do not constitute in themselves the contract between the parties, but that these instructions depend entirely upon and are inseparably tied to the original contract or agreement of exchange. His contention is thus set forth:

> "The said instructions were intended solely to provide for the performance of the contract of exchange dated January 23, 1924, that supported them."

Adopting this contention—and it is urged strenuously throughout appellant's brief—it must follow that appellant's escrow instructions then reflect his idea of the construction to be placed upon and the meaning and intent of the clause regarding the $20,000 mortgage. Appellant also recognizes the fact that when the word "execute" was stricken out and the word "assume" inserted in place thereof there was indicated again the understanding of the parties. However, appellant argues thus:

> "Surely this learned court is to be guided by the intentions of the parties rather than be bound by any technical legal definition. Among the laity the expression 'assume' is invariably and interchangeably used to mean 'subject to,' and this eminent court cannot fail to take cognizance of this fact as common knowledge."

If the words are thus interchangeable, it follows that "subject to" may be intended to mean "assume." Appellant is not only willing but anxious that the rule of construction which seeks to ascertain and follow the intent of the parties be invoked in his behalf, but objects strenuously to such a procedure whenever its effect might be in aid of his adversary.

Appellant further admits that the clause with reference to the $20,000 did contemplate the future act of placing this incumbrance on the property, which act was to be performed by "some one," but not by appellant.

The force of all these arguments coupled with the facts as presented compel the conclusion that the clause itself and its meaning are obscure and indefinite to the extent of requiring oral evidence in aid of the construction. And from the evidence thus taken we find sufficient to support the finding that the contract did provide that defendant was to execute and deliver the incumbrance intended as a part of the exchange.

[4] Appellant argues that the instructions, even if accepted, constituted a new contract, and that the new contract was not pleaded, or, if the instructions operated as a modification of the original agreement for exchange, then the modification was not pleaded. This defect in pleading, appellant continues, resulted in a variance between pleading and proof, and the contract which was the basis of recovery was not the contract sued upon.

The conclusions hereinbefore arrived at dispose of these contentions without further comment.

[5] It is further contended that, inasmuch as plaintiff, Klegman, inserted in his instructions to the title company that Moyer and his wife were to execute the mortgage, he thereby added an additional requirement to the contract by bringing in a new party, the wife, and insisted thereby upon a condition which

defendant, Moyer, was justified in refusing to meet.

It is true that the wife of defendant, Moyer, was not a party to the agreement of exchange. It is true, however, that the deed tendered to Klegman was a deed running to J. J. Moyer and Ida Moyer, his wife, as grantees; and it would be obvious that if the title rested in both grantees any incumbrance thereon should cover the interest of both. Without objection, Moyer deposited in escrow all of the other instruments signed by Mrs. Moyer, his wife. For instance, Mrs. Moyer signed the deed conveying the property to be exchanged by Moyer. She signed the note and second deed of trust upon the Klegman property. She signed the assignment of the deed of trust on the Madera county property; in fact, she signed everything that Moyer signed.

Defendant, Moyer, in the court below urged his willingness to proceed with the exchange save and except on this one question of the $20,000 incumbrance. Not once in all of the negotiations or in the controversy did he object to the demand that Mrs. Moyer join in this incumbrance. On his examination after Moyer had given his version of the contract, and had contended that the mortgage was not to be executed by him, he testified as follows:

> "Q. Until February 19, 1924, did you know that Mr. Klegman has in his mind to have you sign this note and deed of trust for $20,000? A. No, it was absolutely a surprise to me.
>
> "Q. That was a surprise to you? A. Absolutely a surprise to me, because otherwise I would have had the wife down there and made arrangements for it."

Apparently throughout the attempted exchange it was taken for granted that the wives of the parties should join in all transfers. Appellant was ready to accept the deed running to himself and wife, and now urges that the demand of plaintiff that the wife join in the mortgage back was unwarranted. This contention cannot be sustained. The deeds tendered by defendant as well as the other transfers and assignments bore the signature of the wife; and it was and is fair to assume that she might have had some interest in the property conveyed. Without entering into any discussion of the law of community property, it will suffice to say that as a rule one dealing with a married man is to some extent at a peril when he neglects to consider what the interest of the wife might be. And particularly here, where the point was not raised in the trial court, and where every act and writing was without question as far as the present contention goes, it would be an extreme holding to support the contention of appellant. And this is further true for the reason that appellant did or does not offer to execute the mortgage himself, nor has he tendered the executed incumbrance without the additional signature.

[6] Appellant contends that he did raise the question in the court below, but this contention is based upon the notion that by a general objection to the offer of the instructions this specific objection was included.

If appellant was to receive the deed of plaintiff's property as running to Mrs. Moyer as well as himself, the effect of the instrument would be to vest the wife with an interest therein, and, as stated, this interest should be impressed with the mortgage lien. If appellant had any just ground for complaint he was called upon to express it at the time, and not merely as an afterthought in seeking some way out of his contract. In appellant's brief he states:

> "There is not one scintilla of evidence in the record to show that a note or mortgage of $20,000 was ever tendered by respondent or by any one in his behalf to the wife of appellant for her to execute, *nor was there ever any demand made upon appellant's wife so to do.*"

The very next sentence reads as follows:

> "No more convincing evidence may be found in the record of the fact that the minds of respondent and appellant never did meet upon this matter of the execution of a note and mortgage for $20,000 than the conduct of respondent himself in constantly and inexorably demanding of appellant that both he, appellant, and his wife, execute said note and mortgage for $20,000."

The wife was ready and willing to sign all other papers, and the record shows that she was familiar with the transaction. Obviously the demands of respondent could not have been so insistent if the request was never brought to her. Appellant in arguing on the escrow instructions always insists that these were more or less unimportant as being merely the means each party was adopting to carry out his contract. To such an extent does he argue that he claims that when he changed the wording of his escrow instructions he was within his rights for the reason that these instructions were merely, as it were, suggestions. If this is correct, it would seem also that the suggestion that the wife join in the execution of the mortgage was likewise only a tentative proposal. And, as no objection was made to it at the time and apparently acquiesced in as far as mere execution was concerned, the point is not sharp enough to puncture the judgment.

[7, 8] Appellant urges that plaintiff cannot maintain the present action for the reason that, prior to the commencement thereof, the said plaintiff had instituted an action in the superior court of Alameda county wherein he sought specific enforcement of the contract of exchange. The contention is thus made:

> "'Said remedies are inconsistent, and the election of one is deemed the abandonment of the other. Plaintiff's present action to recover damages in lieu of specific performance cannot be successfully maintained until he has first established his right to specific performance."

However, we do not consider that we are called upon to pass on this question. In the first place, the point is presented here for the first time and was not raised in the pleadings nor at all in the court below. Secondly, there is no record before us sufficient to sustain the contention. In the court below defendant offered in evidence a part of the complaint in the action for specific performance. The offer was made under the following circumstances: Plaintiff had testified concerning the difference in value between the properties to be exchanged. This testimony was in support of plaintiff's claim for damages. Defendant's counsel, on cross-examination, asked plaintiff if he had not filed a complaint in another action in which complaint he had stated that the transaction was in all respects just and fair. The complaint was produced and these proceedings were had:

> "The Court: Make your offer in the legal way.
> "Mr. Fontaine: We will offer it in evidence.
> "The Court: Do you offer the whole thing?
> "Mr. Fontaine: No, just the particular portion of it.
> "The Court: Read it."

Upon the formal offer, the evidence was restricted as follows:

> "And I offer this particular portion of that only which reads as follows: 'That said agreement and the terms and conditions thereof aforesaid were and are in all respects just and fair and reasonable between the parties hereto.'"

The admission into evidence followed the offer. Therefore we have only the complaint before us restricted to the particular portion thereof, and no other record of the alleged suit in specific performance. A detailed statement was offered purely for purposes of impeachment, and the offer restricted to the particular portion relied on for that purpose. For the reasons given we decline to pass upon this question of election of remedies and the effect thereof.

Lastly, appellant contends that the findings are insufficient to support the judgment.

[9-12] The complaint alleged the contract and its breach and then alleged:

> "That, by reason of the premises, and because of defendant's refusal and neglect and failure to perform his part of the aforementioned agreement, plaintiff has been damaged in the sum of $15,500."

The answer denies this allegation specifically, denying further that plaintiff has been damaged in any sum or at all. The finding of the trial court is:

> "That it is true, by reason of the premises, and because of defendant's refusal and neglect and failure to perform his part of the aforesaid agreement, plaintiff has been damaged in the sum of $5,000."

The judgment is that plaintiff do have and recover the sum of $5,000. Appellant argues that it was the duty of the trial court to find specifically wherein plaintiff was damaged by the acts or omissions of defendant; that the trial court did not make a finding as to market value of the respective real properties of respondent and appellant, and in the absence of such a finding the trial court could not render a proper judgment.

It is appellant's theory that the measure of damages is controlled by section 3306 or 3307 of the Civil Code. Appellant concedes that the action is for damages resulting from breach of agreement to buy real property, and the Code section 3307 reads:

> "The detriment caused by the breach of an agreement to purchase an estate in real property, is deemed to be the excess, if any, of the amount which would have been due to the seller, under the contract, over the value of the property to him."

The whole theory upon which this phase of the case was tried in the court below was that the value of the property which defendant, Moyer, agreed to convey was greater by $15,000 or more than the value of the Klegman property, and that by reason of the breach Klegman was damaged to the amount of the difference. Many witnesses were called, and the whole controversy as to damages hinged upon this point. The finding of the court is necessarily a finding that the difference in value was the sum of $5,000. All parties understood or must have understood the finding in that light, and to reverse the cause now merely to require that the method of computation be set forth would seem a needless and useless procedure. There was abundant evidence in the record to support this conclusion of the trial court, and no interpretation can be placed on the finding other than that this was the trial court's conclusion. If the court had specifically set forth in the findings the value of plaintiff's property, and then the value of defendant's property, and by a process of simple computation then set forth the result, it would possibly have been more detailed. But, with the controversy hinging alone upon the question of value and the liability contingent upon the amount of difference between the properties, no one was misled as to the basis of the court's finding or as to the values found. If sufficient can be gathered from the whole of the findings of the court that material issues are fairly determined, the findings will support the judgment. Berry v. Crowell, 55 Cal. App. 537, 203 P. 835. From the facts found and from the judgment ordered it is evident, in the light of the entire record, that if more complete findings had been made, they would have been adverse to the contentions of appellant. If that be so, the failure to find further is not ground for reversal. Krasky v. Wollpert, 134 Cal. 338, 66 P. 309. We are entitled to draw necessary inferences from the findings in order to support a judgment. Hulen v. Stuart, 191 Cal. 571, 217 P. 750. In the case of Erskine v. Marchant, 37 Cal. App. 590, 174 P. 74, we find this language:

> "It is further contended that in awarding damages the court did not take into consideration the difference between the entire commission for each sale and what it would cost the plaintiff to make the sale. While it does not appear what elements the court consider in ascertaining the amount of damages, there was nothing in the court's finding to show that these costs and expenses were not taken into consideration. * * * It has been held that courts may find damages in a lump sum, and that any uncertainty in the findings is to be construed so as to support the judgment rather than to defeat it. * * * The trial court had before it evidence of the sales made by the plaintiff and the defendants prior and subsequent to the breach of the contract from which it could form a judgment as to the amount of plaintiff's loss, and from the record before us we cannot say that the trial court erred in estimating the damages."

The same rule is stated in 8 California Jurisprudence, 878, and cases cited. The great prejudice which appellant claims results to him from a finding of general damages is more imaginary than real. Many cases of this sort are submitted to a jury for determination under the general issue, and in no case does the verdict specify the values found, and in no case is it rendered difficult to determine the mode adopted in arriving at the jury's conclusion. This is mentioned merely to indicate that experience has not demonstrated or even suggested the necessity of always supporting a judgment for damages by diagramming the process of calculation leading to the conclusion.

The order of the trial court denied defendant's motion for a new trial. We find no error in such order.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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91 Cal. App. 257

TREBILCOX v. CITY OF SACRAMENTO. (Civ. 3224.)★

District Court of Appeal, Third District, California. April 24, 1928.

Hearing Denied by Supreme Court June 21, 1928.

1. Licenses 🔑1—Power to revoke license to conduct boxing and wrestling contests was not necessarily evidence that ordinance was regulatory measure.

Power to revoke license to conduct boxing and wrestling contests was not necessarily evidence that ordinance providing for licenses was regulatory measure.

2. Licenses 🔑1—Title stating "ordinance providing for licensing and regulating" trades, etc., was not conclusive that ordinance was regulatory measure.

Title of ordinance, reading in part, "An ordinance providing for licensing and regulating certain professions, trades," etc., did not control subject-matter of ordinance, and was not conclusive that ordinance was a regulatory measure.

3. Municipal corporations 🔑112(2)—City council could adopt omnibus form of providing for payment of licenses for carrying on numerous businesses and occupations.

It was proper and legal for city council to adopt omnibus form of providing for payment of licenses for carrying on of each and all of numerous businesses and occupations mentioned in ordinance, rather than to adopt ordinance relating to each business or occupation.

4. Municipal corporations 🔑111(4)—Invalidity of one or more sections of ordinance providing for licensing of different businesses and occupations would not invalidate entire ordinance.

If one or more sections of ordinance providing for payment of licenses for carrying on numerous businesses and occupations were invalid, it would not for that reason result that entire ordinance was invalid.

5. Municipal corporations 🔑592(1)—Ordinance for revenue purposes requiring licenses of those conducting boxing or wrestling exhibitions held not invalidated by statute, creating state athletic commission; "municipal affair" (Const. art. 11, § 6, as amended, and Pol. Code, § 3366, Initiative Statute approved Nov. 4, 1924).

Ordinance of city of Sacramento for revenue purposes, requiring licenses to conduct boxing or wrestling exhibitions when admission fee is charged, *held* under Const. art. 11, § 6, as amended, and Pol. Code, § 3366, not invalidated, by Initiative Statute approved Nov. 4, 1924, (St. 1927, p. LXXXIX), creating state athletic commission of California, since power to tax for all purposes conferred on legislative body of municipal corporation governed by freeholders' charter is "municipal affair" within contemplation of Const. art. 11, § 6.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Affairs.]

6. Municipal corporations 🔑111(4)—Invalidity of provisions of ordinance authorizing revocation of license without notice cannot vitiate legal force of provisions of ordinance requiring payment of license tax for revenue.

Invalidity of provisions of ordinance attempting to clothe city council with power to revoke without notice to licensee or without giving him hearing on charge on which his license is proposed to be or is revoked cannot have effect of vitiating legal force of provisions of ordinance requiring payment of license tax for revenue by persons therein enumerated.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

★Hearing denied by Supreme Court.

Action to recover license fees by M. F. Trebilcox against the City of Sacramento. From a judgment for defendant, plaintiff appeals. Affirmed.

Ralph H. Lewis, of Sacramento, for appellant.

R. L. Shinn, City Atty., and Chas. J. Hasman, both of Sacramento, for respondent.

HART, J. The plaintiff by this action sued the defendant to recover the total sum of $475 as for four different claims alleged to be owing by the latter to as many different alleged claimants, and which claims, it is alleged, were severally assigned to plaintiff by such claimants prior to the commencement of this action. A demurrer to the complaint was sustained without leave to amend. From the judgment thereupon entered, plaintiff appeals.

The plaintiff's assignors are four different incorporated athletic clubs, the principal place of business of each being the city of Sacramento. The specific object of this action is to recover from said city certain sums of money paid to the defendant as for license fees for managing, conducting, and carrying on boxing and wrestling exhibitions in said city after a certain initiative statute, hereinafter to be referred to, went into effect. The allegations of the four causes of action set forth in the complaint are, with the exception of the parties assigning their claims to the plaintiff and the respective sums claimed by said assignors, substantially the same.

The contention of the plaintiff is that the ordinance, by authority of the provisions of which the assignors of the plaintiff were required to pay to said city, as a license fee or tax, the moneys here sued for, is a regulatory measure, and therefore, unless it be true that the "regulation" of boxing and wrestling matches be a "municipal affair," it was and is superseded or invalidated by an initiative statute approved by the electors of the state at the general election on the 4th day of November, 1924, and which became effective or operative on the 17th day of December, 1924 (St. 1925, p. LXXXIX).

An ordinance of the city of Sacramento providing for licensing and regulating the carrying on of certain professions, trades, callings, and occupations within said city was passed by the legislative body thereof on October 1, 1921, and is designated and known as "Ordinance No. 18, Fourth Series, Ordinances of the City of Sacramento." By virtue of its own terms it went into effect October 1, 1921, as an emergency measure. On the 11th day of May, 1922, the city council of said city enacted an ordinance designated and known as "Ordinance No. 73, Fourth Series, Ordinances of the City of Sacramento," adding to Ordinance No. 18, Fourth Series, the following section, designated in said Ordinance No. 18 as:

> "Section 31. For every person, firm or corporation conducting, managing or carrying on a boxing or wrestling exhibition, $25.00 for each exhibition, when a fee of admission is charged."

Said ordinance is entitled:

> "An ordinance providing for licensing and regulating the carrying on of certain professions, trades, callings and occupations; providing a penalty for the violation of this ordinance and making this an emergency measure," etc.

It provides for the imposition of a license tax upon a long list of callings and occupations, many, if not most, of which are not subject to regulation.

The statute above referred to, and which it is claimed superseded the ordinance in question, created a board to be known as the "state athletic commission of California," consisting of three members, to be appointed by the Governor. It authorizes the maintenance of the business of the carrying on of boxing contests, sparring matches, or exhibitions for prizes or purses, or where an admission fee is received. It vests the commission in its discretion with the authority to issue, "and at its pleasure revoke," a license to conduct, hold, or give boxing, sparring, and wrestling contests, matches, and exhibitions, where an admission fee is received, to any club, corporation, organization, or association which holds a lease of a term of at least one year of the premises in which such match, contest, or exhibition is to be held, etc. It prescribes the procedure to be followed to obtain a license to conduct such matches or contests or exhibitions, and provides that there shall accompany the applications for such permits the annual fee, the amount of which must be in accord with that fixed by the statute for such business transacted in a city of the population of Sacramento. There are certain regulatory provisions regarding the manner in which such matches and contests are to be conducted.

The city of Sacramento is, and for many years has been, operating as a municipal corporation under a freeholders' charter. The charter under which it is now operating was ratified by the electors of said city on the 30th day of November, 1920, and ratified by the Legislature at its regular biennial session in 1921. Among the powers thereby granted to the city council or the legislative body of said city is the following (section 12, art. 3):

> "To license for purposes of regulation and revenue all and every kind of business not prohibited by law to be transacted or carried on in the city; to fix the rates of license upon the same and to provide for the collection of such license by suit or otherwise; and, when not unlawful, to license, tax, regulate, prohibit, or

suppress all tippling houses, dramshops, saloons, bars, bar rooms, raffles, hawkers, peddlers, pawnbrokers, refreshment or coffee or soft drink stands, booths and sheds."

The Legislature of 1901 added to the Political Code section 3366 (Stats. 1901 p. 635), which, among things, provides:

> "Boards of supervisors of the counties of the state, and the legislative bodies of the incorporated cities and towns therein, shall, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, have the power to license all and every kind of business not prohibited by law," etc.

Section 6, art. 11, of the Constitution, prior to November, 1896, provided that all "cities and towns * * * and all charters thereof framed or adopted by authority of this Constitution" were "subject to and controlled by general laws." Under that provision of the Constitution, section 3366 of the Political Code, being a general law, controlled as to all matters or subjects pertaining to legally appropriate to the government of a municipal corporation to which it related; and under that section, by force of the limitation upon the power of incorporated cities and towns to impose license fees upon every business, calling, and occupation transacted or carried on within the municipal limits thereof for the purpose of regulation only, necessarily excluded the right of such cities and towns to impose such licenses for the purposes of revenue. In the year 1896, however, the electors of the state approved and adopted an amendment to section 6 of article 11 of the Constitution. This amendment, in so far as it concerned the present consideration, read as follows:

> "All charters thereof framed or adopted by authority of this Constitution, except in municipal affairs, shall be subject to and controlled by general laws."

In 1914 the electors of the state approved and ratified an amendment to said section and article as it read after the adoption of the amendment of 1896. The particular language of the amendment of 1914 pertinent to the present inquiry reads as follows:

> "Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws."

There is no change made, except in form of language, by the amendment of section 6 of article 11 of 1914 with regard to immunity of cities organized under and governed by freeholders' charters from control or interference by general laws in matters which are municipal affairs guaranteed to such cities by the amendment of said provision of the Constitution in the year 1896. Therefore the cases construing the meaning and scope of the amendment of 1896 apply also to the amendment of the section in 1914.

In Fragley v. Phelan, 126 Cal. 383, 387, 58 P. 923, 925, speaking of the phrase "municipal affairs," as used in said amendment, the Supreme Court said:

> "For the purpose of getting at the true significance of these words, there is no brighter light to be shed upon them, than is disclosed by a consideration of the reasons which moved the Legislature to propose the amendment, and the people to adopt it. What was the evil to be remedied? What was the good to be gained by this amendment? The answer is common, everyday history. It was to prevent existing provisions of charters from being frittered away by general laws. It was to enable municipalities to conduct their own business and control their own affairs to the fullest possible extent in their own way. It was enacted upon the principle that the municipality itself knew better what it wanted and needed than did the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs."

[1, 2] The only two questions here for decision are: (1) Is the provision of the ordinance in question exacting the payment of a license tax from persons engaged in the business of carrying on sparring, wrestling, or boxing matches or contests, or the ordinance itself, a regulatory measure? If not, is the power conferred on the legislative body of the city of Sacramento by its charter (a freeholders' charter) to license for purposes of revenue those who hold and carry on boxing and wrestling matches or contests within the limits of said city a "municipal affair?" The ordinance in question, as we have above stated, provides for the collection of license fees for the maintenance, conducting, and carrying on of a large number of different callings, occupations, and businesses. A large number of such callings or businesses are not, as also above stated, appropriate or subject to regulation. Section 31 of said ordinance relating to boxing and wrestling contests contains no provision regulating the manner of conducting such business, or any regulatory provisions at all. As will be seen, it merely prescribes the amount of the license fee to be paid by all engaged in carrying on such business. Counsel says that as evidence of the regulatory character of the provisions of the ordinance is the power thereby vested in the city council to revoke any license issued to any person to maintain a place where boxing and wrestling contests are held. But the power to revoke is not necessarily evidence that the ordinance is a regulatory measure. The proper authorities may, according to legal processes or procedure, revoke a license issued to a person to carry on any kind of business, whether subject to regulation or not, if it be shown that the purpose for which the license has been issued is being abused to the detriment of the public, or is used for a purpose wholly foreign to that for which it was issued. If, for illustration, a license is issued to a person to carry on the business of a café or restaurant, and it turns out that the person to whom the license was issued is or has been, in connection with the restaurant business, engaged in keeping and selling prohibited liquors, and so violating the law, of course his license to conduct the restaurant may and should be revoked. The same would be true as to the keeper of a hotel, or a mercantile business, or, indeed, of persons carrying on any kind of legitimate and necessary business. Counsel declares, however, that the title of the ordinance clearly indicates that the purpose of the ordinance is that of regulation. The ordinance, as shown above, is entitled in part, "An ordinance providing for licensing and regulating of certain professions, trades," etc. City ordinances are not required to have a title. Or, as is stated in Re Johnson, 47 Cal. App. 465, 467, 190 P. 852, 853, "a title is not an indispensable part of an ordinance. It may have a defective title," but this would not or does not invalidate the force of the ordinance. See, also, Ex parte Haskell, 112 Cal. 412, 44 P. 725, 32 L. R. A. 527; Ex parte Young, 154 Cal. 317, 97 P. 822, 22 L. R. A. (N. S.) 330. The title of an ordinance in no manner or degree controls the subject-matter thereof, or is to be taken as conclusive as to its purpose or the character of its provisions.

[3, 4] There are, it is true, certain provisions in the ordinance regarding the business of undertakers and that of retailers of nonintoxicating alcoholic beverages, as to which businesses certain conditions are imposed upon any person intending to engage therein as a prerequisite to his right to receive a license. By those provisions, persons desiring and intending to engage in such businesses are required to file a verified application before the city council before a permit to carry on such businesses may be granted. Said provisions may in their nature be more or less regulatory, but they are confined in their application to the businesses mentioned. Section 31 of the ordinance, authorizing licenses to be issued to persons to carry on the business of boxing, sparring, or wrestling matches, does not, as is to be seen, contain any conditions which must be complied with as a prerequisite to the right of any person applying for a license for such purpose to have the same issued to him. And section 31 is the only section or place in the ordinance where boxing and wrestling matches are referred to. As we have seen, the ordinance in question deals with a large variety of businesses, callings, and occupations each in separate and distinct sections. The one section has no relation to, or connection with, the other, in so far as the subject-matter thereof is concerned. As many ordinances as there are callings and occupations dealt with in the ordinance in question, each such ordinance providing for the payment of a license fee by any person engaging in any particular business or occupation thus separately legislated upon, could, of course, legally have been passed. But, as a matter of convenience, it was proper and legal for the city council to adopt, as it did, the omnibus form of providing for the payment of licenses for the carrying on of each and all of the numerous businesses and occupations mentioned in the ordinance under attack here. It follows from all these considerations that, if one or more sections of the ordinance were deemed to involve the unlawful exercise of the taxing power conferred on the city council of the city of Sacramento by its charter, it would not for that reason result that the entire ordinance was invalid. This is merely the application of the familiar rule that, if a part of a statute be invalid, the other parts, if in no measure or sense dependent for their validity upon the invalid part, will remain undisturbed, and subject to enforcement.

[5] There can be no possible doubt that the power to tax for all purposes conferred upon the legislative body of a municipal corporation governed by a freeholders' charter is strictly a "municipal affair" within the intent and contemplation of section 6 of article 11 of the Constitution. Indeed, it would be difficult to conceive what is "a municipal affair" if the power vested in a municipality by its charter to raise and collect revenues for the support of its local government does not come within the phrase "municipal affairs," as it is used in the Constitution. But this proposition has been thoroughly and ably and clearly considered by the Supreme Court in a number of cases. The case of Ex parte Braun, 141 Cal. 204, 74 P. 780, the opinion by former Chief Justice Angellotti, exhaustively considers the question. Not only that, but the opinion discusses and decides nearly every question involved in the present case in a case in which the general facts are very much the same as those of the one now before us. Braun was arrested and held by the chief of police of the city of Los Angeles for trial before the police court of that city for "willfully and unlawfully" conducting, managing, and carrying on the "business of a wholesale liquor dealer without first having procured a license from the city of Los Angeles so to do." The charge for which the petitioner thus was held was founded on an ordinance of said city entitled: "An ordinance providing for licensing and regulating the carrying on of

certain professions, trades, callings, and occupations carried on within the limits of the city of Los Angeles," and was adopted and passed February 28, 1903. The petitioner asked for his release by the Supreme Court through a writ of habeas corpus. The principal question presented in the proceeding before the Supreme Court was whether the collection of a license tax for revenue purposes under the provisions of the Los Angeles charter (a freeholders' charter) was a "municipal affair." In the opinion it is said:

> "The meaning of the term 'municipal affairs,' as these words are used in the constitutional amendment of 1896, has been considered in several decisions of this court. In discussing the effect of this amendment, this court has always recognized the reason that impelled its adoption. After much public discussion, and upon an exhaustive consideration of the question, it had been decided by this court that the Legislature, prior to this amendment, had power, by general laws, to supersede, or take away, without the consent of the municipality, the powers conferred upon it by a special charter. Thomason v. Ashworth, 73 Cal. 73 [14 P. 615]; People v. Henshaw, 76 Cal. 436 [18 P. 413]; Davies v. Los Angeles, 86 Cal. 37, 24 P. 771. These decisions had demonstrated that the power given by the Constitution to cities to frame charters for their own government for the purpose, as was said in People v. Hoge, 55 Cal. 612, 618, of emancipating them from the authority and control formerly exercised over them by the Legislature in municipal matters, were unavailing if such charters could at once be superseded by any general legislative enactment. Under these circumstances, the section of the Constitution providing that all cities and towns and the charters thereof should be subject to and controlled by general laws was amended by the addition of the words 'except in municipal affairs.'"

Again in the same opinion the court declares:

> "The words used in the amendment are words of wide import, broad enough to include all powers appropriate for a municipality to possess and actually conferred upon it by the sovereign power. The collection of a license-tax for revenue purposes is a well-recognized exercise of the taxing power. See People v. Martin, 60 Cal. 153. That the power of taxation is a power appropriate for a municipality to possess is too obvious to merit discussion. As was said by Mr. Justice Field in United States v. New Orleans, 98 U. S. 381 [25 L. Ed. 225], 'A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose.' It was further said in that case that: 'When such a corporation is created, the power of taxation is vested in it, as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited. For the accomplishment of these purposes, its authorities, however limited the corporation, must have power to raise money and control its expenditure.'"

The court concludes by saying that the power to collect license taxes for revenue purposes was "actually conferred upon the city of Los Angeles for municipal purposes by the charter framed for its government, under the provisions of section 8 of article 11 of the Constitution, and that such power is a 'municipal affair' within the meaning of those words as used in section 6 of article 11 of the Constitution, and cannot be withdrawn or abrogated by the Legislature. Section 3366 of the Political Code is therefore inapplicable to that city."

[6] Counsel for the plaintiff, in his briefs refers to many cases which he claims support his position that the ordinance in question is invalid. Some of the cases so cited harmonize, rather than disagree, with the position of the defendant. It is true, however, that the case of Angelopulos v. Bottorff, 76 Cal. App. 621, 245 P. 447, decided by this court February 24, 1926, the opinion being written by Justice Plummer, holds that the act of the city council of the city of Sacramento in revoking, without notice or a hearing, the plaintiff's license to conduct a restaurant business within the limits of said city because of an alleged violation of the prohibition laws in the carrying on of said business involved the taking from the plaintiff of a property right, in contravention of the "due process clause" of the state and Federal Constitutions, and that, for that reason, the provision of said ordinance purporting to vest in the city council any such power was and is unconstitutional and void. The soundness of this conclusion is, of course, unimpeachable. But the failure, if there be such failure, of the city council to provide proper procedure for coercing the payment of the license taxes exacted by said ordinance or for the punishment of any person subject to the payment of such tax for nonpayment thereof is a matter which is not involved in this case, nor is it so connected with the issues presented herein as to affect the decision thereof; for the invalidity of the provisions of the ordinance attempting to clothe the city council with power to revoke without a notice to the licensee or without giving him a hearing on the charge on which his license is proposed to be or is revoked does not, and cannot, for reasons briefly stated above, have the effect of vitiating the legal force of the provisions of said ordinance requiring the payment of a license tax for revenue by persons engaged in the prosecution of the callings or businesses therein enumerated.

The case of Ex parte Braun is decisive of this case in favor of the defendant.

The judgment is accordingly affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

91 Cal. App. 298

PEOPLE v. MITSUNAGA. (Cr. 1595.)

District Court of Appeal, Second District, Division 1, California. April 25, 1928.

1. Criminal law ⚷1159(6)—That facts are consistent with innocence of accused is insufficient to warrant interference by appellate court.

Although facts shown are consistent with innocence of accused, it does not necessarily follow that facts are insufficient to support conviction so as to justify interference by appellate court.

2. Intoxicating liquors ⚷236(19)—Evidence held to sustain conviction for possession of still used in manufacture of liquor.

Evidence in prosecution for the crime of possession of a still used in the manufacture of intoxicating liquor *held* sufficient to sustain conviction.

3. Jury ⚷59(3)—Relation of landlord and tenant between coroner summoning jurors and prosecuting attorney did not require discharge of panel (Pen. Code, §§ 1064, 1074).

Relation of landlord and tenant existing between coroner summoning jurors to serve at trial and deputy district attorney prosecuting the case *held* not to require discharge of entire panel, under Pen. Code, § 1064, since section 1074, authorizing challenge of juror standing in relation of landlord and tenant with defendant, does not provide for such challenge based on relationship with attorney for party.

4. Indictment and information ⚷144—Motion to set aside information will not be granted on ground defendant had not been legally committed; remedy being by habeas corpus.

Motion to set aside information will not be granted on ground defendant had not been legally committed by magistrate because of lack of evidence on preliminary examination to warrant commitment; remedy available for such situation being writ of habeas corpus.

5. Criminal law ⚷475—Expert witness held properly permitted to state opinion to effect that apparatus introduced in evidence would produce intoxicating liquor.

In prosecution for possession of a still used in the manufacture of intoxicating liquor, witness qualifying as an expert was properly permitted to state his opinion to effect that apparatus introduced in evidence would produce intoxicating liquor.

6. Criminal law ⚷576(6)—Motion to strike testimony on ground information was filed 17 days after commitment held properly denied (Pen. Code, § 1382, and § 809, as amended by St. 1927, p. 1045).

Motion to strike testimony for lack of jurisdiction because of filing information 17 days after commitment *held* properly denied, since, though Pen. Code, § 809, as amended by St. 1927, p. 1045, provided information should be filed 15 days after commitment, Pen. Code, § 1382, providing for dismissal unless information was filed within 30 days, was not amended.

7. Criminal law ⚷576(5)—Motion to strike testimony on ground information was not seasonably filed must be made before trial.

Motion to strike testimony on ground information was filed 17 days after commitment must be made before trial, and motion made after large part of evidence had been received was not seasonable.

8. Criminal law ⚷824(13)—Failure to instruct defendant need not be witness in own behalf held not erroneous, in absence of request.

Failure of trial court to instruct jury that defendant need not be a witness in his own behalf and that his failure to be a witness should not be considered against him *held* not erroneous, in absence of request therefor.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Tom Mitsunaga was convicted of possession of a still used in the manufacture of intoxicating liquor, and he appeals. Affirmed.

William R. McKay, of Hanford, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., and Clarence H. Wilson, Deputy Dist. Atty., for the People.

WOOD, Justice pro tem. Appellant was accused by information filed by the district attorney of Kings county of the crime of possession of a still used in the manufacture of intoxicating liquor. Following his conviction by a jury he filed motions for a new trial and in arrest of judgment. He now appeals from the orders of the court denying these motions and from the judgment.

[1, 2] Appellant contends that the evidence is insufficient to support the verdict and that the corpus delicti was not proved. These contentions may be considered together. By the evidence presented by the prosecution it was established that defendant was arrested in the nighttime when he was the sole occupant of a house near the city of Hanford, in which there was, according to the testimony of the arresting officer:

> "One complete still; 39 quarts of 'jackass'; about 15 empty sacks—just a minute; about 15 sacks of empty bottles; two bottlers, or rather, cappers, two machines for putting caps on bottles; two funnels, one glass; that is, one glass funnel, I mean; one full barrel of Egyptian corn, rye, and sugar mash; two barrels partly filled; one barrel filled with water; one 10-gallon earthen jar; one 15-gallon earthen jar; one 1-gallon glass jug."

When the officers approached the house a light was burning, but the light was extinguished as soon as the officers drove up. The front door was locked. A new padlock, which was on the outside of the back door on the day before the visit of the officers, had been removed, but the door was locked from the inside. The defendant had been in the house on the occasion of a previous visit by the officers. Upon their arrival on the occasion of the arrest, the officers announced who they were and what their business was, and called out to anybody who might be in the house to open the door. There being no response to this request, the officers tried to open the back door with a pass-key, but failed, and finally "pinched it open with a jimmy." In the house they found the defendant standing in the dark facing away from the back door. George F. Bohlken, a chemist, testified that five bottles or jars of liquor which he took from the thirty-nine different containers indiscriminately were intoxicating liquor containing from 40 to 45 per cent. of alcohol by volume. He also testified that the still introduced in evidence contained all the essential elements of an apparatus for distilling intoxicating liquors. Counsel for appellant argues that the facts shown are consistent with the innocence of the accused. If this be conceded, it does not necessarily follow that the facts are insufficient to support the verdict. In People v. Martinez, 20 Cal. App. 343, 128 P. 952, the court said:

> "Where the circumstances are such as to reasonably justify an inference of guilt, as found by the jury, the fact that an inference of innocence might likewise be reasonably drawn therefrom does not present a question of law for review by an appellate court any more than does a verdict based upon direct conflicting evidence. * * * It is only where the evidence obviously does not warrant the inference of guilt that the court will interfere."

In the case at bar there is abundant justification for the inference of guilt drawn by the jury.

[3] The sheriff being disqualified, the county coroner by order of the court summoned jurors to serve at the trial. Defendant presented a motion for the discharge of the entire panel upon the ground that the relation of landlord and tenant existed between the coroner and Clarence H. Wilson, the deputy district attorney who prosecuted the case. The ruling of the court denying this motion was not erroneous. Section 1064 of the Penal Code provides that:

> "When the panel is formed from persons whose names are not drawn as jurors, a challenge may be taken to the panel on account of any bias of the officer who summons them, which would be good ground of challenge to a juror."

Section 1074 of the same Code provides that a juror may be challenged if he stands in the relation of landlord and tenant with the defendant or person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted. No provision is made for a challenge for implied bias based upon a relationship with an attorney for a party. See order denying a hearing by the Supreme Court in People v. Conte, 17 Cal. App. 788, 122 P. 450, 457.

[4] Appellant contends that the trial court should have granted his motion to set aside the information on the ground that the defendant had not been legally committed by a magistrate, asserting that there was no evidence adduced at the preliminary examination to warrant the commitment for trial in the superior court. It was held in People v. Creeks, 170 Cal. 368, 149 P. 821, that a writ of habeas corpus, if timely sought, is the only remedy available in such a situation, and that the reason stated by defendant is "not included in the grounds specified in the statute for the setting aside of an information."

[5] George F. Bohlken, after qualifying as an expert, was allowed over the objection of the defendant to state his opinion to the effect that the apparatus introduced in evidence (the still) would produce intoxicating liquor. The ruling was correct. In 10 California Jurisprudence, 959, we find this statement:

> "There are two classes of cases in which expert testimony is admissible. To one class belong those cases in which the conclusions to be drawn by the jury depend on the existence of facts which are not common knowledge and which are peculiarly within the knowledge of men whose experience and study enables them to speak with authority upon."

The court was justified in holding that our citizenship does not have common knowledge of the workings of a still for the manufacture of intoxicating liquor.

[6, 7] After a large part of the evidence had been received, defendant moved the court to strike out the testimony admitted on the ground that, as alleged, the court had no jurisdiction, it appearing from the clerk's filing marks that the information had been filed seventeen days after the commitment by the magistrate. The court properly denied the motion. The Legislature of 1927 (St. 1927, p. 1045) amended section 809 of the Penal Code by providing that it shall be the duty of the district attorney to file an information within fifteen days after the commitment instead of thirty days, the time fixed before the amendment. The Legislature did not, however, amend section 1382, which provides that the court must, "unless good cause to the contrary is shown," order the dismissal of a prosecution if an information is not filed within *thirty* days. Moreover, the motion was not seasonably or properly made. In cases where dismissals would be proper under this provision of the Code, motions for such action by the court should be made before trial. People v. Newell, 192 Cal. 659, 221 P. 622; People v. Hawkins, 127 Cal. 372, 59 P. 697; Ex parte Apakean, 63 Cal. App. 438, 218 P. 767.

[8] Appellant contends that the trial court erred in failing to instruct the jury that the defendant need not be a witness in his own behalf, and that his failure to be a witness should not be considered against him. The record discloses that no request was made for these instructions. It is well settled that defendant cannot complain before the reviewing court of the failure of the trial court to give the instructions referred to if no request was made at the trial. People v. Flynn, 73 Cal. 511, 15 P. 102; People v. Rogers, 163 Cal. 476, 126 P. 143.

The judgment and order denying a new trial are affirmed. The appeal from the order denying a motion in arrest of judgment is dismissed.

We concur: CONREY, P. J.; HOUSER, J.

91 Cal. App. 350

KELLY v. CONROY. (Civ. 5914.)★

District Court of Appeal, First District, Division 1, California. April 26, 1928.

Hearing Denied by Supreme Court June 25, 1928.

1. Executors and administrators ⚷498—Agreement between executors that plaintiff executor's share of partial allowance of commissions was received by her in full compensation for services as executor held valid.

Agreement between executors of will whereby plaintiff executor agreed that her share of $500 partial allowance for commissions was received in full compensation for work she had done, and would do in future, as one of executors, because she was moving to another city, *held* valid.

2. Executors and administrators ⚷501—Probate court decree awarding compensation to executors held not to apportion sum equally between them (Code Civ. Proc. § 1618).

Probate court's decree settling final account and granting final distribution of estate, stating, among other things, "that sum of $2,000 be, and same is hereby, fixed and allowed as compensation to said executors for their services in said estate, and that unpaid balance thereof, $1,500, is hereby ordered to be paid to said executors," *held* not to apportion sum of $1,500 equally between coexecutors pursuant to power granted under Code Civ. Proc. § 1618; there being no express declaration to that effect in decree.

3. Executors and administrators ⚷498—Executors are not entitled, without regard to time expended, etc., to equal share of statutory fees.

Executors of will are not entitled, without regard to time spent, responsibility assumed, or services rendered, to an equal share of statutory fees.

4. Executors and administrators ⚷501—When stated sum is allowed as compensation to representatives of estate without passing on apportionment, question of apportionment is left open to future determination.

When stated sum is allowed as compensation to representatives of estate without assuming to pass on apportionment, question of such apportionment is left open to future determination.

5. Executors and administrators ⚷501—Plaintiff executor, having instituted action to recover portion of fees allowed executors, was concluded by adverse decision.

Plaintiff executor having instituted action for purpose of recovering portion of fees allowed executors, without assuming to pass on apportionment, and trial court having decided on evidence legally sufficient that she was not entitled to any part thereof, she was concluded by such decision.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action for money had and received by Katie Kelly against James Conroy. From a judgment for defendant, plaintiff appeals. Affirmed.

Albert Jacoby, of San Francisco, for appellant.

James M. Hanley and Prosper Reiter, Jr., both of San Francisco, for respondent.

KNIGHT, J. Plaintiff appeals from an adverse judgment in an action to recover moneys had and received.

The following facts are not disputed: Pursuant to an order made by the superior court in and for the city and county of San Francisco, plaintiff and defendant were appointed executors of the last will and testament of Dennis Kelly, deceased, and during the administration of the estate they applied for, and on October 4, 1921, were granted, a partial allowance of commissions in the sum of $500, which was divided equally between them. On February 8, 1923, a decree settling the final account and granting final distribution of the estate was entered, wherein it was ordered, adjudged, and decreed, among other things, "that the sum of $2,000 be and the same is hereby fixed and allowed as compensation to said executors for their services in said estate and that the unpaid balance thereof, to wit, the sum of $1,500 is hereby ordered to be paid to said executors." The entire latter sum was subsequently paid to defendant by check drawn upon the funds of said estate and signed jointly by plaintiff and defendant as such executors, not without question by plaintiff, however; and, some time after the check had been cashed, she instituted the present action, claiming to be entitled to one-half of the money so received by defendant.

★Hearing denied by Supreme Court.

In his answer to the complaint, defendant alleged, in substance, that at the time the partial allowance of $500 was divided plaintiff declared her intentions to move to Los Angeles, and that she then and there agreed that the sum of $250 received by her "was in full compensation for the work she had done and would do in the future as one of the executors of the estate"; that she did in fact move to, and thereafter continued to reside in, Los Angeles, and consequently performed no further services in the settlement of said estate except the perfunctory signing of papers prepared and sent to her by defendant; "that by agreement between the plaintiff and defendant this formal duty of signing papers already prepared was to be considered as having been compensated for by the sum of $250 heretofore recited as having been received by the said plaintiff; that by said agreement between the plaintiff and defendant the compensation of $1,500 awarded by the above-entitled court as executor's fees on the 8th day of February, 1926, belonged to the defendant as compensation for his services furnished from and after the time the said plaintiff left the city and county of San Francisco." Plaintiff in her testimony denied the truth of the foregoing allegations; but, in view of the judgment in defendant's favor, it must be assumed on appeal that the issues raised by said allegations were resolved by the trial court in defendant's favor; and there appears to be ample testimony to support its conclusions thereon.

[1] Plaintiff contends, however, that, even if said agreement was made as alleged, it was invalid. The question as to the validity of such an agreement does not appear to have been expressly ruled upon by the reviewing courts of this state, so far as our attention has been called; but it is held generally in other jurisdictions that several representatives of an estate may legally contract between themselves as to the apportionment of the commissions to be thereafter allowed by the court, provided such contracts do not contravene the statute, and their purpose is not to relieve any one of them from the responsibility of his trust (Guthrie v. Crews, 286 Mo. 438, 229 S. W. 182; John v. John, 122 Pa. 107, 15 A. 675; Bassett v. Miller, 8 Md. 548; Brown v. Stewart, 4 Md. Ch. 368; In re Aston, 5 Whart. [Pa.] 228; 24 Cor. Jur. 993); and although, as stated, no case has arisen in this state wherein the question of the validity of such agreements has been directly ruled upon, the right to enforce the same in separate actions was apparently recognized by the Supreme Court in the Estate of Carter, 132 Cal. 113, 64 P. 123, 484. There, at the time of the settlement of the final account, a joint executor claimed the entire amount of the commissions pursuant to a contract claimed to have been made with his coexecutor, but the court apportioned the commissions equally between them. He appealed from the order of settlement, and, in disposing of the question of the asserted contract, the court said:

> "The appellant's first claim is to the effect that he had a contract with his coexecutor and the devisees, whereby he was to receive all the commissions allowed to the executors. There is some evidence upon both sides of this claim, but the court holds the matter to be one of no importance. What particular contracts may have been entered into between these parties as to the apportionment of the executors' commissions is a matter which should be heard in another forum. The hearing of a final account by the probate department of the court is not the place to settle disputes of this character. These parties are not entitled to litigate a question of that kind upon the hearing of the settlement of a final account. The existence of that character of contract, and its validity after being made, are matters of no interest to the estate, and must be heard and determined at some other time and in some other proceeding."

We find nothing in the case of Firebaugh v. Burbank, 121 Cal. 186, 53 P. 560, cited and relied upon by plaintiff, which sustains her contention that the agreement under consideration was illegal. The facts of that case show that, at the time of the settlement of the final account and the rendition of the decree of final distribution, the probate court fixed the amount of commissions the surviving executor and his attorney should receive for their services. The surviving widow, being dissatisfied with the distributive share of the estate awarded her, sought and obtained a reversal of the decree, and, under the judgment of reversal, became entitled to the entire estate. Thereafter said attorney procured from her on behalf of himself and the surviving executor, under circumstances indicating duress, a contract calling for the payment to them of an additional sum of money greatly in excess of the amount already allowed by the court, and much larger than the maximum fees fixed by the statute. The contract therefore violated the provisions of section 1618 of the Code of Civil Procedure, which, besides fixing the amount of maximum fees, provides that all contracts between an executor or administrator and an heir, devisee, or legatee, for a higher compensation than that allowed by this section, shall be void; and, in holding said contract to be unenforceable and void, the Supreme Court said:

> "The provision in section 1618 of the Code of Civil Procedure, making void all contracts for higher compensation between an heir and an executor, is not limited to contracts made directly between the executor and the heir, but includes all contracts or agreements by which the executor will receiver either directly or indirectly any greater compensation than has been fixed by the statute, or any compensation other than such as may have been previously ascertained and determined by the court, and applies to every con-

tract which has for one of its objects the payment of such greater compensation, as well as to those which are made solely for such payment."

It will be observed, therefore, that the point of that decision was that the contract violated said Code section because it was procured from the sole beneficiary of the estate by an attorney for the estate, obligating her to pay to him and the executor additional fees much larger in amount than those already fixed by the court, and also in excess of the maximum amount fixed by statute. We have no such contract in the present case; the agreement here being one made between the coexecutors themselves with reference to the apportionment of the remainder of the fees which might be afterwards allowed by the court within the limitations of the statutory provisions. True, the record discloses that plaintiff was also an heir at law of the deceased and a legatee under his will, but this fact becomes unimportant, because the contract in question purported to call for the payment only of such fees as might be thereafter legally allowed by the court.

For the foregoing reasons, we are of the opinion that the contentions made by plaintiff against the validity of said agreement are without merit.

[2-5] Section 1618 of the Code of Civil Procedure also provides that, if there are two or more executors, "the compensation shall be apportioned among them by the (probate) court according to the services actually rendered by them respectively"; and plaintiff claims that, in awarding the sum of $1,500 "to the executors," the probate court in the present case did in fact apportion said sum equally between the coexecutors pursuant to the power granted under said section, and that therefore the judgment entered in the present action denying plaintiff one-half of said commissions is in conflict with the operation of the decree in probate, and in effect constitutes a collateral attack upon the integrity thereof. In our opinion, the construction of the decree plaintiff contends for cannot be sustained, for it may be fairly assumed that, if the probate court had intended, as plaintiff claims, to apportion the fees equally between the coexecutors, an express declaration to that effect would have been inserted in the decree. It has been repeatedly held that there is no rule of law or equity declaring that executors, without regard to the time spent, responsibility assumed, or services rendered, are entitled to an equal share of the statutory fees (Speirs v. Wisner, 88 Mich. 614, 50 N. W. 654, 26 Am. St. Rep. 306; Chase v. Lathrop, 74 Colo. 559, 223 P. 54; Hayward v. Plant, 98 Conn. 374, 119 A. 341; Wickersham's Appeal, 64 Pa. 67; Groover v. Ash, 132 Ga. 371, 64 S. E. 323, 22 L. R. A. (N. S.) 1119, 131 Am. St. Rep. 201; Estate of Carter, supra); also that when, as here, a stated sum is allowed to the representatives without assuming to pass upon the apportionment, the question of such apportionment is left open to future determination (Slingerland v. Norton, 136 Minn. 204, 161 N. W. 497; 12 Cal. Jur. 271). Therefore, the present action having been instituted by plaintiff for the purpose of recovering a portion of said fees, and the trial court having decided upon evidence legally sufficient for that purpose that she was not entitled to any part thereof, she is concluded by such decision.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

91 Cal. App. 268

BURR v. PEPPERS COTTON LUMBER CO. et al. (Civ. 3459.)★

District Court of Appeal, Third District, California. April 24, 1928.

Rehearing Denied May 24, 1928. Hearing Denied by Supreme Court June 21, 1928.

1. Mechanics' liens 🔑1—Right of mechanic's lien is created by organic law, and must be considered as part of fundamental law of state (Const. art. 20, § 15).

Right of mechanic's lien is created by organic law, and must be considered as part of fundamental law of state, by reason of Const. art. 20, § 15, providing that mechanics shall have lien on property on which they have bestowed labor or furnished material, and directing Legislature to provide laws for efficient enforcement of law.

2. Mechanics' liens 🔑8—Constitution providing for mechanics' liens held not to enlarge classes of persons entitled to lien in addition to persons allowed liens prior to Constitution (Const. art. 20, § 15).

Const. art. 20, § 15, providing that mechanics, materialmen, artisans, and laborers shall have lien on property on which they have bestowed labor or furnished material, *held* not to enlarge classes of persons entitled to claim lien in addition to those who, before its enactment, had been allowed liens through various legislative acts.

3. Mechanics' liens 🔑202—Right to lien is personal, and cannot be assigned.

Right to lien is personal, and cannot be assigned.

4. Mechanics' liens 🔑5—Policy intended to be reversed by mechanic's lien statute was to make liens independent of indebtedness, and to liberally construe remedial portions to claimants coming within classes benefited (Code Civ. Proc. § 1183, as amended by St. 1911, p. 1313, § 1).

Under Code Civ. Proc. § 1183, as amended by St. 1911, p. 1313, § 1, policy intended to be reversed by statute was to make liens allowed independent of account of indebtedness between owner and contractor, and direction that provisions of act should be liberally construed was intended to require liberal construction of remedial portions of act to claimants coming within classes entitled to benefit of its provisions.

6. Mechanics' liens 🔑51—Contractor held not to acquire lien for money voluntarily advanced to pay claims against owner for work and materials, which contractor was not obligated to pay (Code Civ. Proc. § 1183, as amended by St. 1911, p. 1313, § 1; Const. art. 20, § 15).

Under Const. art. 20, § 15, and Code Civ. Proc. § 1183, as amended by St. 1911, p. 1313, § 1, contractor *held* to not acquire lien for voluntary advancements of money in paying claims against owner for labor and material bestowed by persons other than himself, which contractor was not obligated to pay.

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge.

Action by P. L. Burr against the Peppers Cotton Lumber Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Hearing denied by Supreme Court: RICHARDS and PRESTON, JJ., dissenting.

R. H. Countryman, of San Francisco, for appellant.

Tebbe & Tebbe and B. K. Collier, all of Yreka, H. S. Young and Frank Thunen, both of San Francisco, and W. S. Dwinell, for respondents.

BARTLETT, Justice pro tem. This is an appeal from an order of the superior court of Siskiyou county, California, sustaining demurrers of various defendants to plaintiff's complaint, without leave to amend, and from the judgments entered in favor of defendants. The action was brought to foreclose a mechanic's lien on a certain railroad and its right of way and improvements thereon in Siskiyou county, California; the facts upon which the action is based set forth in the complaint being substantially the following:

Defendant Peppers Cotton Lumber Company, constructed a railroad, commonly known as the "Peppers Cotton Lumber Company Railroad," about seven miles in length, leading from Macdoel to the mill of the lumber company, in Siskiyou county. Plaintiff was the contractor who built the railroad. His employment had its inception on October 5, 1920, in a letter specifying his duties and compensation for the grading of the roadbed, which letter was addressed to the railroad company, and the terms of which were accepted by the company. Thereafter plaintiff was employed by the company to haul, place, and lay the ties and rails, and build the bridges and culverts, and surface and ballast the railroad, and to act as purchasing agent in San Francisco of the lumber company in construction of the railroad. The lumber company was to pay all costs and expenses of construction, including all materials and labor. Plaintiff was to receive for his services a flat sum fee, a certain percentage amount based on the estimated cost of the work, a division of any savings under the estimated cost prices, and also repayment of any sum of money paid, laid out, or expended in the construction of the railroad. Plaintiff expended various sums of money in connection with the construction of the road, and it is for the balance due on the money so expended that he claims the mechanic's lien on the railroad properties sought to be enforced in this action.

The moneys claimed to have been expended, on which the right to a lien in plaintiff's favor is based, are alleged to have been for amounts and purposes as follows: $7,958.25 for wages of various workmen employed on the railroad work; $1,918.50 for necessary supplies furnished the workmen; $3,072.62 for steel rails furnished the railroad; $182.27 for

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★Rehearing denied. Hearing denied by Supreme Court.

freight or materials and equipment; $31.50 for telegrams in connection with carrying supplies, materials, and labor; $370 for railroad fares for various workmen to and from the railroad right of way; $374.93 for workmen's compensation insurance on said railroad work; and $278.86 for railroad charges for transportation of plaintiff incurred in connection with his work. In the lien filed and in the complaint it is stated:

> "That said respective sums of money and each of them were paid, laid out, and expended by this plaintiff to and for said defendant Peppers Cotton Lumber Company on said railroad, and on said rights of way, between the 5th day of October, 1920, and the 25th day of August, 1921," and "that no part or portion of any of said expenses or pay rolls or wages was or were to be paid by this plaintiff and that each and all thereof was and were to be paid by said defendant Peppers Cotton Lumber Company."

On May 20, 1921, plaintiff ceased work and notified the lumber company that he did so because of its "failure, refusal, and neglect to pay the various demands and charges, bills, and expenses for wages and labor and materials done or furnished to and for said railroad work and in connection with said work and the performance thereof."

But one question for solution is presented by this appeal. Does the California mechanic's lien law give a lien to secure repayment of moneys voluntarily advanced by a contractor in payment of claims against an owner which the contractor is not obligated to pay by his agreement? Appellant has submitted an exhaustive and elaborate brief, in which the law and decisions, both of California and of many other states, are discussed and reviewed, in an endeavor to support his claim that the law, as it now stands, permits a mechanic's lien in favor of plaintiff securing the payment of the moneys claimed to have been advanced by him for work and materials used in the construction of the railroad.

Much attention is given to an examination of cases involving the distinction between liens that are direct and liens by subrogation. Such cases are not material in point concerning this case, for, if appellant has a lien, it is necessarily a direct one arising by virtue of the provisions of section 1183 of the Code of Civil Procedure, which, as it now stands, was enacted in 1911. Stats. 1911, p. 1313. That act, which amended section 1183 and a number of the following sections of the Code of Civil Procedure previously enacted by the California Legislature, concluded with the following declaration of legislative intent:

> "The provisions of this act shall be liberally construed with a view to effect its purpose. They are not intended as a re-enactment of the provisions of former statutes, with the policy heretofore impressed upon the same by the courts of this state, but are intended to reverse that policy to the extent of making the liens provided for direct and independent of any account of indebtedness between the owner and contractor, thereby making the policy of this state conform to that of Nevada and the other Pacific Coast states." Section 14.

[1] The right of a mechanic's lien is created by organic law, and must be considered as a part of the fundamental law of California, by reason of section 15 of article 20 of the state Constitution, which reads:

> "Mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide by law for the speedy and efficient enforcement of such liens."

[2] This provision of the Constitution gives a lien upon properties to four classes of persons contributing material or labor upon real property, and in pursuance of the direction to the Legislature to enact laws for the speedy and efficient enforcement of such liens, section 1183 of the Code of Civil Procedure and subsequent sections of that Code have been enacted. The constitutional provision did not enlarge the classes of persons entitled to a claim of lien additional to those who before its enactment in 1879 had been allowed liens through various legislative acts passed before the adoption of the present Constitution. By the terms of section 1183 of the Code of Civil Procedure a lien is given on property because the person claiming the lien has bestowed labor, or furnished materials or appliances, teams, or power, upon property sought to be charged. Appellant seeks a direct lien in this case, not because of personal labor, nor because of any personal furnishing of materials used in the construction work, but because he advanced his own money in paying for a portion of the labor and materials bestowed and furnished by persons other than himself.

[3] The right to a lien is a personal one. That the right to claim it cannot be assigned is clearly announced in Mills v. La Verne Land Co., 97 Cal. 254, 32 P. 169, 33 Am. St. Rep, 168. The facts in this case are in some respects similar to those in a Cadenasso v. Antonelle, 127 Cal. 382, 59 P. 765, where moneys were advanced to pay for labor and material used in the construction of a tunnel and suit was instituted against the bondsmen of the contractor to compel payment of the money advanced. The court gave a judgment for plaintiff, which was reversed on appeal. In the opinion (page 386 [59 P. 766]) the court says:

> "Money is not labor, and it is not material 'furnished' in the sense of the undertaking and the complaint."

[4] Appellant strenuously insists throughout his argument that the expression of legislative intent announced in the last section of the act of the California Legislature in

1911, hereinbefore set forth, has made inapplicable certain doctrines declaring who are entitled to mechanics' liens, under the former decisions of the Supreme Court of this state. The declaration of intent set forth in the statute does not support this contention. The policy intended to be reversed by the statute was to make any liens allowed by its provisions independent of the account of indebtedness between the owner and contractor and the direction that the provisions of the act should be liberally construed was intended to require that such species of construction should be given the remedial portions of the act to claimants coming within the classes entitled to the benefit of its provisions. The rule of construction as to whether it should be liberal or strict, applicable to mechanic's lien laws, is clearly stated in Corpus Juris, at page 53, § 14, vol. 40:

> "It is held in a number of cases that provisions relating to the creation, existence, or right to the lien, being in derogation of the common law, should be strictly construed, while provisions relating to the enforcement of the lien after it has once attached, being remedial in character, should be liberally construed."

The placing of appellant, by reason of his alleged acts, within the classes afforded a lien under the California statute, would give any one advancing moneys, which paid for supplies or material, in effect, a mortgage or trust deed upon property. That such is not the rule is announced both in text books on the subject of mechanics' liens, and the decisions of the Supreme Court of this state. Boisot on Mechanics' Liens, § 114, says:

> "A statute giving liens to those furnishing work or material does not extend to those furnishing money with which the work and materials are paid for. * * * And a contractor who makes, in the name and on the credit of the owner of the building, a contract with a third person to do certain work on the building, and pays him therefor, has no lien for such work, since the work was furnished by the owner, through the contractor as his agent, and the contractor merely furnishes the money with which to pay for the work."

In James on the Law of Mechanics' Liens upon Real Property in California, § 68, the California rule is given as follows:

> "One who advances money to the contractor, although for the payment of materials and labor devoted to the erection of a building, is not entitled to a mechanic's lien."

The leading case upon this question is that of Godeffroy v. Caldwell, 2 Cal. 489, 56 Am. Dec. 360, which states:

> "The mechanic's lien law provides exclusively for the security of materialmen and laborers; and one who advances money as a loan, although it is expressly for the payment of materials and labor devoted to the erection of a building, can have no claim to the benefit of the law."

The case of Sweet v. Fresno Hotel Co., 174 Cal. 789, 164 P. 788, Ann. Cas. 1918D, 346, was to enforce a claim of lien made up of moneys paid out for labor by a contractor acting under two separate contracts. Sweet, the lien claimant, acted as superintendent of construction of a hotel building for the Fresno Hotel Company; the contractor being Farley & Co., a corporation. Sweet had three different contracts for work on the building. One of these was made on April 1, 1911, and on this the trial court allowed a lien for $628.30. This contract of April 1, 1911, after reciting a contract of February 1, 1911, which Sweet had partly performed, and by which he had earned $358.58 more than had been paid to him, and declaring that the same was canceled, saving the debt for $358.58 and a lien to Sweet on the building therefor, proceeded:

> "In consideration of the above release and cancellation, and of the further payments and considerations hereinafter mentioned, Isaac Sweet hereby assumes and agrees to pay all of the wages due to carpenters and common laborers employed in the erection of the Fresno Hotel, until the same is completed, which said amount shall be returned to Isaac Sweet in the manner as follows: Seventy-five per cent. * * * of the payrolls each month, together with 10 per cent. commission on each weekly payroll, payable on the following month, between the 1st and 5th of the month and the balance, 25 per cent., 35 days after the acceptance and completion of the building, weekly payrolls to be made out by Farley & Co. and signed by them and delivered to said Isaac Sweet each week; Farley & Co. to have the right to hire and discharge any and all men, but their names shall be placed on the pay rolls when employed. Sweet to act in the capacity of superintendent, and to see that the work progresses."

Speaking of this contract, the court says on page 795 of the opinion (164 P. 790):

> "This, on its face, is not a contract by Sweet to perform labor on the building or to have labor performed thereon by others in his employment. It is, on his part, an agreement to assume and pay all wages due to certain classes of laborers employed on the building, and on the part of Farley & Co. an agreement to return to him the money advanced for that purpose. The laborers to be paid thereunder were to be hired and discharged by Farley & Co., who was to make out weekly payrolls for Sweet's information as to the amount to be paid to the men. So far as the work is concerned, Sweet's only function was to act as superintendent and to pay the wages due from the contractor to the men. He was not the employer. In effect he was loaning money to the contractor and performing service as superintendent of the work, for which service he was to receive an amount equal to ten per cent. of the wages earned by the men. The law does not allow a lien for money loaned to a building contractor to enable him to carry out his contract. Godeffroy v. Caldwell, 2 Cal. 489, 56 Am. Dec. 360. The lien claim states, with respect to this contract, that

> it is for 'carpenter labor and common labor' performed under it. This must be understood to refer to the labor performed by the men employed by Farley & Co., and whose wages Sweet paid. It does not cover compensation for his own services as superintendent. It follows, therefore, that the claim did not embrace anything for which he was entitled to a lien and none should have been allowed thereunder."

The contract of June 1, 1911, between Sweet and Farley & Co., which the court upheld as affording Sweet a lien for money paid out for labor of carpenters and common laborers, was different from that of April 1, 1911, above referred to. The court says (page 796 of the opinion [164 P. 791]):

> "The defendant claims that the same rule should apply to the contract made on June 1, 1911. By the contract of June 1st, Sweet expressly 'agrees to furnish all common labor and carpenter labor necessary to the construction and completion of said building and to pay all wages that may become due to the carpenters and common laborers * * * paying such laborers weekly or at such other times as their wages may become due.' Farley & Co. agreed 'for such labor furnished in the erection of such building' to pay to Sweet, between the first and fifth day of each month, the amount of the wages Sweet had paid to such laborers during the preceding month. The contract further declares that Farley & Co. shall make out weekly payrolls and deliver the same to Sweet at the end of each week, and that it was 'understood that all men employed, upon, in, and about said building shall be satisfactory to said' Farley & Co. 'and that they shall have the right at * * * all times to discharge any one not satisfactory to them and to replace the same by persons selected by themselves.' We cannot agree to the proposition that this contract was a mere reiteration or renewal of the previous contract of April 1, 1911. Its language was different from the previous contract in a very important particular, and was presumably made so with the purpose of changing its effect.
>
> "It may be true, as contended by the defendant, that the actual mode of carrying on the work and paying the men after June 1st did not differ materially in appearance from that practiced before June 1st. But this similarity was not fatal to the validity, or destructive of the effect, of the new contract. The old contract was, in effect, an agreement by Sweet to advance money to pay the debts owing by Farley & Co.; the new one was an agreement by him to bestow labor upon the building, hiring the men himself and paying their wages. It was a lawful contract, for a lawful purpose. He had the lawful right to make it, notwithstanding the effect was to give him a right to the lien under the mechanic's lien law which he did not have under the contract of April 1st. * * * The provision that Farley & Co. should have the right to discharge men that were not satisfactory to it and to replace them by other persons selected by itself did not make it the employer of the new men thus selected; it merely empowered it to make the selection of the men to be employed by Sweet. We think the plaintiff, Sweet, was entitled to a lien for the value of the labor furnished under this contract."

The facts in the case at bar put appellant in the same position as was Sweet in the case above discussed, under the contract of April 1, 1911. In fact, Sweet was in a more favorable position for urging the privilege of a lien claimant than is appellant, for Sweet in the contract of April 1, 1911, assumed and agreed to pay all wages due carpenters and common laborers employed on the building, while here appellant does not claim that he ever agreed to pay the costs of labor and material, but on the contrary avers:

> "That no part or portion of any of said expenses or pay rolls or wages was or were to be paid by this claimant, but that any and all thereof was and were to be paid by said Peppers Cotton Lumber Company."

[5] The payments for which foreclosure of a mechanic's lien is sought in this action cannot be regarded as other than advancements of money voluntarily made by appellant to the Peppers Cotton Lumber Company to pay debts owing from said company to persons other than appellant under the allegations set forth in the complaint. In view of the decisions in Godeffroy v. Caldwell, 2 Cal. 489, 56 Am. Dec. 360; Cadenasso v. Antonelle, 127 Cal. 382, 59 P. 765; and Sweet v. Fresno Hotel Co., 174 Cal. 789, 164 P. 788, Ann. Cas. 1918D, 346; the action of the trial court on the demurrers to the complaint in this action was the proper adjudication of the questions presented.

The judgments appealed from are affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

91 Cal. App. 798

Walter M. WILLETT, Plaintiff and Appellant, v. PEPPERS COTTON LUMBER COMPANY (a California Corporation) et al., Defendants and Respondents. (Civ. 3493.)★

District Court of Appeal, Third District, California. April 24, 1928.

Rehearing Denied May 24, 1928. Hearing Denied by Supreme Court June 21, 1928.

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge.

W. M. Willett, of San Francisco, for appellant.

Taylor & Tebbe, Tebbe & Tebbe, and B. K. Collier, all of Yuka, W. S. Dwinell, and H. S. Young and Frank Thunen, both of San Francisco, for respondents.

BARTLETT, Justice pro tem. This appeal by plaintiff from orders of the superior court of Siskiyou County, California, sustaining, without leave to amend, demurrers of defendants, other than Peppers Cotton Lumber Company, to plaintiff's complaint, and from the judgments entered in said action, involves the same issues of law as were raised and presented in the case of P. L. Burr v. Peppers Cotton Lumber Co. (a California Corporation) et al. (Sac. No. 3975, Civ. No. 3459), 266 P. 1025, the decision in which is this day filed. It was stipulated in

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★Rehearing denied. Hearing denied by Supreme Court.

this case that the briefs filed in the Burr Case should be considered in the determination of this appeal.

Upon the authority of the decision in said case (Sac. No. 3975, Civ. No. 3459), the judgments appealed from are affirmed.

We concur: HART, acting P. J.; PLUMMER, J.

91 Cal. App. 1

WILLMON v. POWELL et al. (Civ. 5606.)★

District Court of Appeal, Second District, Division 1, California. April 12, 1928.

Hearing Denied by Supreme Court June 11, 1928.

1. Municipal corporations 🔑57—Municipal corporation can exercise only powers expressly granted, necessarily or fairly implied therefrom, or essential to declared objects of corporation.

Municipal corporation can exercise only those powers granted in express words, those necessarily or fairly implied in or incidental to powers expressly granted, and those essential, not simply convenient, to declared objects and purposes of corporation.

2. Municipal corporations 🔑58—Any fair reasonable doubt of municipal power is resolved against corporation.

Any fair, reasonable doubt concerning existence of power in municipal corporation is resolved against it, and the power denied.

3. Municipal corporations 🔑59—Municipality may do subsidiary acts incidental and necessary to exercise of express power.

Express power conferred on municipal corporation to accomplish some result carries with it authority to do such subsidiary acts as are necessary and incidental to exercise of such power.

4. Municipal corporations 🔑176(1)—Charter provisions for housing commission to eliminate overcrowded tenements, etc., held to relate to "municipal public purpose" (Los Angeles Charter, art. 25, §§ 250–253; Const. art. 11, § 8).

Provisions of Los Angeles Charter, art. 25, §§ 250–253, for municipal housing commission to eliminate overcrowded tenements, unhealthy slums, etc., thereby tending to preserve health of all of city's inhabitants, *held* to relate to a municipal public purpose within Const. art. 11, § 8.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Purposes.]

5. Municipal corporations 🔑176(1)—Charter provision for appointment of directors of municipal housing commission from largest bondholders held not objectionable as establishing private control of public property (Los Angeles Charter, art. 25, §§ 250–253).

Los Angeles Charter, art. 25, §§ 250–253, *held* not subject to objection as establishing private control of public property by providing that twelve of fifteen directors of municipal housing commission established thereby shall be appointed from twenty-four largest registered holders of commission's bonds; no bonds having been issued nor any contention made that holding thereof would disqualify citizen from being member of commission, while mayor may disregard such direction in making appointments, without affecting commission's existence and powers, if such limitation be invalid.

6. Statutes 🔑64(4)—Charter provision for appointment of directors from largest bondholders held not to invalidate entire article establishing municipal housing commission, even if invalid as imposing property qualification to hold office (Los Angeles Charter, art. 25, § 430; Const. art. 1, § 24).

Provision of Los Angeles Charter, art. 25, that twelve of fifteen directors of municipal housing commission established thereby shall be appointed from twenty-four largest registered holders of commission's bonds, being easily severable from remaining clauses, does not invalidate whole article, even if invalid as in conflict with Const. art. 1, § 24, prohibiting property qualification to hold office, especially in view of section 430.

7. Municipal corporations 🔑176(1)—Article of charter establishing municipal housing commission held not invalid as giving city no control over commission's business (Los Angeles Charter, art. 25, §§ 250–253).

Los Angeles Charter, art. 25, §§ 250–253, establishing municipal housing commission, *held* not invalid as giving city no control over conduct of commission's business, in view of provisions for appointment of directors by mayor, removal thereof for cause and approval of sales of property acquired by commission by council.

8. Municipal corporations 🔑58—Elimination of overcrowded tenements, etc., by municipal housing commission, held not purely "commercial or industrial enterprise" (Los Angeles Charter, § 2, subd. 7, and § 3, subds. 2, 15; art. 25, §§ 250–253).

Elimination of overcrowded tenements, unhealthy slums, etc., for which municipal housing commission was established by Los Angeles Charter, art. 25, §§ 250–253, is a public and charitable purpose, not a purely commercial or industrial enterprise within Charter, § 2, subdivision 7 thereof, section 3, and subdivisions 2, 15, thereof, limiting city's power to engage in such enterprises.

9. Municipal corporations 🔑58—General charter provision, prohibiting city from mortgaging its property, is controlled by particular provisions authorizing municipal housing commission to issue bonds constituting lien on commission's property (Los Angeles Charter, § 3, subd. 2; art. 25, §§ 250–253).

General provision in Los Angeles Charter, § 3, subd. 2, that city shall have no power to mortgage its property for any purpose, is controlled by particular provisions specially authorizing municipal housing commission, created by article 25, §§ 250–253, to issue bonds constituting lien on property of such commission alone.

★Hearing denied by Supreme Court.

10. Municipal corporations 🔑192—Members of Los Angeles housing commission are city officers (Los Angeles Charter, §§ 5, 63; art. 25, §§ 250–253).

Members of municipal housing commission, created by Los Angeles Charter, art. 25, §§ 250–253, are officers of city, though not listed as such in section 5, in view of sections providing for commission and appointment of its members, section 251 (a), (b), stating their duties and functions, and section 63 authorizing them to compel attendance of witnesses and administer oaths.

11. Officers 🔑1—Persons having duties and functions of public officers are such officers, though not directly so designated.

That persons' duties and functions are those of public officers is sufficient to establish their legal status, though not designated in direct terms as officers.

12. Municipal corporations 🔑918(1), 931—Los Angeles housing commission bonds may be issued without submission to voters and secured by specified property alone, though contrary to general procedure (Los Angeles Charter, art. 25, § 251 (a), (b); art. 1, § 3, subd. (4).

Under Los Angeles Charter, art. 25, § 251 (a), (b), bonds may be issued by municipal housing commission and city council, without submission to electors for approval, and secured by specified property alone, though contrary to procedure prescribed for creation of bonded indebtedness generally by article 1, § 3, subd. 4.

Application by J. C. Willmon for a writ of mandate to Ned T. Powell, as Treasurer of the City of Los Angeles, and another. Peremptory writ granted.

William P. Mealey, of Los Angeles, for petitioner.

Lucien Gray, of Los Angeles, for respondents.

Jess E. Stephens, City Atty., and C. B. Penn, Deputy City Atty., both of Los Angeles, amici curiæ, for City of Los Angeles.

CONREY, P. J. This cause is presented on general demurrer to the petition. The facts are admitted to be those stated in the petition.

Article 25 of the charter of the city of Los Angeles (including sections 250, 251, 252, and 253 of the charter), by its terms established a municipal housing commission, consisting of fifteen directors to be appointed by the mayor, subject to confirmation by the city council. It was provided (section 251) that the said board shall have the right and power:

"(a) To incur indebtedness by the issuance of bonds in the name of the city of Los Angeles, under such terms and conditions as shall be prescribed by the council by ordinance, for any of the purposes for which the board is authorized to provide, or, for carrying out any of the powers possessed by said board; provided that such bonds shall be a lien upon the property of the municipal housing commission alone and the city shall not be liable on account thereof.

"(b) To provide by purchase, lease, condemnation, construction or otherwise, and to improve, rent, manage, sell and repurchase lands, dwellings, apartment houses, lodging houses or tenement houses, for the purpose of improving the health, safety and welfare of the inhabitants of said city, by providing homes for those who might otherwise live in overcrowded tenements, unhealthy slums, or the most congested areas, provided that none of said property or improvement shall be sold except by a majority vote of the members of said board, approved by resolution adopted by a majority vote of the council; and provided further that whenever any of such property shall have been transferred into private ownership the same shall immediately become subject to taxation."

The municipal housing commission had been duly appointed and organized prior to the adoption of an ordinance of November 17, 1925, providing for the issuance of $1,000,000 of bonds of the said commission. It is a conceded fact that said ordinance and the various proceedings thereunder, down to and including the point where the treasurer refused to sign, and the clerk refused to affix the city's seal to bond No. 901, series No. 2, were duly and regularly conducted in accordance with the formalities prescribed by article 25 of the charter and the said ordinance. The questions raised by the refusal of the respondents and argued in support thereof challenge the authority of the municipal housing commission and of the city of Los Angeles to issue such bonds. In other words, it is admitted that, if such authority exists, the proceedings adopted in exercising that authority are in due form when tested by the procedure outlined in article 25 of the charter and by said ordinance.

The first proposition stated by respondents is that the purpose for which the municipal housing commission was established is not a municipal affair. Counsel refer us to section 8 of article 11 of the Constitution, providing for charters of cities, and particularly to the following sentence contained therein:

"It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws."

[1-3] The controlling principles which determine the extent of the powers of a municipal corporation have been stated as follows:

" 'A municipal corporation possesses and can exercise the following powers and no others: 1. Those granted in express words; 2. Those necessarily or fairly implied in or incidental to the powers expressly granted; and, 3. Those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.' 1 Dillon on Municipal Corporations, § 89. This is the approved rule in this state. (Von Schmidt v. Widber, 105 Cal. 157 [38 P. 682]; Hyatt v. Williams, 148 Cal. 585 [84 P. 41]; Oro Electric Corp. v. Railroad Commission, 169 Cal. 466, 477 [147 P. 118].) 'If an express power to accomplish some result has been conferred, it will carry with it the authority to do such subsidiary acts as are incidental and necessary to the exercise of that power.' Von Schmidt v. Widber, 105 Cal. 157 [38 P. 682]." City of Long Beach v. Lisenby, 175 Cal. 575, 166 P. 333.

If the subject-matter of the charter provisions relating to the municipal housing commission is within the description of a municipal affair, it will follow that the powers sought to be exercised by the commission are authorized by the Constitution, and are granted in express words by the charter. It is argued by respondents that the business of providing homes for private individuals, even if they be "those who might otherwise live in overcrowded tenements, unhealthy slums, or the most congested areas," constitutes a commercial enterprise unaffected by any public use, and therefore cannot be a municipal affair. It is further argued that the stated purpose is not a governmental purpose because it is limited to a certain restricted class, and does not include those other citizens of Los Angeles who might not otherwise live in overcrowded tenements, etc. On the other hand, it is admitted by counsel for respondents that proprietary purposes of a municipality, such as furnishing public utilities, are within the police powers, and therefore are municipal affairs, and affect all the people generally.

[4] Primarily, it is necessary to determine whether the objects and purposes of the housing commission are within the description of a public purpose. If the public nature of the enterprise is recognized, there remains little difficulty in accepting it as a municipal public purpose. In Veterans' Welfare Board v. Jordan, 189 Cal. 124, 208 P. 284, 22 A. L. R. 1515, the Supreme Court had before it for consideration the statute enacted for the purpose of creating a fund to carry on the operations of the veterans' welfare board which had been created to carry out the provisions of the Veterans' Welfare Act (St. 1921, p. 969). For the determination of the questions arising in that case, the court found it necessary to consider at length the field of judicial decision wherein it has been attempted to determine what is a public purpose. We refer to that case, beginning at page 141 (208 P. 284) thereof, without making extensive quotations here. Grounding its decision upon the liberal views of the courts to which it referred, our Supreme Court took into consideration the legislative assumption that the legislation in question tended to make "for better citizenship, better notions of necessity for law and order, and a sounder and saner patriotism," and concluded that the provisions of the statute authorizing a bond issue for the purpose of acquiring, subdividing, improving, acquiring water rights for, and selling the land so improved at cost, were valid as authorizing the expenditure of public money for a public purpose. If those observations were justified in that case, with equal reason it may be said that an enterprise of the kind contemplated by the charter provisions concerning the municipal housing commission, which has for its purpose the elimination of overcrowded tenements, unhealthy slums, and congested areas, thereby tending to ward off epidemics of disease and preserve the health of all of the inhabitants of a city, is a public purpose.

The fact that in the course of administration of the affairs of the commission private persons will receive benefit, as tenants or otherwise, of houses constructed by the commission, is not sufficient to take away from the enterprise the characteristics of a public purpose. In a somewhat analogous case in Massachusetts dealing with the question whether or not a corporation organized to provide a home for working girls was a charitable institution, the court said:

> "Though not paupers, they are so poor as to make it a work of charity to provide for them a home. The individuals of the class change from day to day. They are sufficiently numerous, and so a part of the public, and so connected with it and with the public welfare, as to give to the work of providing a home for any individuals comprised in the class that quality of indefiniteness in the persons helped, which, with the charitable purpose aimed at, makes a public charity in the legal sense." Franklin Square House v. City of Boston, 188 Mass. 409, 74 N. E. 675.

See, also, Thornton v. Franklin Square House, 200 Mass. 465, 86 N. E. 909, 22 L. R. A. (N. S.) 486; Collier v. Lindley (Cal. Sup.) 266 P. 526.

We conclude that the provisions of the charter for a municipal housing commission relate to a public purpose. And, since the conditions sought to be remedied are those peculiar to a large city, we think that the business of providing such remedy in accordance with the plan stated in the charter is a municipal affair.

[5] The second proposition relied upon by respondents is that the public use of public property cannot coexist with private management and control of such property; and that the charter has attempted to establish such private control by providing that, of the fifteen directors of the commission, twelve shall be appointed from among the twenty-four largest registered holders of bonds of the commission. Manifestly, it cannot be contended that the present commission contains

any holders of bonds, since no bonds have yet been issued. Moreover, it is not contended that the fact of holding such bonds would disqualify a citizen from being a member of the commission, and it might well be considered that, if the stated limitation upon the qualification of a part of the members of the commission is invalid, the mayor might disregard said direction in making his appointments, and that the existence and powers of the commission would not be affected thereby. We think that this objection is without merit.

Respondents have referred to the case of Egan v. San Francisco, 165 Cal. 576, 583, 133 P. 294, Ann. Cas. 1915A, 754, where it was held that the public use of public property cannot, under any provisions of the charter of the city of San Francisco or of any statute to which the court's attention was directed, coexist with private management and control of such property. We may assume that the same statement would be true in reference to the charter of the city of Los Angeles. But the facts of that case exhibited a distinct attempt to authorize private management and control of public property of the city, not at all parallel to the provisions now under consideration of the charter of the city of Los Angeles.

[6] It is suggested by respondents that the provision that twelve of the directors (after the commission first appointed) shall be appointed from a list of those who are registered holders of bonds of the commission is in conflict with section 24 of article 1 of the state Constitution, which provides that no property qualification shall ever be required of any person to vote or hold office. From this it is argued that, because the charter provides that twelve of the directors shall be appointed from among the twenty-four largest registered holders of bonds of the commission, it results that the whole article is void because there cannot be a legal board of directors. Assuming for the present purpose that section 24 of article 1 of the Constitution is not limited to the offices created by the Constitution, and that it applies to limitations upon the qualification of municipal officers, this does not necessarily interfere with the existence of the commission. The charter in plain terms establishes the commission, declares the number of its directors, and provides for their appointment by the mayor, subject to the confirmation of the city council. The additional clause concerning ownership of bonds, if invalid, is easily severable therefrom, and may be eliminated without destroying the commission. It cannot, in our opinion, reasonably be claimed that this particular detail bears such a relation of importance to the entire plan that without this particular qualifying clause the article 25 of the charter, covering the subject of a municipal housing commission, would not have been adopted. Moreover, the charter itself (section 430) contains a very specific declaration of its policy and intention in relation to any such matter.

[7] The suggestion of respondents that the city is not given any control over the conduct of the business of the commission is not quite correct. In addition to the power of appointment of the directors, and the power to remove them "for cause," it is provided that none of the property acquired shall be sold by the commission, except when "approved by resolution adopted by a majority vote of the council."

[8, 9] Respondents contend that the commission is not authorized to engage in the business for which it was established. The argument is rested upon certain provisions of the charter which limit the power of the city to engage in any purely commercial or industrial enterprise. Charter, § 2; subdivision 7 of section 2; section 3; subdivision 2 of section 3; subdivision 15 of section 3. This point is answered when we have held that the enterprise is for a public and charitable purpose, and is not a "purely commercial or industrial enterprise." And the general provision in the charter (subdivision 2 of section 3) that "the city shall have no power to mortgage its property for any purpose" is controlled by the particular provisions relating to the municipal housing commission, which specially authorize the issuance of bonds which shall be "a lien upon the property of the municipal housing commission alone."

[10, 11] Incidental to their claim that the municipal housing commission is a privately controlled body, respondents contend that the members thereof are not officers of the city. They point to section 5 of the charter, which lists the officers of the city, and does not include the members of the municipal housing commission in the stated list. Nevertheless, the charter in another section does in terms provide for the commission and for the appointment of its members. The question of their legal status, as officers or not, should be tested by their duties and functions, rather than by their designation in direct terms as officers. If their duties and functions are those of public officers, that fact is sufficient to establish their legal status as such officers. Spreckels v. Graham, 194 Cal. 516, 530, 228 P. 1040; Logan v. Shields, 190 Cal. 661, 214 P. 45.

In addition to the powers and duties of the housing commission, to which we have referred, we find it provided in the charter (section 63) that "each board provided for in this charter" shall have power to compel the attendance of witnesses in proceedings and investigations before it, and in connection with those matters each member of any such board shall have power to administer oaths. Unquestionably, this is an official power.

[12] Counsel for respondents has suggested that the bonds in question as proposed to

be issued are not serial bonds, and that the proposition of issuing said bonds was not submitted to the voters of the city. It is contended that for this reason the bonds are not in conformity to the requirements of the statutes which provide for the method of creation of bonded indebtedness of municipalities; and it is further contended that, under the provisions of the charter, no bonded indebtedness can be created except by the procedure directed by those statutes. In article 1 of the charter it is provided:

> "Sec. 3. The rights and powers granted by this charter shall be subject to the restrictions set forth in this section, or elsewhere in this charter. * * * (4) The general laws of the state of California establishing the procedure for the creation of bonded indebtedness in force at the time any bonded indebtedness is created by the city shall, so far as applicable, be observed and followed."

If there were no other provisions covering the subject, the general rule stated in said subdivision 4 of section 3 presumably would furnish the controlling rule for the procedure in the creation of such bonded indebtedness. But in section 251 there are the particular provisions hereinbefore set forth, which declares that "the board shall have the right and power" to incur indebtedness by the issuance of bonds in the manner therein stated. The terms and conditions thereof are to be prescribed by the council by ordinance, and the bonds are made a lien "upon the property of the municipal housing commission alone and the city shall not be liable on account thereof." The terms of section 251 in relation to these bonds constitute a particular rule, which must be read together with the general rule stated in section 3. The people of the city, in voting to adopt the charter, determined that the nature of the business of the municipal housing commission was such that, notwithstanding its character as a municipal affair, the bonds to be issued should not create a liability to be met by taxation, but should be secured on the specified property alone. They further determined that under these circumstances the right to issue such bonds should depend upon action by the housing commission and the city council, without submitting such matters for approval by the electors. It reasonably may be inferred that, in the opinion of the framers of the charter and the people who voted for it, the general laws relating to municipal bonds were not applicable to the plan and purpose of creation of these bonds which were to aid in financing the business entrusted to the housing commission. There appears to be no constitutional restriction upon the right of the city, by its charter, to adopt the procedure which the charter has thus established.

For the foregoing reasons, we are of the opinion the demurrer should be, and the same hereby is, overruled.

Let the peremptory writ issue.

We concur: HOUSER, J.; YORK, J.

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Daniel O'CONNELL, Plaintiff and Appellant, v. CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents. (S. F. 12282.)★ Supreme Court of California. April 10, 1928. Department 2. Appeal by plaintiff from a judgment of the Superior Court, City and County of San Francisco, J. J. Trabucco, Judge, sustaining demurrer. Affirmed. Daniel O'Connell, of San Francisco, for appellant. Edward F. Moran, of San Francisco, for Thomas F. Boyle. Robert M. Searls, of San Francisco, for Ralph McLeran.

PER CURIAM. Upon a careful examination of the record herein, we are satisfied that the plaintiff's complaint failed to state a cause of action, that the demurrer thereto was properly sustained, and that the judgment in favor of the defendants thereon was correctly given and made, and that this appeal is without merit. The judgment is affirmed.

★Republished with statement of facts. See 284 P. 655.

CALIFORNIA REPORTER

267 PACIFIC REPORTER

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HUNT v. BOYLE, Auditor, et al.
(S. F. 12823.)

Supreme Court of California. May 7, 1928.

1. Street railroads 🔑13—Radiating railway lines built at different times, through separate bond issues and separate elections, constituted single municipally owned railway system (City and County of San Francisco Charter, art. 12, § 16).

Several radiating railway lines built by city and county of San Francisco at different times and in each instance submitted to public approval, and made possible through separate bond issues pursuant to City and County of San Francisco Charter, art. 12, contemplating gradual acquisition by city and county of public utilities, *held* to constitute in actual operation single municipally owned and operated street railway system within section 16, providing for maintenance in city treasury of special fund to be set aside for utility for operating expenses, repairs, sinking fund, extensions, and reserve.

2. Street railroads 🔑13—Proposed addition to municipally owned railway by connecting lines employing same method of operation involved "extension" which might be built without popular vote (City and County of San Francisco Charter, art. 12, § 16).

Proposed construction of addition to the system of municipally owned railways connecting with existing lines and using same method of operation, though not proceeding from existing termini of street railway system, *held* to constitute "extension" under City and County of San Francisco Charter, art. 12, § 16, permitting maintenance of fund in city treasury for extensions of public utilities, and not to constitute another distinct municipally owned railway, creation of which would have to be submitted to vote of people.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extend—Extension.]

3. Street railroads 🔑13—Depreciation fund provided from earnings of municipal railway held available for extensions, though such purpose was not contemplated by ordinance creating fund (City and County of San Francisco Charter, art. 12, § 16).

City and county of San Francisco, having gradually acquired municipally owned street railway system, under Charter, art. 12, *held* entitled to use funds provided for and sequestered in so-called "depreciation fund" derived from earnings of municipal railway system, under section 16, for construction of new railway lines constituting "extension" of existing system, even though board of supervisors did not in the original ordinance creating the fund embrace in its purposes that of extensions, since provisions of charter governed uses of the fund.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Reuben G. Hunt against Thomas F. Boyle, as auditor of the City and County of San Francisco, and Timothy A. Reardon and others, as Commissioners of the Department of Public Works and as the Board of Public Works. Judgment for defendants, and plaintiffs appeal. Affirmed.

Harry G. McKannay, of San Francisco, for appellant.

John J. O'Toole, City Atty., Dion R. Holm, Asst. City Atty., and Frank L. Fenton, all of San Francisco, for respondents.

RICHARDS, J. This appeal is by the plaintiff, alleging himself to be a taxpayer, from a judgment of the superior court, in and for the city and county of San Francisco, refusing to enjoin the board of public works of said municipality from entering into a contract for the construction of certain municipally owned railway lines therein, and also to restrain the auditor from certifying that there are funds available in the municipal treasury to meet the payments to become due under such proposed contract or to audit such payments as the same become due. The facts are not seriously in dispute. In the year 1909 the city and county of San Francisco, by an ordinance duly adopted by its board of supervisors, undertook to commit its people to the policy of public ownership, control, and conduct of a system of street railways upon and along certain of its principal streets and extending from its business center outward in several stated directions into its main residential districts and suburbs. The ordinances declaring this purpose and providing for the submission of this policy to popular vote were proposed and adopted under the provisions of article 12 of the Charter of the city and county of San Francisco, in the opening clause of which "it is hereby declared to be the purpose and intention of the people of the city and county of San Francisco that its public utilities shall be gradually acquired and ultimately owned by the city and county." Under this and the succeeding provisions of said article, the people of San Francisco approved the foregoing policy as applied to the creation, operation, and control of railway lines upon and along the public streets designated in said ordinances by providing for a bond issue for the cost thereof, and in due course the municipally owned and operated railway system thus provided for began to function. In the year 1913, due doubtless, in part at least, to the plan of the people of San Francisco to create and conduct the Panama-Pacific International Exposition and to the location thereof, certain other ordinances were adopted by the board of supervisors determining that the public interest and necessity demanded the acquisition and construction of "a system of municipal street railways" commencing at certain points on Market street and extending along certain other designated streets to defined terminals, and providing for the submission of the matter of these additions to the already owned and operated system to popluar vote in the form of bond issues to cover the cost of construction. These ordinances also received a vote of popular sanction and the municipally owned railways thus provided for were constructed and put in operation.

[1] An examination of the maps which have been submitted to our inspection carries conviction that these several radiating railway lines, though built at different times, and though in each instance at their inception submitted to public approval and as to their cost made possible by separate bond issues, constitute in actual operation and practical effect but one municipally owned and operated railway system, and as such subject in its entirety to all of the provisions of the aforesaid article of the charter. Under the provisions of section 16 of said article 12 of the Charter it is provided that:

"1. Whenever any public utility shall be operated by the city and county, the receipts from such utility shall be paid daily into the city treasury, and maintained in a special fund set aside for such utility. The supervisors may, from time to time, make appropriations from such funds for the following purposes:

"(a) For the payment of the operating expenses of such utility.

"(b) For repairs and reconstruction.

"(c) For payment of interest and sinking fund on the bonds issued for the acquisition or construction of such utility.

"(d) For extensions and improvements.

"(e) For a reserve fund."

Pursuant to the foregoing provision the board of supervisors of said municipality in the year 1915 adopted an ordinance creating a so-called "depreciation fund" through the appropriation and setting apart of 18 per cent. of the gross passenger revenues of "the municipal railway" for certain purposes designated therein. It is true that in the designation of such purposes in said ordinance the board did not expressly embrace the item of extensions among the purposes to which when necessary and available such sequestrated funds were to be applied; and that, this being so, it might well be that the rule governing the disposition of the moneys accumulated and accumulating in said "depreciation fund" must first have have been devoted to the expressed objects in said ordinance; but it would not follow therefrom that the moneys thus collected in said fund, when the aforesaid expressed purposes of its creation were provided for, might not be applied to "extensions" in the municipal railway system when such were found to be needful, since the section of the charter in question does expressly provide that "extensions" are to be one of the purposes for which said "depreciation fund" is required to be set apart. In the year 1926 the board of supervisors, by an ordinance duly adopted, undertook to recreate the former depreciation fund under the name of "new depreciation fund," the only practical change in which apparently was that of transferring from the accumulations in said fund certain specific amounts to purposes to which under the said charter provision they might be devoted, and in otherwise lessening the amount of the annual deposit to be placed to the credit of such fund. It was not shown upon the trial of this action, nor is it here seriously contended, that there is not at present in the form of accumulations in the aggregate of said depreciation fund sufficient money after all of the purposes which should be given precedence in the distribution thereof have been satisfied to permit the devotion of the money sought to be applied to the purposes sought to be enjoined in this proceeding, provided such purposes are otherwise lawful and being lawfully undertaken.

In the month of March, 1927, the board of supervisors of the city and county of San Francisco passed, and the mayor duly approved, a so-called "declaratory ordinance" relating to "municipal railway extensions." By the express terms of this ordinance it was determined and declared that the public interest and necessity demanded the acquisition or construction of "a number of extensions to the existing municipal street railway system along public streets, private rights of way, and through tunnels being constructed by the municipality, said extensions to be made from the existing municipal railway track" at various specified points thereon, among which was the specification, "From the municipal railway tracks on Market street at Duboce avenue through the Sunset-Duboce tunnel into the Sunset District, and through the Sunset District to a terminal near Ocean Beach, with connecting cross-town service west of Twentieth avenue between said extension and the existing municipal line on Taraval street." Numerous other so-called extensions were provided for in this ordinance, and the board of public works was directed to procure through the city engineer and file with the board of supervisors plans and estimates of cost of original construction and completion "of the extensions to the municipal street railways as herein described." Upon the coming in of the report of the board of public works pursuant to the foregoing direction, it was determined by the board of supervisors that the cost of making and providing for the equipment of all of the extensions to the municipal railway system enumerated in its previous ordinance would be too great to be paid out of the ordinary annual revenues of the municipality or out of other available funds thereof devotable to such purposes, and that a bond issue would be required. The board of supervisors accordingly, by proper ordinance, provided for and duly called a special election to be held for the purpose of submitting to the voters of San Francisco the proposition of a bond issue in the sum of $4,700,000 for the making of the proposed municipal railway extensions. Upon the holding of said election, however, the proposed bond issue was defeated by its failure to receive the requisite two-thirds majority of the vote cast, although a large majority of the voters favored the proposition. Thereafter and during the month of September, 1927, the board of public works of the city and county of San Francisco, proceeding upon the theory that the construction of the so-called Judah street and Duboce tunnel addition to the already existing municipal railway system of said municipality was such an extension of said railway system as was within the contemplation of the provisions of said article 12 of the Charter, and that the power to proceed to construct such extension had been intrusted to said municipal body under the previous acts and resolutions of the board of supervisors, and that there had been or were to be provided and set apart, out of the depreciation fund above referred to, a sufficiency of funds available for the making of said "extension," proceeded to award a contract to Eaton & Smith, a firm of contractors, for the construction of said extension on and along the defined route at a preliminary cost of $248,264. The total estimated cost of said "extension," according to the estimates thereof theretofore made by said board of public works, will be approximately $800,000. The available funds to make and complete said extension and the necessary equipment thereof have been or are to be provided out of said "depreciation fund," through the creation of such fund as stated above in the year 1915, and through an appropriation by the board of supervisors of $500,000 out of said fund made in the year 1921, when the proceedings for the construction of said addition to the then existing municipal railway system were first initiated by said board; and by the subsequent appropriation of the additional sum of $200,000 made by said board of supervisors in the same year; and by the still further appropriation of the sum of $116,000 from the same fund made by said board in 1927. The trial court found that the proposed construction of the Judah street and Duboce tunnel addition to the already existing system of municipal railways was an extension of said system within the purport and meaning of said article 12 of the Charter of said municipality, and further found that the foregoing appropriation, aggregating the sum of $816,000. from the said depreciation fund had been duly and legally made, and that the said aggregate sum was available for the making of said extension, and that the contract therefor with said firm of contractors had been lawfully entered into by said board of public works of said municipality; and, based upon such findings of fact and conclusions of law, the trial court by its judgment denied the plaintiff the relief demanded in his complaint, whereupon he has taken and prosecutes this appeal.

[2] The main and practically the controlling contention of the appellant here is that the proposed addition to the municipally owned railways of the city and county of San Francisco is not an "extension" thereof, but is in fact another municipally owned railway which it is proposed to add to the several already existing municipally owned railways of the municipality; and that this being so the precedure provided by article 12 of the Charter thereof for the creation or acquisition of a new public utility through the submission, of the question of its creation or acquisition to the vote of the people must be pursued; and that such procedure not having been pursued in respect to the construction of the railway line in question, the public officials who are proceeding or threatening to make or to approve such construction, or to devote to it the funds of the municipality from whatever source derived, should have been enjoined.

We are unable to agree with the contention of the appellant herein that the proposed construction of the Judah street and Duboce tunnel addition to the already existing system of municipally owned railways of the city and county of San Francisco is not to be regarded as an extension thereof, within the intent and meaning of article 12 of the Charter thereof. When the people of San Francisco adopted the said provision in said Charter relating to the acquisition of public utilities, they doubtless had in contemplation the creation or acquisition of a system of municipally owned railways which should not only measurably meet the needs of travel and transportation within certain areas of the then existing city, but which should also be made responsive to the increasing needs in the way of travel and transportation of the growing and expanding city; and while it may be true that the governing body of the municipality saw fit upon those earlier occasions when such needed enlargements of the service of its municipal railways were in contemplation to submit the question to popular vote in the form of proposed bonds to meet the cost of their construction, it does not follow that those enlargements of the system were not in truth and in fact extensions thereof, which, having been approved and completed by whatever method, became merely an enlargement and extension of a single and unified system, and as such have been managed, controlled, and operated since their completion. The present proposed enlargement of the existing municipally owned railway system of the municipality is evidently, actually, and in point of practical conduct and operation intended to similarly blend into and form a part of the system and by so doing to form an extension of the facilities of such system corresponding and responsive to the expanding areas of improvement and of population in and about the growing city. The extension when made will branch forth from the designated streets of said city which are already occupied with municipally owned railway lines and will be so connected with such existing lines that the same cars and the same system and method of operation will be employed on the extended as are already employed on and along the existing lines, while travel will move and pass from the one to the other as travel is wont to do over a single and unified line of railway, regardless of differences in the time or method of creation of its component parts. There is no merit in the contention of the appellant that the proposed addition to the municipally owned railway system of the municipality is not to be deemed an "extension" because it does not proceed from existing termini thereof. A system of street railways in any large city is, of necessity, a radiating system, responding in its enlargements to the trend of population and taking off from original laterals at such points of contact as the economics of construction require. It is therefore our conclusion that the proposed construction of the so-called Judah street and Duboce tunnel enlargement of the existing system of municipally owned railways in said municipality was properly treated and stated by the board of public works thereof to be an extension of said system, and that the trial court was correct in so holding in the instant case.

[3] This being so, the only remaining question would be as to whether the funds already provided for and sequestered in the so-called "depreciation fund" derived from the earnings of said municipal railway system under the requirements of section 16 of article 12 of the Charter are to be held available for the construction of such extension. Said section of the charter, as we have already seen, by its express terms sets forth the purposes for which the funds of the public utility were required to be accumulated. Among these purposes is that of "extensions." It is not seriously contended upon this appeal that if the construction of said new railway line or lines constitute an extension of the already existing system of municipal railways from the earnings of which this specific fund has been accumulated it may not, if other demands upon it have been satisfied, be drawn upon for the making of such extensions as the one in question here. The contention of the appellant in that regard is that, since the board of supervisors did not in the original ordinance creating such fund embrace in its purposes that of "extensions," its residue is not now available for that purpose. But, as already stated herein, we think that the provisions of the charter, and not the ordinance of the board, is to govern the uses to which said funds when once created shall from time to time be applied.

In conclusion, it may be stated that we do not consider that any views expressed by this court in the case of Uhl v. Badaracco, 199 Cal. 270, 248 P. 917, or by the District Court of Appeal in Mobley v. Board of Public Works, 44 Cal. App. 167, 186 P. 412, are out of harmony with the views expressed in the foregoing opinion.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.

204 Cal. 193

HARP v. HARP et al. (Sac. 4012.)

Supreme Court of California. May 15, 1928.

Divorce 🔑130—Under evidence, denial of divorce for cruelty held not abuse of discretion.

Where evidence showed that parties had lived together with much misunderstanding and fault on both sides for several years, and court found that acts of cruelty by defendant alleged as grounds for divorce were mitigated or induced by the harassing and annoying conduct of plaintiff herself and that plaintiff's acts did not cause defendant grievous mental anguish sufficient to award defendant a divorce, denial of divorce to either party was not abuse of discretion.

Department 2.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action for divorce by Addie M. Harp against Henry O. Harp and others, in which named defendant filed a cross-complaint. From a judgment denying a divorce to either party, plaintiff appeals. Affirmed.

L. J. Maddux, of Modesto, for appellant.

J. M. Walthall, of Modesto, for respondents.

RICHARDS, J. This appeal is from a judgment of the trial court denying a divorce to either of the parties to this action. The plaintiff commenced her action for divorce upon the ground of extreme cruelty, with numerous specifications as to wherein such alleged cruelty consisted. The defendant answered, denying a number of the averments of the plaintiff as to his specific acts of cruelty, and as to the rest qualifying certain admissions as to his abuse of plaintiff in the use of violent language in certain instances by the statement that he had not used such language to the plaintiff without cause. Upon the trial of the case the evidence showed that the parties had lived a sort of "cat and dog" life for several years, with much misunderstanding and fault on both sides. The trial court upon the submission of the cause filed findings of fact wherein it negatived a number of plaintiff's averments as to specific acts of cruelty, and as to the rest found that, while in a measure true, they were mitigated or induced by the harassing and annoying conduct of the plaintiff herself. As to the defendant's cross-complaint, the trial court held that the actions of the plaintiff shown thereunder were not such as to amount to grievous mental anguish sufficient to justify awarding the defendant a divorce. The trial court therefore, by its judgment, denied a divorce to either of the parties.

The appellant herein contends that the trial court was in error in so doing for the reason, as it is urged, that the whole testimony shows that the two parties cannot live in harmony together. From an examination of the entire record, however, we are satisfied that the trial court did not abuse the discretion with which it was invested in denying a divorce under the facts as presented in this particular case.

The judgment is affirmed.

We concur: LANGDON, J.; SHENK, J.

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204 Cal. 169

Ex parte BRUEGGER.

BRUEGGER v. PATTERSON et al.

(L. A. 10306.)

Supreme Court of California. May 12, 1928.

Habeas corpus 🔑113(3)—Judgment awarding custody of minor child in habeas corpus proceedings held not reviewable.

Judgment awarding custody of minor child in habeas corpus proceedings *held* not reviewable; neither doctrine of res judicata nor Pen. Code, § 1506, as added by St. 1927, p. 1061, permitting appeal in habeas corpus proceedings in certain cases, being applicable.

In Bank.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Application by Clinton Bruegger for writ of habeas corpus to determine the custody of Agnes Patterson Bruegger, a minor, opposed by Samuel B. Patterson and another. From an adverse judgment, contestants appeal. Appeal dismissed.

A. T. Folsom and L. S. Barnes, both of Los Angeles, for appellants.

Rollin L. McNitt, of Los Angeles, for respondent.

WASTE, C. J. In a proceeding in habeas corpus the court below awarded the custody of Agnes Patterson Bruegger, a minor, to her father, the petitioner for the writ. A motion is now made to dismiss the appeal taken by the maternal grandparents, respondents in the court below, upon the ground that there is no right to an appeal in a matter of this character, for which reason, it is contended, the court has no jurisdiction to entertain the proceeding.

Until the enactment of section 1506 of the Penal Code, in 1927 (St. 1927, p. 1061), it was always the rule in this state that the determination of a court having jurisdiction in proceedings in habeas corpus was not subject to review by any other court in any manner, and that the doctrine of res adjudicata did not apply. In re Perkins, 2 Cal. 424; Matter of Ring, 28 Cal. 247; In re Zany, 164 Cal. 724, 130 P. 710. Section 1506 provides only for an

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appeal to the District Court of Appeal by the people from a final order made upon the return of a writ of habeas corpus discharging a defendant after his conviction in criminal cases prosecuted by indictment or information in a court of record. In all other cases the law remains unchanged. In re Alpine (Cal. Sup.) 265 P. 947.

Appellants contend that our decisions deal only with cases involving proceedings instituted to secure the release of persons from restraint, and that there is a distinction between such cases and proceedings brought to determine the right to the custody of children. Such a distinction has been drawn by courts in a number of other jurisdictions, where it has been held that an appeal will lie from an order entered in habeas corpus proceedings fixing the custody of a child. Those courts, while recognizing the generally accepted rule that in proceedings brought to secure release from imprisonment or restraint a decision on one writ is not a bar to proceedings upon another writ, hold that, where the facts in a proceeding brought to determine the custody of a child are the same as those determined in a previous proceeding, the former order is res adjudicata. Jamison v. Gilbert, 38 Okl. 751, 135 P. 342, 47 L. R. A. (N. S.) 1133. The latter kind of proceedings they hold, partake of the nature of a private suit in which the public has no concern, and in which the rights of the parties are determined as in any civil action, and the judgment rendered is a final adjudication in regard to the custody of the child. 12 R. C. L. p. 1257, § 75; 29 C. J. p. 185, § 212. This theory, while supported by most respectable authority, is at variance with what has been the general rule in this state. Its weakness, in its application to appeals, lies in the fact that such an adjudication is res adjudicata and binding upon the parties only so long as the facts are the same and the conditions affecting the child's welfare or the parents' rights remain as they were when the hearing was had and the order made. In re Gille, 65 Cal. App. 617, 620, 224 P. 784, and cases cited. While such an order finally determines the question of the custody on facts and issues then before the court, it is in its nature but temporary and interlocutory. The decisions from other jurisdictions are not in agreement on the subject. See R. C. L. and C. J., supra. Some of those sustaining the contention of the appellants are based on statutes giving the right to appeal in these matters; others rest on the distinction we have noted. We have in this state no express legislative provision for an appeal in habeas corpus proceedings, save in the single instance provided by section 1506 of the Penal Code. We deem it to be the definitely settled law in this state that, in the absence of legislative action, an appeal will not lie in such matters. The cases cited so hold. See Matter of Hughes, 159 Cal. 360, 366, 113 P. 684.

The primary purpose of the writ of habeas corpus is to provide a summary and speedy mode of inquiring into the legality of imprisonment or restraint. Incidentally, in its application to children, the child's welfare may be inquired into; but the writ would be deprived of its effect if an order made pursuant to the inquiry can be suspended, and the person or parties affected can be compelled to undergo the delay attendant upon an appeal to the higher court.

The motion is granted and the appeal is dismissed.

We concur: LANGDON, J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.

204 Cal. 141

MEISNER v. McINTOSH. (S. F. 12347.)*

Supreme Court of California. May 2, 1928.

Rehearing Granted May 31, 1928.

1. Deeds 🔑59(3)—Grantor's execution and recording of deed, without grantee's knowledge or consent, held not to constitute delivery.

Grantor's excution of deed to property located near property previously sold grantee, together with recording of deed, all without knowledge, acquiescence, or consent of grantee, did not constitute delivery either express or implied.

2. Fraud 🔑34—Plaintiff's reconveyance of other property, to which defendants executed and recorded deed in plaintiff's name, without his consent, held not condition precedent to plaintiff's recovery for fraud.

In action for damages for defendants' fraud in purporting to convey property to which they had no title, plaintiff's reconveyance of other property, to which defendants executed and recorded deed in plaintiff's name, without plaintiff's consent, *held* not condition precedent to recovery.

3. Judgment 🔑252(2)—Alleged recovery in action for damages for fraud in excess of amount demanded in complaint held not error, where answer was filed (Code Civ. Proc. § 580).

Alleged recovery by plaintiff of judgment in excess of amount demanded in complaint, in action for damages for fraud, *held* not ground for reversal, where defendant answered, under Code Civ. Proc. § 580, which permits court to grant any relief consistent with the case made by the complaint and embraced within the issues.

4. Appeal and error 🔑989—Affidavits filed on motion for new trial are not considered in determining whether evidence supported findings.

Substance of affidavits filed on motion for new trial, which tended to contradict plaintiff's

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*Superseded by opinion 268 P. 612.

testimony, cannot be considered in connection with contention that evidence did not support findings for plaintiff.

5. New trial ⚷106—Refusal of defendants' motion for new trial held not abuse of discretion, notwithstanding accompanying affidavits which tended to contradict plaintiff's testimony at trial.

Refusal of defendants' motion for new trial *held* not abuse of discretion, though affidavits were filed with the motion, which tended to contradict plaintiff's testimony at trial, since such evidence should have been offered at the trial.

Department 2.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Lloyd A. Meisner against Margaret McIntosh, individually and as administratrix of the estate of John McIntosh, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. F. Rose, of San Francisco, for appellant.

James H. Boyer, of Oakland, for respondent.

LANGDON, J. This is an appeal by the defendant from a judgment against her for $2,361.56 in an action for damages for fraud. The facts as found by the trial court are:

That on the 27th day of March, 1924, and at the time of the transfer thereof to defendant Margaret McIntosh, plaintiff was the owner and in the possession of a certain described parcel of real property in Berkeley, Cal., then having a fair market value over and above all liens and incumbrances of the sum of $1,525, which facts were then known to John McIntosh and Margaret McIntosh. That in the months of March and April, 1924, and many times prior thereto, at said county of Alameda, state of California, for the purpose and with the intent of cheating and defrauding plaintiff, defendants represented to said plaintiff that said John McIntosh and Margaret McIntosh were the owners of a certain described piece or parcel of real property in the county of Calaveras, state of California, consisting of 160 acres, and in the month of April, 1924, and prior to the sale of said property to plaintiff, said John McIntosh, acting for himself and as the agent of said Margaret McIntosh, pointed out to this plaintiff a spring of water, and stated to this plaintiff that said spring of water was located on said 160 acres of land then claimed to have been owned by said John McIntosh and Margaret McIntosh. That many times prior to the 1st day of April, 1926, said Margaret McIntosh and John McIntosh offered to trade said land in Calaveras county, Cal., to plaintiff, subject to the incumbrances thereon, for said property in the city of Berkeley owned by plaintiff, together with the promissory note of plaintiff, payable to said John McIntosh and Margaret McIntosh, in the sum of $580.

That, relying upon said representations of said John McIntosh and Margaret McIntosh, and because thereof, said plaintiff accepted said proposal of exchange. That plaintiff believed in and relied upon said representations, offers, and promises made to him by said Margaret McIntosh and John McIntosh, and because thereof, thereafter, subsequent to the 27th day of March, 1924, executed a grant deed granting and conveying to said Margaret McIntosh said real property owned by plaintiff in said city of Berkeley, and on said last named date plaintiff also executed to said Margaret McIntosh and John McIntosh his said promissory note in the sum of $580. That plaintiff received no other consideration, and neither said John McIntosh nor Margaret McIntosh parted with anything for the transfer and conveyance by plaintiff of said Berkeley property to Margaret McIntosh and the execution and delivery of said note for $580, except the said deed purporting to convey to plaintiff said land in Calaveras county, Cal. That neither said John McIntosh nor said Margaret McIntosh, on the 27th day of March, 1924, or at any time thereafter, owned any right, title, or interest in or to said land in Calaveras county, and said spring of water was not on said land, but was situate on other and adjoining land, which latter property was at no time owned by John McIntosh and Margaret McIntosh, or either of them—all of which facts were at all times herein mentioned well known to said John McIntosh and Margaret McIntosh, and unknown to plaintiff, for more than one year subsequent to the execution of said deeds. That, prior to discovery that said John McIntosh and Margaret McIntosh were not the owners of said real property in Calaveras county, or any part thereof, and that said spring of water was not on said or any land owned by said defendants, and without knowledge of the falsity of said representations made to him as aforesaid, and within six months after the execution by him of said note, said plaintiff paid to said John McIntosh and Margaret McIntosh said sum of $580, named as the principal sum in said promissory note, together with the interest accrued thereon, and said note was thereupon returned to plaintiff. That no part of said sums has been repaid to plaintiff.

That on or about August 15, 1924, said Margaret McIntosh and John McIntosh sold, transferred, and conveyed said real property situate in Berkeley, previously granted to them by plaintiff, to Earl W. and Virginia E. Weber, who ever since have been and now are the owners thereof.

An examination of the record discloses

that the contention of appellant that the evidence does not support the findings is without merit. The testimony of the plaintiff supports the findings made by the trial court.

[1, 2] It appears that, after plaintiff discovered the fraud which had been practiced upon him, and threatened to commence criminal proceedings, defendants executed a deed purporting to convey to plaintiff a 200-acre tract of land, located about a mile from the quarter section which they had sold to him; that John McIntosh caused said deed to be recorded, and gave instructions to the recorder to mail said deed to plaintiff. It also appears that the preparation and recording of this deed was all without the knowledge, acquiescence, or consent of plaintiff. Under the circumstances, there was no delivery of this deed to plaintiff. Delivery cannot be made without the consent, express or implied, of the grantee. There is, therefore, no merit to appellant's contention that a reconveyance should have been made by plaintiff as a condition precedent to his recovery in this action.

[3] Appellant attacks the judgment as being in excess of the amount demanded in the complaint. Section 580, Code of Civil Procedure, expressly declares that, where an answer is filed, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issues. In the case of Cassinella v. Allen, 168 Cal. 681, 144 P. 748, it is said:

> "Although the plaintiff, by praying for less than is his due, exposes himself to the risk, in case of default, of having to take judgment for a limited relief, he does not, by the mere filing of his complaint, irrevocably surrender or release the balance of his demand. The complaint is still subject to amendment, and it is also possible that the defendant, by answering, may enlarge the scope of the relief to any extent 'consistent with the case made by the complaint and embraced within the issue.' Code Civ. Proc. § 580. If the defendant wishes to have the relief limited to that prayed for, he must allow the case to reach the status contemplated by section 580; i. e., that of an application for judgment by default, upon failure to answer."

To the same effect is the case of Potter-Huffman Co. v. Witcher, 48 Cal. App. 96, 191 P. 725.

[4, 5] Certain allegations were made in affidavits filed by defendant upon her motion for a new trial, which allegations either directly or indirectly tended to contradict the testimony of plaintiff in certain particulars. Of course, the substance of these affidavits cannot be considered in connection with the contention of the appellant that the evidence does not support the findings. At the most, the allegations in the affidavits would but create a conflict in the testimony, and such allegations were not before the court at the time of making its findings. As to the refusal of the trial court to grant the motion for a new trial, we are of the opinion that its discretion was properly exercised in this matter, as the defendant should have produced at the trial any testimony available to contradict that offered by the plaintiff.

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.

204 Cal. 166

GARDE v. GOLDSMITH. (S. F. 12363.)

Supreme Court of California. May 11, 1928.

1. Wills 🔑108—Instrument given plaintiff by writer, relative to disposition of money after death of writer's sister, held not testamentary where not executed as will.

Written instrument handed to plaintiff by writer to be placed in writer's safety deposit box and to be opened after death, which instrument was addressed to writer's niece and stated a desire that she pay plaintiff stated sum after death of writer's sister, *held*, in suit after writer's decease for payment according to terms, to have no force as a testamentary disposition since not executed as a will.

2. Wills 🔑97—Extraneous document cannot affect will unless in existence when will was made and document was clearly identified therein.

An extraneous document cannot affect the terms of a will or in any way restrict testamentary succession to property unless the document was in existence when the will was made and is so clearly identified in the will itself as to become a part thereof.

3. Gifts 🔑28(1), 64(1)—Instrument handed to plaintiff by writer stating desire that niece pay plaintiff stated sum on death held not gift.

Written instrument handed to plaintiff in sealed envelope to be placed in writer's safety deposit box and opened after his death, addressed to writer's niece with statement of writer's desire that, on death of writer's sister, niece pay plaintiff amount stated therein, *held* neither an inter vivos nor causa mortis gift of sum of money stated or of bonds mentioned therein as source from which the money was to be obtained.

4. Trusts 🔑29—Instrument given plaintiff to be opened on writer's death, stating desire to have named sum then paid plaintiff, created no trust.

Written instrument handed by writer to plaintiff, addressed to writer's niece, stating writer's desire that on death of writer's sister the niece should pay plaintiff the sum stated therein, which letter was not to be opened until writer's death, created no trust.

Department 2.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Solomon Garde against Sybil E. Goldsmith (formerly Sybil E. Lippitt). From the judgment, plaintiff appeals. Affirmed.

Goldman & Altman, of San Francisco (Samuel R. Stern, of Seattle, Wash., of counsel), for appellant.

H. U. Brandenstein, of San Francisco, for respondent.

LANGDON, J. Appeal by plaintiff from a judgment against him entered upon sustaining a demurrer to the first count of his amended complaint. He was given leave to amend the second count of said complaint, but declined to do so and withdrew the claim made thereunder.

The action was brought upon the following letter, written by Simon L. Selling to the defendant, his niece, and handed to plaintiff in a sealed envelope, to be placed in the writer's safe deposit box, to be opened after his death:

"Tacoma, Wn., Sept. 24, 1923.

"Sept. 24, 1923.

"Sybil E. Lippitt (Lippitt). San Francisco, Cal.—I desire that you pay to Solomon Garde (Solomon Garde) of Seattle, Wn., the sum of $20,000 Twenty Thousand Dollars, and to come from amount I have invested at present in Crown Columbia Pulp & Paper Co., such sum to be paid after my sister's Rose Selling's death.

"Carrie out this wish in full.

"Simon L. Selling.

"I have no witness—I know you will fulfill my wish."

(Reverse side of instrument.)

"Crown Columbia Pulp & Paper Co. Bonds or other securities issuing from amount bought from Bonds that amount came from original amount that came or was procured from amount that I purchased from amount Crown Willamette Pulp & Co. Paper Bonds.

"Simon L. Selling."

Prior to writing the foregoing letter, and in 1918, Simon L. Selling had executed a last will and testament and on July 26, 1923, had executed a codicil. These instruments made substantial bequests, among others, to plaintiff and his wife and daughter, and created a trust for the benefit of testator's sister for life and left the residuum of the estate to the defendant herein, a niece of testator.

Within a few months after writing the letter above quoted, Simon L. Selling died and his sister, Rosa Selling, died one month later. After her death plaintiff claimed to be entitled to $20,000 under the letter written by Selling. In brief, the foregoing is the situation disclosed by the complaint, and it would seem that the demurrer was properly sustained.

[1, 2] The instrument relied upon has no force as a testamentary disposition. It is not executed with the required formalities to stand alone, and it could not become a part of the will and codicil previously executed. An extraneous document cannot affect the terms of a will or in any way restrict testamentary succession to property, unless the document is in existence when the will is made and is so clearly identified in the will itself as to become a part of the will. Estate of Shillaber, 74 Cal. 144, 146, 15 P. 453 (5 Am. St. Rep. 433); Estate of Young, 123 Cal. 337, 342, 55 P. 1011; Estate of Plumel, 151 Cal. 77, 81, 90 P. 192 (121 Am. St. Rep. 100); Estate of Doane, 190 Cal. 412, 414, 213 P. 53.

[3, 4] It is apparent that the instrument in question did not constitute a gift of the money or bonds, either inter vivos or causa mortis. The only other aspect of plaintiff's case is the trust theory. It is apparent that no trust was created at the time the instrument was written. It was not to be opened until the death of Selling; it did not purport to create a present equitable title in plaintiff. No part or parcel of the title to the money or bonds was parted with by Selling during his lifetime; the letter written by him is entirely testamentary in character. Upon Selling's death, by reason of the will and codicil, the title to the property became vested in the defendant. There was no consideration to support a trust for plaintiff in the property. The letter of Selling imposed but a moral obligation upon the defendant, and its language indicates that Selling understood this and appealed to her to carry out his wish as he had "no witness."

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.

91 Cal. App. 232

APABLASA et al. v. SEPULVEDA et al.* (Civ. 5967.)

District Court of Appeal, First District, Division 2, California. April 24, 1928.

Hearing Denied by Supreme Court June 25, 1928.

1. **Trusts ⚿95—Alleged beneficiaries must show extrinsic fraud to prove person receiving property became involuntary trustee (Civ. Code, § 2224).**

To show that another received property by fraud, and thereby became involuntary trustee for the persons entitled to the benefit thereof under Civ. Code, § 2224, persons claiming as beneficiaries must show extrinsic fraud.

2. **Trusts ⚿103(3)—Widow who after securing devise of her husband's property, to use for children's maintenance, procured distribution in her own name, and refused to account held "involuntary trustee" (Civ. Code, § 2224).**

Widow, who in complaint by her children was alleged to have induced husband to place

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court.

property in her charge by his will on representation that she would protect the interests of the children and provide for their education and maintenance, and who allegedly procured decree of distribution during children's minority placing entire estate in her name, and thereafter failed and refused to account to the children for the income or the profits of the property, *held* liable as "involuntary trustee" for family of her deceased husband, under Civ. Code, § 2224, since the complaint charged extrinsic fraud on part of widow.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Involuntary Trustee.]

3. **Trusts ⚷371(2)—Complaint of children, alleging that mother procured deceased father's property on representation that she would care for children, and that she afterwards refused to account, held to allege trust (Civ. Code, § 2224).**

Complaint by children, alleging that their mother procured devise of father's property on representation that she would properly manage it and provide for education and support of children, that widow secured decree of distribution, placing property in her own name, and that she thereafter refused to account to the children for the proceeds of the property, which was definitely described, *held* to state cause of action under Civ. Code, § 2224, to establish involuntary trust in property for benefit of children.

4. **Parties ⚷35—Persons having common interest in establishing involuntary trust were properly named as defendants, where they refused to join as plaintiffs (Civ. Code, § 2224; Code Civ. Proc. § 382).**

Children, alleged in complaint to have common interest with other children suing mother as involuntary trustee of property received under father's will, under Civ. Code, § 2224, where they refused to join as plaintiffs, were properly named as defendants under Code Civ. Proc. § 382.

5. **Pleading ⚷18—Children's complaint against mother to establish trust in deceased husband's property held not demurrable for uncertainty (Civ. Code, § 2224).**

Complaint by children against mother to establish involuntary trust under Civ. Code, § 2224, alleging that mother procured devise of father's property on representation that she would provide for children's support, that she procured decree of distribution in her own name, and thereafter refused to account to children, *held* not subject to special demurrer for uncertainty or ambiguity, where property in which it was sought to establish trust was described, and alleged trustee and beneficiaries were named.

6. **Limitation of actions ⚷102(8)—Children's action against mother as involuntary trustee held not barred, where filed 16 months after mother's intention to hold property in her own right became known (Civ. Code, § 2224; Code Civ. Proc. §§ 318, 322, 336, 338).**

Cause of action by children to hold mother liable as involuntary trustee under Civ. Code, § 2224, for alleged failure to account to children for property devised her in accordance with representations made to deceased husband, *held* not barred by limitation under Code Civ. Proc. §§ 318, 322, 336, 338, where it was alleged that plaintiffs had no notice that their mother was claiming the property in any other manner than as trustee until date 16 months prior to filing of complaint.

Appeal from Superior Court of Los Angeles County; Hugh J. Crawford, Judge.

Action by Cayetano C. Apablasa, sometimes known as Cayetano J. Apablasa, and another, against Concepcion Apablasa de Sepulveda and others. From a judgment of dismissal, plaintiffs appeal. Reversed, with directions.

Randall & Bartlett, Rex B. Goodcell, Hunsaker, Britt & Cosgrove, and John W. Luter, all of Los Angeles, for appellants.

Haas & Dunnigan, of Los Angeles, for respondents.

KING, Presiding Justice, pro tem. Plaintiffs are sons of Cayetano Apablasa, who died November 14, 1889, leaving a widow, defendant Concepcion Apablasa, now Concepcion Apablasa de Sepulveda, wife of defendant Ildefonso A. Sepulveda, mother of the plaintiffs and four other children, who are also defendants.

The action seeks to leave it adjudged that their mother holds certain property which was distributed to her by decree of distribution in the estate of Cayetano Apablasa, with its rents, issues, profits, and proceeds, in trust for the use and benefit of plaintiffs and their brothers and sisters, and for an accounting.

The amended complaint alleged:

That shortly before their father's death he expressed to his wife his desire and intention that all of his property should remain in his family and be devoted to the maintenance and support of his said wife, and the education, maintenance, and support of the said children of himself and the said defendant during the lifetime of said defendant, and upon her death all of said property, together with the accumulated rentals, income, and proceeds thereof, should go to his said children, without sale, partition, or division, deducting therefrom only a sufficient amount to pay for the upkeep and maintenance of said property, and for the education, maintenance, and support of the said defendant and the children of the said defendant and the said Cayetano Apablasa.

That at said time the said defendant promised and represented to the said Cayetano Apablasa that, if he would put said property in her charge on his death, she would carry out his said desire and intention, and would protect the interests of the children of the said Cayetano Apablasa and herself in the matter of said property, and would properly manage said property and provide for the

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

education, support, and maintenance of said children during her lifetime, and that the said children would receive said property upon her death. That the said Cayetano Apablasa believed the said promises and representations of the said defendant, and in reliance thereon, and in pursuance of his desire and intention, he entered into an agreement with the said defendant that he would, by will, place the property in her charge on said terms. That, in pursuance of said desire and intention, and the said agreement of the said defendant Concepcion Apablasa de Sepulveda, and in reliance upon her promises and representations, the said Cayetano Apablasa caused a will to be prepared, a copy of which is attached. That said defendant and the said Cayetano Apablasa employed an attorney to draw said will, marked Exhibit 1, and that the said defendant caused the said attorney and did herself advise the said Cayetano Apablasa, that the language and terms of said will marked Exhibit 1 were expressive of the desire and intention of the said Cayetano Apablasa, and in accordance with the agreement between said Cayetano Apablasa and the said defendant, and that the legal effect thereof would be to cause his estate to be dealt with and to be distributed by the courts in pursuance of the desire and intention expressed by said Cayetano Apablasa, as hereinbefore alleged.

Plaintiffs are informed and believe, and therefore allege, that the said Cayetano Apablasa, relying upon the representations of the said defendant Concepcion Apablasa de Sepulveda and the said attorney, and believing that said will would have said legal effect, and that the said defendant would perform all of her said promises, and having trust and confidence in the said defendant and said attorney, did, on or about the 15th day of October, 1889, duly execute and publish his last will and testament. A copy of the will is incorporated in the complaint.

After the death of their father, the will was admitted to probate; the mother acting as executrix.

No guardian or representative acted for the seven children, whose ages, at their father's death, ranged from 10 months to 16 years.

The will provides:

"Secondly, I hereby declare that the property in which I now reside on Grandview avenue, in the city of Los Angeles and the interest held by me in the lot on Castelar street in Los Angeles City is community property and that the property on Alameda street in said city is my separate estate—having been acquired by inheritance from my father.

"Thirdly, I give and bequeath to my beloved wife Concepcion Apablasa, all my property real and personal wherever the same may be situated, with full power and control over the same to lease, improve and manage the same and collect the rents thereof and use the same as she may deem best without any order or proceeding in any court of tribunal other than such as are required by law to establish this will in so far as I can legally dispense with legal proceedings—and it is my will and desire that my said wife shall not sell any of said property, but shall retain the same and carry on and manage the same for the benefit and support of herself and the education and maintenance of our children John C. Apablasa now aged sixteen years, Cayetano C. Aplablasa aged thirteen years, Mariya Apablasa, aged twelve years, Concepcion Apablasa aged seven years, Sara Apablasa aged three years, Benjamin Apablasa, aged four years and Candelaria Apablasa, aged ten months—trusting to my said wife to make all necessary and proper provision for their support, education and maintenance at all times during her lifetime and it is my wish that my said wife shall by her will or otherwise before her death, vest the title to the property on Alameda street, derived from my father, as aforesaid, in my said children or such of them as may then be living and in the children if any there be of my said children who shall have died leaving issue then living—To the end and with the purpose of keeping said property in my family, for their support and maintenance, without partition, such conveyance to be of undivided interests therein, share and share alike to my said children."

The complaint also alleges:

That on July 28, 1891, the executrix, as such executrix, filed in said matter her petition for distribution of the whole of said estate to her. That she alleged in said petition, and plaintiffs are informed and believe and therefore allege, that she and her attorney represented to the court on the hearing thereof, and thereby led the judge hearing said proceeding to believe, that said defendant Concepcion Apablasa was the sole devisee under the will of Cayetano Apablasa, deceased. That upon such petition and representation, and by reason thereof, the court made and entered its decree of distribution in said matter, distributing the whole of the estate of said deceased to said defendant Concepcion Apablasa de Sepulveda. That the proceedings in said matter were, except as herein stated, regular on the face of the records, and that by reason thereof there is no appeal from said decree of distribution. That neither of these plaintiffs had any actual knowledge of the terms of said decree until the year 1923, and made no effort to ascertain any facts in regard to said proceedings, or the status of said property, by reason of the facts hereinafter alleged.

That during all of the time said matter of the estate of Cayetano Apablasa was pending in said court, the said defendant had the actual custody and control of these plaintiffs and of the other minor children of Cayetano Apablasa and herself, and was their natural guardian, and was acting as such. That during all of this time these plaintiffs and said other minor children relied upon said defendant, their mother, to properly represent them in said proceedings and to secure for them their respective interests and just and lawful shares in said estate.

That, after the death of the said Cayetano Apablasa, the said defendant Concepcion Apablasa de Sepulveda undertook to and did improve and manage and collect the rents of the real property described in said will, and did make certain provisions out of the rentals, incomes, and proceeds thereof for the benefit and support of herself and of the children named in said will, according to the desire and intention of said Cayetano Apablasa, for the benefit of the beneficiaries therein named in said will, according to the desire and intention of the said Cayetano Apablasa, for the benefit of the beneficiaries therein named, and not otherwise, and that during all the times since the death of said Cayetano Apablasa, up to and including the month of July, 1923, the said Concepcion Apablasa de Sepulveda assured and represented to these plaintiffs that she, the said Concepcion Apablasa de Sepulveda, had received said property under said will, and was holding the same under the provisions thereof, and as trustee thereunder, and according to the desire and intention of said Cayetano Apablasa, and for the benefit of herself and the said children, according to their interests in said property under said will, as such interests are defined and provided for thereby, and according to their father's desire and intention, as expressed therein, and as expressed to her before his death, and not otherwise, and during all of said time said Concepcion Apablasa de Sepulveda assured and represented to these plaintiffs and to the said other children that she, as their mother, was treating, and would treat, them fairly, and was protecting, and would protect, them in the matter of their said interests in their said father's estate, and would, at any time, upon demand, render an account of her acts as such trustee, and yield and deliver to each of said children all sums of money, property, or interests to which they were and are entitled as therein set forth, and that the interest of each child was a one-seventh interest in all the property left by their said father.

That these plaintiffs and the said other children relied upon the assurances, representations, and promises, and relied upon the fact that the said Concepcion Apablasa de Sepulveda was their mother and natural guardian, and thereby, and from all the circumstances hereinbefore stated, believed that said Concepcion Apablasa was holding possession of said property as such trustee only, and for the use and benefit of all of said children, according to their interests under said will, and according to their father's wishes and intentions, and not otherwise, and that she (the said Concepcion Apablasa de Sepulveda) would, on demand, account to all of said children for her acts as such trustee, and yield and deliver to each of said children all sums of money, property, or interests to which they were and are entitled as herein set forth.

It is then alleged:

That in 1912 the defendant Concepcion sold the Alameda street property, and that said defendants paid to plaintiffs the sum of $40,000, and at the time of said payment stated and represented to plaintiffs that the property was sold for their benefit, and that the said sum so paid was their share of the proceeds of said property; that the said sum of $40,000 did not fully cover and embrace the interest of plaintiffs, as beneficiaries under said trust, in the proceeds of the sale of said property; and that plaintiffs should have been paid a greater sum as their share of the proceeds of the sale of said property, the exact amount of which is to plaintiffs unknown.

That plaintiffs never knew that defendant Concepcion Apablasa de Sepulveda claimed any interest in and to said property or any part thereof, except as trustee, for plaintiffs and their said brothers and sisters, as heretofore set out. That from time to time after the death of the said Cayetano Apablasa the said defendant Concepcion Apablasa de Sepulveda, up to and just prior to the 6th day of July, 1923, gave plaintiffs sums of money which she (the said Concepcion Apablasa de Sepulveda) told plaintiffs were given to them by her as trustee, according to the terms of the said will. That plaintiffs relied upon the said statements and representations of their mother, the said defendant Concepcion Apablasa de Sepulveda, and believed that she was holding said property and the whole thereof in trust for the benefit of plaintiffs, and their said brothers and sisters, and did so believe until on or about the 6th day of July, 1923, when the said defendant Concepcion Apablasa de Sepulveda stated to plaintiffs that the said properties and all of them were hers, and that neither plaintiffs nor their brothers nor sisters had any right, title, or interest in and to said properties, or any part thereof.

That the said defendant Concepcion Apablasa de Sepulveda is now in possession and control of, and is using and enjoying for her sole and exclusive use and benefit, certain enumerated property coming from the estate of Cayetano Apablasa.

That the said defendant Concepcion Apablasa de Sepulveda is receiving, and has long received, rents, issues, profits, and proceeds from said properties, of an amount and character to the plaintiffs unknown. That said defendant Concepcion Apablasa de Sepulveda has neglected and refused, and still neglects and refuses, to account to plaintiffs as to said properties, or any of said properties, and said rents, issues, profits and proceeds and to state and set forth the property belonging to said Cayetano Apablasa at the time of his death; and has refused, and still refuses, to turn over to plaintiffs their part of the said properties and said rents, issues, profits, and proceeds, or any part or portion of the same. That the said properties and said rents, profits, and issues and proceeds of said properties are the properties and the rents, profits, issues, and proceeds of the properties that the said defendant Concepcion Apablasa de Sepulveda promised and agreed with the said defendant Cayetano Apablasa to receive and hold.

The original complaint was filed November 7, 1924. A demurrer was sustained to it and the amended complaint was then filed, to which a demurrer was interposed and sustained, without leave to amend, and a judgment of dismissal entered in behalf of defendants Concepcion Apablasa de Sepulveda and Ildefonso A. Sepulveda, the only defendants appearing. From this judgment of dismissal the appeal is taken by plaintiffs.

The demurrer is, first, general; second, on the ground of misjoinder of parties defendant, in that the sisters of plaintiffs are joined, and that the complaint is uncertain, ambiguous, and unintelligible; and, third, that any cause of action is barred by sections 318, 322, 336, and 338, Code of Civil Procedure.

It is necessary to present the foregoing voluminous excerpts from the pleadings in order to intelligently discuss the demurrer. Four briefs are presented by appellants and two by respondents.

The grounds of demurrer will be taken up in their order.

First, the general demurrer:

The complaint seeks to establish an involuntary trust. It names the person sought to be charged as trustee, the beneficiaries, sets forth a description of the properties in which it is sought to establish the trust, and gives the terms of the trust. It also alleges the facts which are alleged to give rise to the trust.

Appellants practically concede that the decree of distribution is a conclusive adjudication that legal title under the will is vested in Mrs. Sepulveda free of any precatory trust created by the will, and hence that the allegations attacking the decree of distribution on the ground of fraud are surplusage, but strenuously contend that the remaining allegations of the complaint of themselves constitute a perfect cause of action.

[1-3] Appellants' claim then is that Mrs. Sepulveda promised her then husband that, if he would devise his property to her, she would carry out his desires and intentions as to his children; that thereupon he did so devise the property, which was distributed to her, and that she now claims this property as her own. Under the terms of section 2224, Civil Code, appellants claim that she, having gained this property by fraud, thereby became an involuntary trustee of it for the family of her deceased husband. To maintain this claim they must show extrinsic fraud.

In the Estate of Walker, 160 Cal. 549, 117 P. 511, 36 L. R. A. (N. S.) 89, the court held that, if through accident, fraud, or mistake the distributees are holding property under a decree of distribution "to which they are not entitled, equity will do justice, not by overthrowing the decree of distribution, but by declaring the distributees to be involuntary trustees of the rightful owners of the property. * * * The sanctity and immunity of a decree of distribution which has become final attaches to the decree itself and not to those who under it may have derived an unconscionable advantage through fraud, accident, or mistake."

In Mulcahey v. Dow, 131 Cal. 74, 63 P. 159, the court concedes that section 2224, Civil Code, "in its terms, is broad enough to apply to judgments of courts adjudicating property rights"—referring to a decree of distribution—and quotes with approval Wickersham v. Comerford, 104 Cal. 495, 38 P. 101, that "it was necessary for the plaintiff to establish by clear and indubitable proof, to the satisfaction of the superior court, that the order setting apart the homestead had been obtained through some fraud practiced upon that court by the defendant," and proceeds further to say: "Again, fraud must be shown which is extrinsic and collateral to the cause."

In Sohler v. Sohler, 135 Cal. at 330, 67 P. 285, 87 Am. St. Rep. 98, the court, after reviewing the English doctrine, held that, while permitting the probate to stand, as having no power to set it aside, the false legatee or wrongful legatee should be decreed to be a trustee for the rightful claimant. This case adopts the statement in Pomeroy's Equity Jurisprudence, § 919, and note, that, "when probate is obtained by fraud, equity may declare the executor or other person deriving title under it, a trustee for the party defrauded."

The extrinsic fraud for which a judgment may be set aside is defined by Lord Cairns in Patch v. Ward, L. R., 3 Ch. App. 207, to be "actual fraud such that there is on the part of the person chargeable with it the malus animus, the mala mens putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him." Parsons v. Weis, 144 Cal. 419, 77 P. 1007.

As the court says in Wingerter v. Wingerter, 71 Cal. at 110, 11 P. 855:

> "This action was not brought to set aside the deeds and decree of distribution, but to charge the defendant as an involuntary trustee, for the benefit of the plaintiff, of the property which he fraudulently and wrongfully obtained under them. The action was authorized and proper, and plaintiff was entitled to the relief granted"—citing O'Connor v. Flynn, 57 Cal. 293; Olivas v. Olivas, 61 Cal. 382.

See, also, Lataillade v. Orena, 91 Cal. 576, 27 P. 924, 25 Am. St. Rep. 219; Bergin v.

Haight, 99 Cal. 52, 33 P. 760; and Curtis v. Schell, 129 Cal. 208, 61 P. 951, 79 Am. St. Rep. 107.

These authorities lead to the conclusion that the complaint contains sufficient allegations to constitute a cause of action and that the general demurrer should have been overruled.

Second, the misjoinder:

[4, 5] The other children of decedent have, as alleged, a common interest with the plaintiffs, and, when they refused to join as plaintiffs, were properly named defendants, as provided by section 382, Code of Civil Procedure. As to the special demurrer for uncertainty, ambiguity, etc., from what has been said before in this discussion it appears that the demurrer on these grounds is not well founded.

And, third, as to the ground of the running of the statute, sections 318, 322, 336, and 338, Code of Civil Procedure:

[6] The complaint avers that plaintiffs never knew that their mother, defendant, claimed any interest in the property other than as trustee, and believed she was so holding it till July 6, 1923, when she stated the property was hers, and that plaintiffs and her other children had no right or interest therein. This date is 16 months prior to the filing of the original complaint, and therefore the action is not so barred.

The judgment appealed from is reversed, with directions to the trial court to overrule the demurrer.

We concur: STURTEVANT, J.; NOURSE, J.

91 Cal. App. 435

ZIMMER v. EDINGER. (Civ. 5130.)

District Court of Appeal, Second District, Division 2, California. April 30, 1928.

1. Brokers 🔑86(5)—Evidence held to sustain finding that landowner prevented sale when broker had buyer ready, willing, and able to purchase.

In real estate broker's action against owner for commission, though sale was not consummated, evidence *held* sufficient to sustain trial court's finding that owner of realty prevented a sale thereof when broker had a buyer ready, willing, and able to purchase.

2. Brokers 🔑63(1)—Broker held entitled to commission, where he had ready, willing, and able purchaser, but consummation of sale was prevented by landowner.

In action by real estate broker against landowner for commission allegedly due, though sale had not been consummated, broker *held* entitled to commission, where he had procured a purchaser who was ready, willing, and able to perform but performance was prevented by owner.

3. Brokers 🔑57(1)—Broker held not entitled to commission on procuring purchaser depositing small payment, where there was no writing binding purchaser to proceed further, and brokerage contract required consummated sale.

In action by real estate broker against landowner for commission allegedly due, though sale had not been consummated, broker *held* not entitled to commission on his having procured a purchaser who deposited a relatively small payment, where there was no writing binding the purchaser to proceed further with her contract, and the brokerage contract required a consummated sale before commission was earned.

4. Brokers 🔑44—Under ordinary authorization to sell realty, revocation of authority during sale, with strong likelihood of sale being successful, cannot deprive agent of commission.

Under an ordinary authorization to sell real estate, a revocation of the authority while a sale is in progress, with strong likelihood of its being successful, cannot deprive the agent of his commission.

5. Brokers 🔑86(1)—Evidence held insufficient to support finding realty broker was entitled to commission for securing buyer.

In action by real estate broker against landowner for commission allegedly due, though sale was not consummated, evidence *held* insufficient to support finding that broker had secured a buyer under conditions entitling broker to commission.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by N. W. Zimmer against C. L. Edinger. From the judgment, defendant appeals. Modified, and, as modified, affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellant.

Joe Crail and Harold C. Morton, both of Los Angeles, for respondent.

STEPHENS, Justice pro tem. This is an action for real estate commission. Plaintiff alleged three causes of action in his second amended complaint. The answer admits there was an authorization in writing from defendant to plaintiff as alleged in the complaint, but denies that any sale was consummated thereunder or commission earned. The court's findings are that plaintiff's allegations are true in the main, and judgment was awarded against defendant in the sum of $1,770, the full amount prayed for, together with costs. Defendant appeals from the judgment under the alternative method, and presses the points that the findings are not supported by the evidence, and that the court committed error in the admission of evidence relating to custom in the matter of a cash deposit in escrow pending search of title, etc.

The facts relating to the first alleged cause of action are as follows: The defendant-appellant owned certain property in that part of the city of Los Angeles known as Sawtelle. The plaintiff-respondent, a real estate agent who had formerly done some business with appellant, and who was personally acquainted with him, was trying to arrange for the leasing of a theater which appellant contemplated building on his property. In this connection respondent introduced appellant to a Mr. Fyhn as a possible lessee. Appellant soon abandoned the project, however, as it entailed an expenditure beyond his means. There was some discussion during the summer between the three, looking to a sale of 60 feet of the property to Fyhn for $250 a front foot. Nothing definite on this occurred, but on October 24, 1922, Fyhn stated to respondent that he had made arrangements for money with the Citizens' Bank, through a Mr. Schnell, and was ready to buy. Respondent then went to appellant (he testified that he told appellant about Fyhn's statement), and secured the following document:

> "Sawtelle, Calif., October 25—1922.
>
> "I hereby appoint and nominate N. W. Zimmer a licensed real estate broker, of Sawtelle, Calif., as my personal and sole agent for a period of ten days from date to sell for me the following described property situated at the north east corner of Santa Monica Blvd. and Gettysburg Ave. Sawtelle, Calif., and further known as lots (8) eight and (9) nine, block H, Barnette Villa tract, at the price of $250 a front foot on the Santa Monica Blvd. frontage approximately 142 feet more or less, either 60 ft. or all of said frontage. In case the said N. W. Zimmer consummates a sale for me within the prescribed time I agree to pay him a commission of 5% on the purchase price.
>
> "[Signed] C. L. Edinger."

Fyhn had talked with Schnell, and had promised the latter $1,000 if he would find parties to finance a theater proposition such as Fyhn desired. Schnell found such parties, and this was the basis of Fyhn's statement to respondent, which moved respondent to secure the authorization from appellant.

The morning after the authorization was given, Schnell sent word to appellant that he had found purchasers, naming Hughes and King—the same persons who were to furnish the money for Fyhn's proposition. Appellant then informed Schnell of the authorization. There is some testimony that there was a bad feeling existing between Schnell and respondent. Appellant went to respondent, stating something about Fyhn and associates being ready, as was he, to go into escrow, and asked that he be released from the authorization. A quarrel ensued, in which it seems that appellant sought to have respondent take a one-half commission. This was declined by respondent, and threats were made that the deal was off, and that respondent would not get a cent commission. Hughes and King thereupon withdrew, and nothing further came of the negotiations. These happenings occurred about October 25 or 26, 1922, and on October 28th appellant signed a revocation of the authorization, and caused it to be delivered to respondent. Subsequent to February 7, 1923, Fyhn purchased 60 feet of appellant's lot.

The court found for plaintiff that the sale of the 60 feet was made through the efforts of respondent and under the terms of the authority herein set out; that the sale wherein Hughes and King were to put up the money was prevented by appellant; and that it was prevented through a scheme whereby Fyhn was to purchase the 60 feet after expiration of the authority given respondent.

[1] Appellant contends that he did not prevent the sale, but that Schnell did. However, it appears from the evidence that the deal would have proceeded had respondent agreed to take one-half of his commission instead of demanding the whole of it, which appellant would not pay. It is passing strange why Schnell would have proceeded if one-half the commission had been paid, but wholly declined when all had to be paid, and this, considering that neither Schnell nor his associates Hughes and King had any financial interest in the payment or nonpayment of the commission. The evidence is highly conflicting upon this point, and subject to construction. We cannot say that there was no evidence upon which the court could reasonably have arrived at its conclusion on this cause of action.

[2] We are cognizant of the expression in the authorization, "In case the said N. W. Zimmer consummates a sale for me within the prescribed time I agree to pay him a commission of 5% on the purchase price." The court finds that such consummation was only prevented by the arbitrary action of appellant. The evidence shows that Schnell, Hughes, and King met through the direct act of Fyhn, who was dealing with Zimmer, and that they were ready, willing, and able to proceed. As was said in Houston v. Williams, 53 Cal. App. 267, 200 P. 55, "As full performance was prevented by the act of the owner, the agent had earned his commission." Under such circumstances, respondent is entitled to the full benefit of his actions under the terms of his authorization.

After the incident upon which the first cause of action is based, and on the morning of October 27th, respondent, having received a deposit of $250 on the purchase price of the property from an agent representing a Mrs. Mary Regan, tendered the same to appellant, whereupon the latter declined the tender on the ground that it was not enough. The next day appellant revoked the authorization to respondent. On October 28th, and subsequent to such revocation, an attorney for Mrs. Regan tendered by writing the full amount of cash in payment for the property. On October 31st appellant replied to such tender, stating that, if Mrs. Regan would deposit in bank by 3 o'clock in the afternoon of the next day the full purchase price, he would furnish a deed with certificate of title showing the property clear, except "subject to certain street improvement bonds and some taxes," the amounts thereof to be deducted from the sum paid to him, commission thereon to be paid according to rules of the Los Angeles realty board. Nothing further was done until November 4th (the tenth and last day allotted respondent to consummate the sale), when appellant modified his instructions at the bank, authorizing $2,500 initial payment, balance "when title shows clear." Respondent in his brief says:

> "The demand of appellant that the full purchase price be put up at once being told to Mary Regan, the prospective purchaser, and she being unable to procure that amount of money in twenty-four hours, dropped the matter and did nothing further towards purchasing the property."

This would demonstrate that the tender contained in the letter of Mrs. Regan's attorney could not have been made good, and that she directed it when in fact she knowingly could not perform.

[3] The authorization clearly required that the sale should be *consummated* before a commission was earned. There was no deal with Mrs. Regan ever consummated. Appellant was under no obligation to accept the $250 originally tendered on this transaction, because there was nothing in writing binding her to proceed further, and we seriously doubt that the matter of custom could affect the status of this proposed deal. Even if it could, the $250 tendered or the $1,000 verbally offered was not sufficient, as the testimony was that customarily "10 per cent. or 20" was required as the first deposit.

[4, 5] We thoroughly agree with counsel for respondent, and with the authorities he cites in support of the proposition, that under an ordinary authorization a revocation of the authority while a sale is in progress, with strong likelihood of its being successful, cannot deprive the agent of his commission. But in the instant case, as to Mary Regan, there was no deal on at the time the authorized period expired. We conclude that there was no testimony to support the main allegations of the second cause of action, and that the findings are therefore not supported by the evidence.

The judgment entered was for the sum of $1,770, which covers and includes the sums claimed on both the Fyhn and Regan transactions. Inasmuch as we are sustaining only that part of the judgment which is based upon the Fyhn transaction, amounting to $647.50, the judgment is modified by deducting therefrom the sum of $1,122.50, and, as so modified, it is affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

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91 Cal. App. 535

WILSON v. EARP. (Civ. 5134.)

District Court of Appeal, Second District, Division 2, California. May 2, 1928.

1. Appeal and error 🔑757(5)—Reviewing court was not required to search through transcripts to ascertain whether trial court failed to make findings on issues not appearing in brief.

Where briefs of plaintiff on her appeal merely contained part of complaint and defendant's answer raising single issue on which court made finding, reviewing court was not required to search through typewritten transcripts to discover whether there were other issues presented by the pleadings, or whether court failed to find on such other issues.

2. Appeal and error 🔑1071(6)—Finding upon issue which determines case renders failure to find upon other issues immaterial.

Where finding is made upon issue which determines case, other issues become immaterial, and failure to find thereon does not constitute prejudicial error.

3. Brokers 🔑43(2)—Oral agreement employing broker to induce prospective purchasers of office space to get in touch with employer, in return for commissions on resulting sales, held invalid (Civ. Code, § 1624, subd. 6).

Verbal agreement by which holder of lease, who proposed to erect office building, hired broker to interview prospective purchasers of office space to induce them to see the holder of the lease, and agreed to pay commissions on sales so induced, *held* invalid under Civ. Code, § 1624, subd. 6, making agreements authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission invalid, unless in writing.

4. Brokers 🔑82(1)—Failure of plaintiff suing for commissions for procuring purchasers of office space to allege that she was licensed as broker precluded recovery (St. 1919, p. 1252, § 20).

Plaintiff who failed to allege in complaint for commissions, alleged to have been earned in procuring purchasers of space in office building, that at the time agreement was made and services rendered she was a duly licensed real estate broker or real estate salesman, as required by St. 1919, p. 1252, § 20, was not entitled to recover.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by C. Myrtle Wilson against H. R. Earp. Judgment for defendant, and plaintiff appeals. Affirmed.

Leo D. Daze, of Los Angeles, R. P. Wheat, of Glendale, and Martin F. Shakley, of Los Angeles, for appellant.

Garten & Maltby, of Long Beach, for respondent.

HAZLETT, Justice pro tem. Plaintiff sued to recover commissions she alleges she earned in procuring purchasers for defendant of office spaces in a building to be erected. Judgment was given for defendant.

Plaintiff appeals from the judgment, and her appeal is made pursuant to the alternative method provided for in sections 953a, 953b, and 953c of the Code of Civil Procedure. However, she did not print in her briefs or in a supplement thereto sufficient of the record to indicate that the trial court committed any error in giving judgment for defendant. The only portions of the record so printed are one paragraph of plaintiff's amended complaint, the paragraph of defendant's answer thereto, and the findings made by the court, consisting of one paragraph. The paragraph from the amended complaint recites that plaintiff and defendant made a contract whereby plaintiff was employed by defendant to interview prospective purchasers of office spaces in a building to be erected, to advertise the proposed building, and to otherwise interest various persons therein as defendant should direct, and to induce such prospective purchasers to interview defendant, and that defendant should pay to plaintiff 5 per cent. of the purchase price of any office which defendant might sell to persons produced by plaintiff. The paragraph of the answer so printed denies the specific contract pleaded by plaintiff, but alleges that plaintiff and defendant entered into a verbal conditional contract of such employment providing that defendant should pay plaintiff 5 per cent. "on the total purchase price of any office sold by or through the efforts of plaintiff, only in the event that said office building was erected, and then only upon the moneys actually received by the defendant from purchasers furnished by plaintiff, and paid in upon the completion of sales upon said offices in said building." The paragraph of the findings printed is to the effect that no written agreement was signed by defendant authorizing or employing plaintiff as an agent or broker to sell offices in the proposed building.

The principal difference between the allegations of the amended complaint and of the answer thereto above referred to is that the allegations of the amended complaint imply and in effect allege that the agreement mentioned was in writing and signed by defendant (Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567, 569, 112 P. 454), and the portion of the answer above mentioned admits a contract containing stipulations substantially as pleaded by plaintiff, but alleges that the contract was in parol. The findings referred to determine the issue in favor of the defendant and find "that there was no written agreement signed by defendant authorizing or employing plaintiff as an agent or broker to sell real property, to wit, offices in the proposed Oil Exchange building, * * * with a corresponding interest in the 99-year lease" on the real property upon which it was proposed that the building should be built.

[1] Appellant complains that there were no findings upon other issues made by the pleadings. As appellant failed to print any other portions of the record, except those above referred to, we are not required to search through the typewritten transcripts to learn whether any other issues were presented by the pleadings, or, if other issues were joined, to determine whether the finding passed upon them. Dahlberg v. Dahlberg (Cal. Sup.) 260 P. 290.

[2, 3] Defendant was the owner and holder of a 99-year lease upon the real property, and he proposed to cause an office building to be erected on the property by a corporation, and to sell 99-year leases of office spaces in the building, and plaintiff's employment was to assist defendant in making sales of the office leases. Defendant was not a real estate broker and had no license as such, but in his dealings with plaintiff he treated the 99-year lease and the proposition for the erection of the building as his own. Upon those facts another reason appears why appellant's contention is not well founded, viz: Our courts have repeatedly held that if a finding is made upon an issue which determines a cause, other issues become immaterial and a failure to find thereon does not constitute prejudicial error. Wilbur v. Wilbur, 197 Cal. 1, 14, 239 P. 332. The finding printed as above recited determines the case for the reason that "an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission, * * *" is invalid if not in writing. Section 1624, subd. 6, Civil Code. This statute has been held to apply in a case where one was employed to assist in the sale of real property by showing it to prospective purchasers and by getting them in touch with the employer, for a commission to be paid only in the event that the employer sells to a prospective purchaser so produced (Kornman v. Nelson [Cal. App.] 257 P. 150), and also where a mining expert was employed to induce a prospective buyer of a mine to consummate a purchase of the mine from the employer, the expert to be paid a commission should the sale be made by the employer (Dolan v. O'Toole, 129 Cal. 488, 62 P. 92). To the same effect, see Shanklin v. Hall, 100 Cal. 26, 34 P. 636.

[4] There is still another reason why plaintiff was not entitled to recover in this case, and that is: She did not allege in her amended complaint that when the agreement was made and the alleged services performed she was a duly licensed real estate broker or real estate salesman. The statute (providing for the regulation, supervision and licensing of real estate brokers and salesman, approved May 27, 1919, Stats. 1919, p. 1252, § 20) provides in effect that no person engaged

in this state in the business or acting in the capacity of a real estate broker or salesman shall maintain any action in the courts of this state for the collection of commission or compensation as such, without alleging and providing that a license was issued to such person as provided in that act.

The judgment is affirmed.

We concur: WORKS, P. J., CRAIG, J.

91 Cal. App. 405

JACOBSON v. LAMB et al. (Civ. 6194.)★

District Court of Appeal, First District, Division 1, California. April 30, 1928.

Hearing Denied by Supreme Court June 28, 1928.

1. Partnership 🔑146(1)—Notes executed by one of partners of general partnership in ordinary course of business are binding on other partner.

Notes executed by one of partners of a general partnership in the ordinary course of business are binding on the other partner, even though he had no knowledge of their execution.

2. Partnership 🔑146(1)—Business of hauling freight and manufacturing and selling boxes held "trading partnership," implying authority of partner to execute notes on behalf of partnership.

Business of hauling freight for hire together with manufacturing and selling boxes for crating merchandise for export shipment *held* to constitute trading partnership implying authority of one of partners to execute nôtes on behalf of partnership.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trading Partnership.]

3. Partnership 🔑126—Same rules governing power and authority of partnership apply whether partnership is engaged in buying and selling merchandise for profit or other business (Civ. Code, §§ 2319, 2424, 2429, 2430, 2443).

Under Civ. Code, §§ 2319, 2424, 2429, 2430, 2443, relative to general partnerships and abolishing distinction between trading and nontrading partnerships, same rules governing power and authority apply whether partnership is engaged in business of buying and selling merchandise for profit or engaged in any other business.

4. Partnership 🔑126—Partners engaged in draying and box manufacturing held general partners, creating liability of each partner for acts of other in apparent scope of authority (Code, §§ 2319, 2424, 2429, 2430, 2443).

Under Code, §§ 2319, 2424, 2429, 2430, 2443, partners engaged in the business of hauling freight for hire and box manufacturing were general partners creating liability of each partner for acts of other within apparent scope of his authority, whether acting in good or bad faith.

5. Partnership 🔑217(3)—Evidence held to sustain finding that execution of notes by one partner was within ordinary and usual course of conduct of partnership.

In action on notes executed by one of partners in name of partnership, evidence *held* sufficient to sustain finding that execution thereof was in ordinary and usual course of conduct of business of partnership.

6. Partnership 🔑145—Partnership business of draying and box manufacturing implied borrowing money to accommodate necessities and convenience.

Nature of business of partnership, consisting of hauling freight for hire and manufacturing boxes for crating merchandise, fairly and reasonably implied borrowing of money to accommodate necessities and convenience whenever the occasion occurred.

7. Trial 🔑59(2)—Order of proof is regulated by discretion of trial court (Code Civ. Proc. § 2042).

Order of proof is regulated under Code Civ. Proc. § 2042, by sound discretion of trial court, and such discretion will not be interfered with by reviewing court unless it has been abused to substantial detriment of party complaining.

8. Partnership 🔑217(2)—Testimony in action on partnership notes as to personal withdrawal by partner executing note held properly excluded.

In action to recover on note executed in name of partnership by one of partners, testimony relative to withdrawals by partner executing note *held* properly excluded, in view of fact that such party had authority to draw on partnership funds, and fact that he had misappropriated funds of partnership or overdrew account did not concern plaintiff, nor could she be bound by entries on books of partnership of which she had no knowledge or over which she had no control.

9. Partnership 🔑125—Acts and declarations of partner within apparent scope of authority are binding on copartners in favor of third persons.

Where partner acts within apparent scope of his authority, whether he acts in good or bad faith his acts and declarations are binding on his copartners in favor of third persons.

10. Partnership 🔑218(2)—Charge on liability of partners in general partnership held not erroneous.

In action to recover on notes executed in name of partnership by one of partners, charge relative to partnership liability of general partnership *held* not erroneous, particularly where there was no proposal of instructions in accordance with complaint made thereto.

11. Appeal and error 🔑216(1)—Defendant failing to request instructions cannot complain on appeal of court's failure to give particular instruction.

Where defendant objecting to instructions as given failed to request particular instruction,

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★Hearing denied by Supreme Court.

being necessary to correct understanding by jury of his theory of case, he cannot complain of failure of court to give instructions which it was his right to prepare and propose to court for submission to jury.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Millie K. Jacobson against George W. Lamb and others. Judgment for plaintiff, and defendant named appeals. Affirmed.

Corbet & Selby and W. C. Sharpsteen, all of San Francisco, for appellant.

Goldman & Altman, of San Francisco, for respondent.

Bradley L. Wallace, of San Francisco, for trustee.

CAMPBELL, Justice pro tem. This is an action to recover on six promissory notes aggregating the principal sum of $24,000, all signed "King & Company; J. Charles King." The first of these notes is for $3,000, dated September 7, 1922; the second for $5,000, dated September 22, 1922; the third for $3,000, dated October 25, 1922; the fourth for $5,000, dated December 29, 1922. These four notes are payable to Harry or Millie K. Jacobson. Harry Jacobson died prior to the commencement of the action, and plaintiff, his widow, acquired his interest in the notes. The fifth note is for $4,000, dated October 15, 1923, and is payable to the order of Millie K. Jacobson, and the sixth is for $4,000 dated March 31, 1923, payable to Bertha Kalisky. This last note was assigned to the plaintiff, Millie K. Jacobson, prior to the commencement of the action.

The case was tried by a jury, which returned a verdict for plaintiff and against each of the defendants, George W. Lamb and J. Charles King, individually and as copartners, doing business under the name and style of King & Co., and King & Co., a copartnership, for the face value of the notes sued upon. From the judgment entered upon such verdict this appeal is taken.

King & Co. continuously since 1906 has been a copartnership consisting of George W. Lamb and J. Charles King. The evidence discloses that defendants Lamb and King entered into a written agreement of partnership on November 1, 1906, for the purpose of conducting the business of draying under the name and style of King & Co. King was to manage the business, but had "no power to incur any indebtedness other than for current expenses." This agreement continued in force and effect until January 1, 1922, when a new agreement was entered into. This second agreement provided that King was to purchase the interest of Lamb in the copartnership for a sum therein specified payable in monthly installments. It was specifically provided that the execution of this second agreement did not dissolve the copartnership. With reference to the authority of King, it provided that he should "not contract any obligations other than those incident to the copartnership business." It further provided that King was to render to Lamb a monthly statement showing the assets and liabilities of the partnership and of all moneys received and disbursed in the conduct of the business.

The promissory notes in question were executed and delivered subsequent to the execution of the second agreement made between Lamb and King on January 1, 1922. Lamb had no knowledge of the execution of the promissory notes until March, 1924. In February, 1924, King disappeared, and after his disappearance defendant Lamb continued to conduct the business of the partnership up to and including the time of the trial of this action. At the time each of the notes in controversy was delivered to the respective payees, defendant King received a check equal to the face value of the note. Each of these checks was payable to King & Co. and indorsed by King & Co. and deposited to the credit of the copartnership in the Bank of California, the depositary of the partnership funds of King & Co., with other checks and money in the regular course of business.

[1] If King & Co. were a general partnership and the notes were executed by one of the partners in the ordinary course of business, the other partner would be bound, even though he had no knowledge of their execution. Appellant claims that the copartnership of King & Co. was not a commercial and trading partnership, but on the contrary was a noncommercial and nontrading partnership. As to this contention the question arises: Does the distinction between trading and nontrading partnerships apply in California? Appellant has cited us to numerous authorities from other jurisdictions to support this contention; however, the question seems to be one of first impression in this state since the adoption of the Codes. Our attention is directed to but two California cases recognizing this distinction, and these were decided prior to the enactment of the Code provisions, Skillman v. Lachman, 23 Cal. 199, 83 Am. Dec. 96, a mining partnership decided in 1863, and McConnell v. Denver, 35 Cal. 365, 95 Am. Dec. 107, a ditch company organized to sell water for mines, decided in 1868, and also the following reference: "It was not a trading partnership in which it is presumed that one partner has authority to bind the others in this way," —found in Los Angeles Bank v. Wallace, 101 Cal. at page 481, 36 P. 199.

[2] No case has been called to our attention involving a classification of a business similar to that conducted by defendants in this action as trading or nontrading firms. Under modern business conditions it would seem that the business of hauling freight for

hire is a commercial business, but when in addition to that we find the partnership engaged in manufacturing and selling boxes for crating merchandise for export shipment, we can but conclude that such a business is a trading partnership. If this be so, then, under the authorities cited by appellant, the defendant King as the managing partner of King & Co. had implied authority to execute promissory notes on behalf of the partnership, and as plaintiff gave a valuable consideration for each of the notes herein sued upon and accepted the same as the obligation of King & Co. in good faith and without any knowledge or means of knowing that the defendant King was acting beyond the scope of his authority, the jury was justified in returning a verdict for the plaintiff, and the judgment must be affirmed.

The reason that there are no adjudicated cases in this state on this question is apparent. The Civil Code contains a complete statement of the rights, powers, and authority of partners between themselves. The distinction between general partnerships and mining partnerships, as laid down in Skillman v. Lachman and McConnell v. Denver, supra, is maintained in the Code. Thus sections 2511 and 2520, inclusive, of the Civil Code, have reference to mining partnerships. Section 2512 provides that an express agreement to become partners or to share the profits and losses of mining is not necessary to the formation or existence of a mining partnership. The relationship arises from the ownership of shares or interest in the mine and working the same for the purpose of extracting minerals therefrom. Section 2516 further provides that a member of a mining partnership may convey his interest in the mining business without dissolving the partnership, and section 2519 provides that no member of a mining partnership or the agent or manager thereof can, by a contract in writing, bind the partnership except by express authority derived from the members thereof.

Thus we see that the distinction between mining partners operating upon shares where one member may dispose of his interest without the consent of the other partners and without dissolving the partnership is carried into our Code. Bearing this in mind, we now turn to the sections of the Civil Code with reference to general partnerships, and it is distinctly stated in section 2424 that every partnership other than a special or mining partnership is a general partnership. With reference to the power and authority of partners of a general partnership, every general partner is agent for the partnership in the transaction of its business and has authority to do whatever is necessary to carry on such business in the ordinary manner, and for this purpose may bind his copartners by an agreement in writing. Section 2429, Civ. Code. In section 2430 are defined the acts which a partner has no implied authority to perform. The execution of negotiable notes is not one of the acts which a partner is by law prohibited from performing on behalf of a general partnership. Section 2431 specifically provides that even acts of a copartner in bad faith towards the other members of a partnership are nevertheless binding on the partnership, in favor of persons who have in good faith parted with value in reliance upon such acts. Section 2443 provides that the liability of general partners for each other's acts is defined by the title on agency.

Section 2319 gives an agent authority to do everything necessary or proper and usual in the ordinary course of business for effecting the purpose of his agency and to make a representation respecting any matter of fact not including the terms of his authority, but upon which his right to use his authority depends and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is made.

[3] With the adoption of the Code in this state the distinction between trading and nontrading partnerships which has been made in other jurisdictions is unnecessary, for, with the exception of mining partnerships and special partnerships, all partnerships under the laws of the state of California fall within the same class, and the same rules governing the power and authority apply, whether the partnership is engaged in the business of buying and selling merchandise for profit or engaged in any other business.

In the case of First National Bank of Dixon v. Spangler, 49 Cal. App. 133, 192 P. 874, one of the members of a general copartnership engaged in the butcher business borrowed money from plaintiff upon three promissory notes, all of which were executed by one of the defendants, but the evidence discloses that the partner executing the note represented to plaintiff that the money was to be used for the use and benefit of the copartnership. The trial court found in favor of plaintiff. On appeal the judgment was affirmed with the following observations:

> "There is no doubt that at the time said obligations were incurred, a general partnership existed between the defendants for the transaction of said business; 'that every general partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner, and for this purpose may bind his copartnership by an agreement in writing' (section 2429, Civ. Code); if such partner acts within the apparent scope of his authority, whether he acts in good or bad faith, his acts and declarations are binding upon his copartners in favor of third persons, if said third persons believe in and rely upon his statements, and upon the strength of" such evidence "extend credit or advance money to said partner for the use and benefit of the partnership."

[4] Appellant points out that in First National Bank of Dixon v. Spangler the defendants were engaged in the butcher business and that the money for which the notes were given was to purchase cattle to slaughter and that therefore the court found the defendants were general partners. We think under the sections of the Code the defendants here, being engaged in the business of draying and box manufacturing, were general partners, and therefore the rule announced in the Spangler Case, "that every general partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business * * * and * * * if such partner acts within the apparent scope of his authority, whether he acts in good or bad faith, his acts and declarations are binding upon his copartners," has application here, as the act of defendant King in borrowing money for the purposes stated was certainly within the apparent scope of his authority. As to Los Angeles Bank v. Wallace, supra, wherein appellant quotes the court as saying, "It was not a trading partnership in which it is presumed that one partner has authority to bind the others in this way," it may be said that the sentence quoted is a mere isolated sentence and is not authority that a distinction is recognized in this state between trading and nontrading partnerships. The court clearly used that sentence to distinguish the particular arrangement between the parties in that case from a partnership which is formed for carrying on a business. Its lack of authority on the point to which it is cited is readily seen by reading the paragraph from which the sentence is taken, viz.:

> "Had the bills been drawn simply to obtain money to meet the current expenses of the adventure it may be conceded that all parties would have been liable, if Wallace had the requisite authority to draw the bills, but no such claim can here be made. *The payee knew of the arrangement between the parties, and the purpose for which bills were drawn.* It was not a trading partnership in which it is presumed that one partner has authority to bind the others in this way. In fact it was not contemplated by the parties that any such thing should be done. Wallace was merely to expend the funds provided by Babcock and Collins. *He had no authority to incur indebtedness.* Nor can his authority be increased by calling the relation a partnership. The parties fixed by contract their own rights and obligations. They did not call themselves partners. If it be essential to a partnership that one should have the power to bind all by drawing bills of exchange then this was not a partnership, for Wallace had no such power." (Italics ours.)

It appears that the arrangement between the so-called partners was not for the conduct of a business; that no one had authority to incur indebtedness; that they did not even consider themselves partners; that the payee of the note had knowledge of the arrangement. In short, the court does not even declare the arrangement a partnership, but points out that, even if it were a partnership, there was an agreement that neither party had the right to incur indebtedness and this fact was known to the payee.

In the present case the negotiations leading up to the execution of the first four notes were conducted by Harry Jacobson, husband of plaintiff, who died in July, 1923. The negotiations leading up to the execution of the last two notes were conducted by Leonard Jacobson, the son of plaintiff. Leonard Jacobson testified that his father had known the defendant King since 1907, and that the witness had a conversation with the defendant King during the late summer or early fall of 1922. King stated to him that he was in need of funds for the business of King & Co., due to the fact that they were expanding and that they had a lot of freight to pay which they had to advance before they could take delivery of the merchandise and a few weeks intervened before they could make collections from their customers. The witness told King that he did not personally have any funds which he could lend him, but suggested that his father had some money on hand which he might be willing to lend him. Defendant King then communicated with the elder Jacobson, who agreed to advance $16,000. This money was advanced to King between September 7, 1922, and December 29, 1922, and is represented by four of the promissory notes. About March 31, 1923, defendant King again spoke to the witness about another loan and stated that he was pressed for money; that it was a question of expansion and he had to have funds, and asked the witness if he could arrange for more money. After consulting with his father by wire, as the latter was then in the East, he arranged a loan of $4,000 which was obtained from his grandmother, Bertha Kalisky, and a note therefor was executed. In October, 1923, defendant King again stated to the witness that he needed more money, and the witness arranged for a loan in the sum of $4,000.

At the time the last two notes were executed the witness was an employee of King & Co. The witness testified that the defendant King was in active charge of the business during the time of his employment. He met the defendant Lamb occasionally, but Lamb never gave any instructions to any of the employees of the company to his knowledge.

The business conducted by King & Co. was primarily that of draying. The witness Jacobson testified that, in addition to the drayage business, King & Co. conducted a boxing plant. He testified:

> "I know that they manufactured boxes for crating automobiles for persons other than drayage customers. * * * We boxed a lot of automobiles for the General Motors, for the Chevrolet, and for the Ford. * * * We did

not always do the drayage. * * * I went to the boxing plant at least once a month."

Defendant Lamb also testified, with reference to the boxing plant conducted by King & Co., as follows:

> "In addition to draying we manufactured boxes for the purpose of crating automobiles and other merchandise for exporting. That part of the business was carried on at Ninth and Bryant streets, * * * and I think that the rent of the place where we manufactured the boxes was about $400 a month."

It will thus be seen that the partnership was engaged in the business of manufacturing boxes for crating automobiles and other merchandise for export; and that this portion of the business was not inconsequential is evidenced by the fact that the rental of the premises where the boxing plant was operated amounted to $400 a month.

[5] There is substantial evidence in the record from which the jury could have determined, and evidently did determine, that it was within the ordinary and usual course of the conduct of the business of King & Co. to borrow money and execute promissory notes. The following testimony amply supports the verdict of the jury. Defendant Lamb testified that some of the accounts of King & Co. were pretty large and involved advancing money for freight; that all draymen have to advance freight; that when a large shipment comes in it runs into considerable money; that he had no idea how much on an average the business had to advance for freight while defendant King was in charge of the business; that he knew that defendant King represented that the firm had to advance large amounts for freight. He also testified that the business borrowed money from the Bank of California. One of the purposes of borrowing money from this source was for the purchase of the season's supply of hay at a time when the market was right, and that the defendant King attended to the selection and purchasing of the hay. During the early history of the business defendant Lamb had considerable to do with purchasing of equipment, but as time went on he trusted King more and became less active. Elmer G. Grove, bookkeeper of King & Co., testified that there was an account on the books of King & Co. entitled "Notes Payable." On January 1, 1922, there appeared upon the books of the company in this account an aggregate of $10,000, representing notes on the firm for moneys borrowed as follows: To the Bank of California, $5,000; to the Canton Bank, $2,500; and to the South End Warehouse Company, $2,500. The witness then testified from the books and records of the company that the total indebtedness evidenced by promissory notes aggregated at all times at least the sum of $10,000, and that for a very considerable period of time was in excess of $20,000, the highest amount as disclosed by the books being $28,000 on the 1st of January, 1924. Other firms from whom defendant borrowed money and executed promissory notes as disclosed by the books and records of the company during the period when King was borrowing money from plaintiff were International Harvester Company and the Bank of Italy. All of the obligations shown by the books of the company were paid in the regular course of business, some during the time that defendant King was in charge of the business and some by defendant Lamb after the disappearance of King in February, 1924.

[6] It seems that the nature of the business of King & Co. fairly and reasonably implies borrowing of money to accommodate its necessities and convenience whenever the occasion occurs. In Chumbley v. Courtney, 181 Iowa, 482, 164 N. W. 945, which was an action involving the liability of a purported partnership as well as the individual members thereof on a promissory note executed in the name of the partnership by one of the alleged partners, the Supreme Court of Iowa says:

> "The error in each was in assuming that a partner in a nontrading partnership could only be bound by the act of the other in executing a promissory note by attaching the firm name thereto where he has an express order of the other partner so to do. On the contrary, such authority may be implied from the circumstances proven, and in this case the jury might have found from the circumstances proven that, in signing the note, Courtney was authorized by O'Donnell to use the firm name."

It would seem, therefore, on the facts here, even if the distinction between trading and nontrading partnerships were recognized in this state the same result would obtain.

There is another point presented, and that is: Was express authority conferred upon defendant King? Counsel for appellant in their brief and argument filed assume that no express authority to borrow money and to execute notes on behalf of the partnership as evidence of such indebtedness was so conferred. They state that King had no power to incur any indebtedness other than for current expenses. It is true that under the original articles of copartnership, which were executed on November 1, 1906, defendant King was to manage the business subject to the approval of defendant Lamb, and was to incur no indebtedness other than for current expenses. However, on January 1, 1922, a new agreement was entered into by the terms of which it was agreed that defendant King was to purchase the interest of defendant Lamb for a specified sum, and in which agreement it was specifically stated that it was not to dissolve the copartnership, and provided that defendant King had the right to contract obligations incident to the copartnership business, defendant King agreeing to hold defendant Lamb harmless for any debts incurred by the copartnership prior to its dissolution.

Appellant urges that the court erred "in not sustaining the objections of defendants Lamb and King & Co. to the introduction of evidence of the acts and declarations of defendant King until after proof by plaintiff that King had authority to bind the partnership, his authority being specifically denied in the answer," and "in sustaining plaintiff's objection to the offering made by the same defendants to prove and show by the books of King & Co. that the moneys placed to the personal credit of defendant King were withdrawn for his personal use, and were not used in the business of King & Co."

[7] The first objection goes merely to the order of proof, which must be regulated by the sound discretion of the trial court (Code Civ. Proc. § 2042; Estate of McNamara, 181 Cal. 82, 183 P. 552; More v. Finger, 128 Cal. 313, 60 P. 933), and such discretion will not be interfered with by a reviewing court unless it has been abused to the substantial detriment of the party complaining (Bates v. Tower, 103 Cal. 404, 37 P. 385; Smeland v. Renwick, 50 Cal. App. 565, 196 P. 283).

[8] As to the second objection, that the court erred in sustaining the objection of plaintiff to a question asked the witness Elmer G. Grove, the cashier and accountant of King & Co., the record shows the following: "Q. You have stated that certain checks were placed to the personal credit of the defendant King; just state what that record was?"—to which objection was made. Thereupon the defendants Lamb and King & Co. stated to the court that if the witness were permitted to answer the question he would testify that the personal account of the defendant King was kept by the witness by direction of King, and that the items concerning which the witness has testified as having been entered to the personal credit of the defendant King were entered by the witness in that account by direction of defendant King to be charged to him personally, and that all of the sums so charged to defendant King were drawn by the defendant for his own personal use, and that none of it was in the partnership business. The court sustained the objection. We cannot see how appellant was prejudiced by the court's sustaining this objection. The money received by defendant King from respondent and her assignor was deposited in the account of King & Co. in the Bank of California along with other moneys received by the partnership in the ordinary course of business. It is conceded that authority was conferred upon King by his copartner Lamb to draw on the partnership funds at all times. Assuming that the books of the partnership disclosed that upon the same day certain of these deposits were made, defendant King's personal account was credited with an equivalent amount and that at the time of his disappearance King had overdrawn his personal account, it would in no way indicate that the partnership did not receive the benefit of the money obtained from respondent and deposited in its account. Whether defendant King misappropriated funds of the partnership or overdrew his account was no concern of respondent, nor can she be bound by the entries made in the books of King & Co., of which she had no knowledge or over which she had no control.

[9] Appellant claims error committed by the court in giving certain instructions, as follows: In instruction XV, "that King in dealing with third persons, such as the plaintiff in the action, acted as the agent of King & Co. and also George W. Lamb, his partner." This instruction is claimed erroneous in that it failed to point out that such agency could only exist when King was acting within the scope of the business of King & Co. Instruction XVI, "that King as a general partner represented King & Co. and Lamb the other partner in all his dealings with third persons." Appellant here complains that the instruction should have limited such agency to those dealings necessary or proper and usual in the ordinary course of business of King & Co. Instruction XVIII, in not limiting the agency to acting within the scope of his actual or ostensible authority instead of apparent scope of his authority. This objection may be answered in the language of the court in First National Bank of Dixon v. Spangler, supra: "If such partner acts within the apparent scope of his authority, whether he acts in good or bad faith, his acts and declarations are binding upon his copartners in favor of third persons." Instruction XIX is claimed to be misleading in stating "actual authority is such as a principal intentionally or by want of ordinary care allows an agent to believe himself to possess." Instruction XX is also claimed to be misleading in stating "to effect the purpose of his principal," instead of making use of the language of section 2319 of the Civil Code, "for effecting the purpose of his agency"; and instruction XXII, "A general partner represents a partnership and his other general partners for all purposes within the scope of his actual or ostensible authority." Civ. Code, § 2330. This is claimed erroneous in failing to call attention to or limit such application to the requirements of section 2429 of the Civil Code "in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner."

Elsewhere in its instructions the court instructed the jury:

"One general partner is deemed to be the agent of the other general partners and each is liable for the acts of the other within the scope of his authority. * * * An agency is either actual or ostensible when the principal intentionally or by want of ordinary care causes third persons to believe another his agent who is not really employed by him. * * * If you find that J. Charles King in executing the promissory note which is the subject-matter of this action in the name of King & Co. acted within the apparent scope of his authority, whether he acted in good or bad faith, his acts and declarations are binding upon his copartner in favor of plaintiff herein, if the said plaintiff believed in and relied upon his statements as to the purpose for which said promissory notes were executed, and upon the strength of said confidence agreed to advance money to the said J. Charles King for the use and benefit of the partnership of King & Co."

[10, 11] Appellant's principal objection to the instructions is not so much that they do not contain correct statements of the law, but that certain additions should have been made to limit the application of the principles involved. Taking the charge as a whole, the instructions cover the principles of law necessary to the jury's understanding of the issues and contain the limitations claimed to be omitted in the instructions complained of. Furthermore, appellant did not propose any instructions for submission to the jury. If appellant desired any particular instructions given which he deemed were necessary to a correct understanding by the jury of his theory of the case, it was his privilege and duty to request them, and he cannot now complain of the failure of the court to give instructions which it was his right to prepare and propose to the court for submission to the jury.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

91 Cal. App. 527

PEOPLE v. BRATTINGHAM. (Cr. 1584.)

District Court of Appeal, Second District, Division 2, California. May 2, 1928.

1. Criminal law 🔑1023(12)—Order made after judgment is not appealable, where court is merely asked to repeat or overrule former ruling on same facts (Pen. Code, § 1237, subd. 3).

An order made after judgment is not appealable, under Pen. Code, § 1237, subd. 3, where motion merely asks court to repeat or overrule former ruling on same facts.

2. Criminal law 🔑1023(12)—Order made after judgment is not appealable where appeal from judgment presents same question.

Appellate court will not entertain an appeal from an order made after judgment, where appeal from judgment would present precisely same question and in every way afford protection to rights of defendant.

3. Criminal law 🔑1023(12)—Appeal from order refusing to modify judgment by striking provision for additional sentence on nonpayment of fine must be dismissed, where appeal from judgment would involve determination of alleged error (Motor Vehicle Act, § 141).

Where appeal from judgment sentencing defendant, for violating the Motor Vehicle Act, § 141 (St. 1923, p. 562), to county jail, and in addition imposing fine and, on default in payment, providing for imprisonment of one day for each $2 of fine not paid, would contain everything necessary to determine alleged error in imposing additional sentence on default in paying fine, appeal from order refusing to modify judgment by striking provision for additional sentence would, in effect, allow two appeals and must be dismissed.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

A. J. Brattingham was convicted of violating the Motor Vehicle Act. From and order, denying defendant's motion for a modification of the judgment, defendant appeals. On motion by the People of the State of California to dismiss the appeal. Appeal dismissed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CRAIG, J. This is an appeal from an order denying a motion of the defendant for modification of the judgment heretofore made and entered. The judgment in question is one after verdict of guilty of the charge contained in the information accusing the defendant of a violation of section 141 of the California Motor Vehicle Act (St. 1923, p. 562). The judgment was:

> "* * * It is therefore ordered, adjudged, and decreed that the said Alfred J. Brattingham be punished by imprisonment in the county jail of the county of Los Angeles for the term of 1 year; in addition, defendant shall pay a fine of $1000.00; or defaulting in said payment, he shall be punished by imprisonment in the county jail of the county of Los Angeles at the rate of 1 day for each $2 of said fine not paid."

This was done on July 29, 1927, and the defendant was at once remanded to the custody of the sheriff. On October 1, 1927, the defendant served notice that on October 7, 1927, he would move the superior court to modify the judgment by striking therefrom the following:

> "Or defaulting in said payment, he shall be punished by imprisonment in the county jail of the county of Los Angeles, at the rate of 1 day for each $2 of said fine not paid."

It is claimed that the court was without jurisdiction to pronounce that part of the sentence sought to be stricken out. The motion was denied, and the defendant appeals. The people have moved to dismiss the appeal.

[1, 2] Appellant contends that an appeal is authorized by subdivision 3 of section 1237 of the Penal Code, which provides that an appeal may be taken from an order after judgment affecting the substantial rights of the defendant. It is also said that the court has inherent power at any time to vacate a void judgment. Generally this is true, but the rule is well established that an order made after judgment is not appealable where the motion merely asks the court to repeat or overrule the former ruling on the same facts. As said in De la Montanya v. De la Montanya, 112 Cal. 101, 44 P. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165, this is so because to permit such an appeal "would be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appealing contrary to the intent of the statute." To the same effect are Kent v. Williams, 146 Cal. 3, 79 P. 527, Alpers v. Bliss, 145 Cal. 565, 79 P. 171, and other cases.

A number of decisions cited by appellant hold that the trial court has jurisdiction to vacate or modify a void judgment, but they do not mention the question here presented; namely, Will an appellate court entertain an appeal from an order made after judgment, where the appeal from the judgment would present precisely the same question and in every way afford protection to the rights of the defendant? The authorities sustain the contention of the people upon this issue.

[3] Applying the rule to the record before us, it is apparent that upon an appeal from the judgment alone the judgment roll would contain everything necessary to a determination of the contention of the appellant, and to consider the appeal from the order refusing to modify the judgment would have the effect of allowing the right to two appeals.

It is ordered that the appeal be dismissed.

We concur: WORKS, P. J.; THOMPSON, J.

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91 Cal. App. 588

REDDING v. PETTY. (Civ. 5373.)★

District Court of Appeal, Second District, Division 1, California. May 3, 1928.

Hearing Denied by Supreme Court July 2, 1928.

1. Compromise and settlement ⇨23(3)—Evidence held not to show settlement by part payment.

In action by broker against employer to recover remainder of commission for helping negotiate sale of land, evidence that subsequent agreement between parties was only for part payment of sum due and was not in full settlement as contended by defendant *held* to support judgment for plaintiff.

2. Appeal and error ⇨1011(1)—Trial court's findings on conflicting evidence held binding on appeal.

Findings of trial court, made on conflicting evidence, are binding on appeal.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action by A. E. Redding against G. M. Petty, doing business as the G. M. Petty Realty Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. Ellis Lady, of Los Angeles, for appellant.

Bearman & Engelhardt and Marcus C. Clark, all of Los Angeles, for respondent.

WOOD, Justice pro tem. [1, 2] Plaintiff alleged in his complaint that there became due him from defendant the sum of $1,000 for services rendered at the special instance and request of defendant and that only $600 had been paid. Judgment was rendered in plaintiff's favor in the sum of $400, in accordance with the prayer of the complaint. Defendant now contends that the evidence was insufficient to support the findings.

The evidence was fragmentary, and the witnesses did not clearly explain the transaction. A careful reading of the record discloses that plaintiff testified, in substance, that he was employed as a real estate salesman by defendant, who held a broker's license; that defendant held an option on a 20-acre tract of land and agreed to give plaintiff a certain commission for negotiating its sale; that plaintiff and one Brown were attempting to make a sale to one La Tow, but encountered difficulties in completing the transaction, and thereupon each agreed with the defendant that defendant should assist in consummating the sale and that they would reduce their commission so that plaintiff, Brown, and defendant should each receive $1,000 of the total commission of $3,000; that defendant completed the sale and received in cash as part of his commission the sum of $300; that defendant at once gave $100 to plaintiff and $100 to Brown; that after the sale was made to La Tow defendant was about to go to Kentucky and plaintiff was in need of money; that thereupon, after some argument between the parties, defendant gave plaintiff a check for $500, and plaintiff signed a receipt which was written on a form commonly used in acknowledging receipts of deposits in real estate purchases, certain of the words being crossed out. As finally signed the receipt was as follows:

"Received of G. M. Petty the sum of $500 Dollars As commission in full until 5 lots is sold on frontage in Tract 6812 Goodyear Heights than $400 is to be payed 20% now Frontage means San Pedro St."

★Hearing denied by Supreme Court.

Defendant testified that the total commission received for the sale of the 20-acre tract included certain lots beside the $300 received in cash; that he, plaintiff, and Brown were to each sell a certain number of these lots; that when he made the $500 payment to plaintiff it was understood to be in full settlement and that plaintiff should receive the regular commission for any lot that he might thereafter sell; that plaintiff did in fact sell one lot for $2,500 and received a commission of $125 therefor; that defendant himself sold the other lots. Plaintiff denied that he ever agreed to take his commission "in lots." The testimony of defendant was in contradiction of the terms of the receipt accepted by him when he paid $500 to plaintiff. By the terms of this receipt plaintiff was to receive $400 additional when five lots should be sold. Both parties testified that all of the lots were in fact sold. The findings of the trial court, made upon conflicting evidence, are sustained, and we are bound thereby.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

91 Cal. App. 465

C. C. MOORE & CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 5996.)

District Court of Appeal, First District, Division 1, California. May 2, 1928.

1. Master and servant 🔑419—Industrial Accident Commission could at any time within 245 weeks alter findings and award without showing of increased disability (Workmen's Compensation Act, § 20(d).

The Industrial Accident Commission could, under Workmen's Compensation Act, § 20(d), St. 1917, p. 850, at any time within 245 weeks alter its findings and award relative to employee's injury without a showing of any increased disability, and regardless of the question of prior awards having been final so as to make matter res judicata.

2. Master and servant 🔑385(1)—As between temporary and permanent disability for same condition, employee held entitled to award for greater of the two.

Where the Industrial Accident Commission found both temporary and permanent disability, the employee was entitled, as between the two awards, to the greater.

Proceedings under the Workmen's Compensation Act by Alfred Gustafson, employee, opposed by the C. C. Moore Company, employer, and the Ocean Accident & Guarantee Corporation, insurer. To review an order of the Industrial Accident Commission awarding compensation for injuries, employer and insurer apply for certiorari. Award affirmed.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioners.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

Warren H. Pillsbury, of San Francisco, for respondent Gustafson.

TYLER, P. J. Certiorari to review an award of the Industrial Accident Commission. It appears from the petition that respondent Alfred Gustafson was injured while in the employ of petitioner C. C. Moore & Co. He fell a distance of about eight feet and fractured his right oscalis, commonly called the heel bone. Compensation was assumed and paid by petitioners and medical attention was furnished. A dispute arose over the propriety of certain medical attention and over the period of disability. Gustafson then filed an application for adjustment of claim before the commission, in which he sought a permanent injury rating. Petitioners herein contested the claim, alleging that Gustafson had neglected, refused, and failed to continue his medical treatments and had likewise failed to take up some light work, which would reduce his disability. On January 27, 1925, the commission made its findings and award, allowing total compensation from September 20, 1923, to December 5, 1924, and partial disability from and after December 5, 1924. Further medical treatment was ordered to be given, which was tendered by petitioners. Gustafson became dissatisfied with the award, and on February 27, 1925, filed a petition for a rehearing, claiming that he had been totally disabled since his injury. The petition was granted. Further hearings were had, and on May 28, 1925, the commission made its decision, after rehearing, by which it rescinded the previous findings and award and found that the right ankle joint had received a permanent injury in the nature of stiffness and pain, which entitled Gustafson to an award of 26¼ per cent. of total disability, amounting to 105 weeks' compensation in a total sum of $2,187.15. This award became final 20 days thereafter and was paid. It extended to about October 1, 1925. Thereafter Gustafson returned to work, and in January, 1926, he had an attack of weeping eczema. In February, 1926, he filed a petition claiming new and further disability. After hearing the commission made its "Order Amending Findings and Award." In this order the commission rescinded the previous orders and allowed total disability from September 20, 1923, to and including May 31, 1925; partial disability from May 31, 1925, to and including January 22, 1926. It further found the eczema to be compensable, and allowed temporary total disability from and after January

22, 1926, and ordered further medical treatment. A petition for rehearing was filed by petitioners herein on May 28, 1926, in which it was set forth that the commission acted without and in excess of its powers in that the question of the permanency of the bone condition and the need for medical attention had been previously considered, and that there was no change in condition that would justify any alteration in the award; that the medical reports showed without conflict that the eczema was not due to the injury and that the commission should not therefore have allowed any compensation for it. It was also claimed that the case was not one coming within the continuing jurisdiction of the commission, in that the only question that had been compensable was the injured ankle, which had been fully adjudicated in the award of May 28, 1925. On June 21, 1926, the petition for a rehearing was granted. On September following the commission rendered its decision, after rehearing, in which it found that the temporary disability did not exceed the period of permanent disability, viz., 105 weeks; that the illness of January 22, 1926, was not a new and further disability caused by the injury; and "that the disability caused by the injury herein does not require further surgical or medical treatment; that the disability resulting from the injury is at this time the same as heretofore found herein by the decision made and filed herein on May 28, 1925." In accordance therewith the commission annulled the order of May 20, 1926, and reaffirmed the order of May 28, 1925. Gustafson filed a petition for rehearing, which was denied October 20, 1926, and the decision after rehearing of September 20, 1926, became final.

On March 17, 1927, Gustafson filed a petition for "Supplemental Award of Medical and Hospital Expenses and Disability Compensation." In this petition it was set forth that he had, on his own initiative, on November 4, 1926, been operated upon and a fixation done to his ankle. It was claimed that this was a new and further disability for which temporary disability compensation should be granted, and that the operation was a new development that justified the reopening of the cause and the granting of the medical expenses. Petitioners herein filed an answer to this petition and set forth that the matter had become res judicata; that the applicant had waited for over a year and had received all the benefits of a permanent injury rating for his condition; and that he could not therefore claim further temporary compensation after having been paid for the condition as a permanent injury. On June 22, 1927, the commission made an order amending findings and award, in which the previous findings and award were rescinded and vacated and compensation was ordered payable for temporary total disability from September 20, 1923, to May 31, 1925, and partial temporary disability from May 31, 1925, to February 1, 1926, a total compensation of $2,187.15. It further found that there was a temporary total disability beginning November 4, 1926, to and including March 14, 1927 (18 4/7 weeks), in an amount of $386.84; that the temporary disability exceeded the permanent disability, and the employee was entitled to the greater amount; that the operation of arthrodesis of the ankle established that said operation was necessary to cure and relieve from the effects of the injury; and that the operation constituted a change in the disability that permitted the commission to take jurisdiction of a new and further disability. The medical expense for the operation was also allowed, the exact amount to be ascertained at a later hearing. The award was for a total of $2,573.99 for disability as against the previous disability rating of $2,187.15. Gustafson filed a petition for a rehearing, claiming that he was entitled to a continuing temporary total disability from the date of the accident. Petitioners herein also filed a petition for a rehearing, claiming that the decision of May 28, 1925, fixing a condition of permanent disability of 26¼ per cent., had become final; that there was never any change in applicant's condition or subsequent thereto and the adjudication had therefore become res adjudicata as to both parties; that the later decision upon rehearing entered September 28, 1926, reaffirmed this previous final award and found specifically that the injury did not require further medical treatment and that this award also became final and binding upon the parties. On August 2, 1927, the commission entered an order denying a rehearing to each party.

[1] It is here claimed in support of the present petition that the commission in rendering said decision upon rehearing and in entering said award against petitioners acted without and in excess of its powers, as the evidence shows without conflict that the condition in ankle did not change after May 28, 1925, at which time it was held that medical attention was not indicated and that the condition was a permanent one; that this adjudication became final and it was reaffirmed on September 20, 1926, which decision also became final; that it was specifically found in the latter decision that no further medical or surgical aid should be given, and that there had been no change in the condition of the applicant's foot; that the entire issue therefore had become res adjudicata. Since the filing of this petition our Supreme Court has had occasion to construe section 20 (d) of the act of 1917 (St. 1917, p. 850), enlarging the continuing jurisdiction of the commission beyond that which had obtained under the Act of 1913 (St. 1913, p. 279). In the case of Bartlett Hayward Co. v. Industrial Accident Commission (Cal. Sup.) 265 P. 195, it is held that the Legislature by the enactment of sec-

tion 20 (d) of the Workmen's Compensation Act of 1917 enlarged the continuing jurisdiction of the Industrial Accident Commission beyond that which had obtained under the act of 1913, so as to embrace the power of the commission to rescind, alter, or amend its orders, decisions, and awards within the period of 245 weeks upon good cause appearing, without the necessity of any showing that the applicant's disability had recurred, increased, diminished, or terminated. The decision is here controlling.

[2] Further objection is made to the award because of the fact that the commission has awarded the applicant both permanent and temporary disability for the same condition. As between temporary and permanent disability the applicant was entitled to the greater of the two, and this is all he has been awarded. National E. Corp. v. Ind. Acc. Com., 193 Cal. 422, 225 P. 2. The award is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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91 Cal. App. 585

KELLER v. LILE et al. (Civ. 5803.)

District Court of Appeal, Second District, Division 1, California. May 3, 1928.

1. Replevin 🔑72—Evidence held to sustain finding that stock certificate transferred by plaintiff to defendant was in payment for defendant's services, in action to recover possession thereof (Code Civ. Proc. § 509 et seq.).

In action under Code Civ. Proc. § 509 et seq., to recover possession of stock certificate claimed to have been transferred to defendant to sell on behalf of corporation, evidence *held* to sustain finding that stock was issued in consideration of services rendered by defendant in making survey on claims of the mining company, and that plaintiff was therefore not entitled to recover it.

2. Appeal and error 🔑1010(1)—Findings of trial court supported by evidence are conclusive, though based largely on depositions.

Fact that all of evidence, or nearly all of it, introduced in trial court, was in form of depositions, *held* not to alter rule that findings of trial court are conclusive if supported by evidence.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by Kent E. Keller against Richard Lile and others, doing business under the fictitious firm name and style of A. C. Wagy & Co. Judgment for defendants, and plaintiff appeals. Affirmed.

Henry Schaefer, Jr., and Raymond V. Haun, both of Los Angeles, for appellant.

Mitchell, Silberberg & Davis, of Los Angeles, for respondents.

WOOD, Justice pro tem. Plaintiff, the owner of a number of mining claims in the state of Arizona, transferred the claims to the White Hills Mining Company, a corporation of which he was manager, and received about 750,000 shares of the stock of the corporation in exchange therefor. This stock was placed in escrow under permits from the corporation commissioners of California and Arizona, by which he was authorized to sell the stock to the public. The record does not disclose the terms of the escrow nor of the permits under which plaintiff was authorized to sell. Defendant Lile and one Colton were college students making a survey upon the claims of the company. A question arose as to whether Lile and Colton would remain at work until the survey was completed, and plaintiff promised them each a bonus if they would stay with the work until its completion. The survey was completed and Lile left Arizona. Thereafter a certificate representing 5,000 shares of the capital stock of the company was mailed by plaintiff to Lile. A similar certificate was mailed to Colton. Lile caused the certificate to be delivered to defendant Wagy to be sold. The stock delivered to Lile was treasury stock of the company, but after it was mailed to Lile plaintiff paid the company for it in cash. Plaintiff commenced this action to recover possession of the stock certificate, which was seized by the sheriff and thereafter delivered into the possession of the plaintiff by virtue of the provisions of sections 509 et seq. of the Code of Civil Procedure. The trial court found that Lile was the owner and entitled to the possession of the stock certificate, and rendered judgment for its return to Lile and for damages occasioned by plaintiff's action in having it seized.

[1] The record discloses a sharp conflict between the testimony of Keller and that of Lile. While Keller did not deny that a bonus had been promised to Lile, he testified that the stock in question had been mailed to Lile for the sole purpose of enabling Lile to sell it on behalf of the corporation, for which Lile was to receive a commission of 20 per cent. of the selling price. Lile, on the other hand, testified that the stock had been sent to him in accordance with the previous agreement with Keller whereby he was to receive a bonus for services rendered. He stated that Keller had promised him at least 5,000 shares of the capital stock of the company as a bonus if he would complete the survey and that the same promise had been made to Colton; that Keller had said that he "had enough personal stock to take care of us all." He further testified: "Q. Well, he indicated to you that any stock he would give you from his personal stock, didn't he? A.

No; he didn't indicate that, other than my statement." The trial court found that the stock was issued to Lile "in consideration of services rendered * * * in surveying and mapping properties of White Hills Mining Company." The court also found that the stock was not "issued for the purpose of having Richard Lile make a sale of said stock and return the proceeds thereof to plaintiff, less a 20 per cent. commission." The findings are sustained by the evidence. Plaintiff promised 5,000 shares to Lile and, in keeping with his promise, he caused that number of shares to be issued and delivered. The fact that the stock was, at the time of its issue, treasury stock, cannot alter the situation, since plaintiff subsequently made payment for it to the corporation. Even if it be held that plaintiff had agreed to deliver only his "personal" stock, he would not be in position to complain, for he now asserts that the stock delivered is in fact his personal stock.

[2] All of the evidence was in the form of depositions, except the testimony of plaintiff, who appeared in person at the trial. Appellant now argues that the reviewing court has the same opportunity to weigh the evidence as had the trial court, and therefore the general rule that the findings of the trial court are binding should not prevail. The fact that most, or even all, of the evidence, may be in the form of depositions, does not alter the rule referred to. The findings of the trial court must control if supported by the evidence. There being ample evidence to sustain the findings, the judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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91 Cal. App. 364

MONROE v. SWITZER et al. (Civ. 5125.)

District Court of Appeal, Second District, Division 2, California. April 26, 1928.

1. Automobiles ⚷244(10)—Plaintiff's evidence held to make out case of truck driver's negligence in making left turn at intersection, requiring trial on merits (Motor Vehicle Act, § 129).

In action for damages growing out of collision between plaintiff's automobile driven by his daughter and defendant's motortruck when latter made a left turn at intersection in violation of Motor Vehicle Act, § 129 (St. 1923, p. 558), plaintiff's evidence *held* sufficient to make out case of truck driver's negligence proximately causing accident requiring trial on merits, and court erred in dismissing case at end of plaintiff's evidence.

2. Appeal and error ⚷1011(1)—Appellate courts will not disturb finding where there is more than inconsequential conflict in evidence.

Appellate courts will not disturb a finding where there is more than an inconsequential conflict in the evidence.

3. Negligence ⚷136(8, 10)—On conflicting evidence negligence is question for jury, but if evidence is undisputed and only one reasonable conclusion can be drawn, it is for court.

When evidence is conflicting, question of negligence is for jury to determine under proper instructions, but where facts are undisputed and only one reasonable conclusion can be drawn, question is one of law for the court.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Lewis A. Monroe against J. Gordon Switzer, the Pauley Oil Company, and others. From an adverse judgment, plaintiff appeals. Reversed.

Chauncey Gardner, of Los Angeles, for appellant.

George L. Greer and George W. Seith, both of Los Angeles (Louis P. Pink, of Los Angeles, of counsel), for respondent.

STEPHENS, Justice pro tem. This case arose from a collision between a truck driven by the defendant Switzer and owned by the defendant Pauley Oil Company, a corporation, and plaintiff's Studebaker automobile. Dismissal was entered as against all of the defendants except Pauley Oil Company. The action was tried by the court without a jury and judgment rendered that plaintiff take nothing and that the defendant corporation recover its costs.

[1] The facts are as follows: The truck was traveling easterly on Whittier boulevard, a thoroughfare of Los Angeles county, while the Studebaker, a passenger car, was proceeding in the opposite direction upon the same road. The machines collided west of the westerly line of Guirado road, an intersecting street, and north of the northerly line of the traveled thoroughfare. Both cars nosed together northerly and cut 3 or 4 feet into the porch of a small grocery store at a point 19 feet west of the westerly pavement line of the intersecting street and 21 feet north of the northerly pavement line of the thoroughfare. There was testimony that the automobile was traveling 12 or 14 miles per hour and the truck between 20 and 25 miles per hour, and that the truck driver gave a signal for a left-hand turn. There was testimony also that the truck was on its left side of the street when about 60 feet from the intersection, and that it left the paved portion of the thoroughfare about 20 feet from the west line of Guiardo road and continued northerly to the point of collision a few feet from the store porch, into which both machines ploughed.

The conclusion is compelling that the driver of the truck was "cutting the corner," or, to quote from a statement made from the bench by the trial judge:

"The truck, as far as the evidence shows—and of course for the purpose of a nonsuit it must be taken as strongly as possible for the plaintiff—the evidence shows that the truck turned before it reached the intersection; that it, to use the ordinary expression, cut the corner, in other words, had not come to or passed beyond the point where the button would have been had there been a button indicating the center of the intersection; in other words, the truck turned and cut the corner and got off the highway altogether."

One witness, driving his own car, testified as follows:

"But my attention was drawn to him [the truck driver] by the fact that he seemed to be quite a considerable distance this [the westerly] side of the intersection, and I was naturally curious to know what he was doing; and when I saw him, as it were, heading for the building, then I looked again, and it occurred to me at that time he was in the middle of the road, that his truck was in trouble; it looked as though he was having trouble with his truck; then my attention was drawn to my own car. I wanted to get past."

Another witness testified:

"Q. Was the truck on the north side of Whittier boulevard when you first noticed it? A. He was coming on the Camino Real, the Real Road, in front of the pool room.

"Q. Was he upon the north or south side of the road? A. To the north. He was leaning to the north, to the left.

"Q. He was, then, driving east on the wrong side of the road, the left-hand side of the road; is that right? A. He was coming wrong then. He was out of his route.

"Q. He was out of his route? About how far back was that from the intersection of Guirado road? A. Oh, more than 60 feet.

"Q. When did you first see the Studebaker automobile? A. Precisely I saw it—I was sitting in front of the porch just out, and I saw the Studebaker and I concluded she was going to pass, and in getting to the store the truck driver made a quick movement and that caused a collision—that is what occasioned the accident or the collision."

On cross-examination, the same witness testified:

"A. I could see the driver [of the truck], yet, at the wheel, I certainly did.

"Q. Did he have both hands on the wheel or was he fooling with the gears? A. No, he was working with the wheel, as near as I can remember."

An eyewitness to the collision testified:

"Q. And then she [the driver of the Studebaker] turned northwest so as to land up in front of the store at the time that she and the truck collided? A. Yes. She went off the road into the dirt."

The driver of the Studebaker testified that she was rendered unconscious by the collision and did not recover for about two weeks, and does not remember anything regarding the accident. There was testimony from other witnesses, no part of which is inconsistent with that above quoted or referred to. Defendant offered no evidence.

The trial court found in paragraph II of its findings:

"That the same [the truck] was neither carelessly or negligently operated * * * or [operated] in such a manner as to cause said truck to collide with plaintiff's automobile or to damage the same."

And in paragraph III:

"That neither the carelessness or negligence of the defendant corporation was the proximate cause of the collision or the damage suffered by plaintiff."

The evidence as it stands shows the truck to have been traveling westerly at about 20 miles per hour, and then, with a turn to the left, heading practically at right angles to the road, straight at the front of the store. It places the Studebaker car on its own right and proper side of the road, traveling at a lawful speed and turning to the right off the road. There is no word of criticism with the operation of the Studebaker, and the court finds that it was operated without negligence. As the evidence stands, no reasonable construction thereof could produce any other conclusion than that the collision would not have occurred except for the turning of the truck in this unusual manner and place, and unless there is something to excuse these acts—which as it appears from the testimony amounted to gross carelessness and a violation of section 129 of the Motor Vehicle Act (St. 1923, p. 558) as well—there is no evidence supporting that part of findings Nos. II and III above quoted.

Upon the plaintiff's resting, counsel for defendant made a motion for nonsuit, whereupon the trial judge made an extended statement which closed with the following:

"Now, I will say very frankly that while I am to some extent in doubt upon a motion for a nonsuit, yet if the defendant were to simply rest the case on the evidence now before the court, I would have to find for the defendant, solely because the plaintiff has not shown any negligence."

Counsel for respondent apparently "took the hint" from these remarks that he need not put on any testimony in order to win the case, and rested without offering any.

[2, 3] In our opinion, there is no escaping the conclusion that the evidence referred to established negligence. While we are cognizant of the rule that Courts of Appeal will not disturb a finding where there is more than an inconsequential conflict, a thorough review of the evidence convinces us that no such conflict exists in this case, and that the entire circumstance points with certainty and unavoidably to the fact that such negligence was the proximate cause of the accident. "When evidence is conflicting, the question of * * * negligence * * * is one for

the jury to determine under proper instructions from the court; but where the facts are undisputed, and the dictates of common prudence point to only one reasonable conclusion, the question is then one of law for the court." Smith v. Associated Oil Co., 53 Cal. App. 143, 199 P. 880. We think there should be a new trial and that the issues of negligence and contributory negligence, as well as all other issues raised by the pleadings, should be considered and determined.

Judgment reversed.

WORKS, P. J. I concur in all that is said in the foregoing opinion and in the conclusion reached by it, but I think the conduct of the trial judge, as shown by his remarks in dealing with the motion for a nonsuit, should not pass unnoticed. As he felt a doubt upon the question as to the disposition of the motion, he should have denied it. Bush v. Weed Lumber Co., 55 Cal. App. 588, 204 P. 24. Instead of taking that course, however, he invited respondent to rest its case upon the evidence presented by appellant so that he might weigh what he considered to be conflicting evidence, a thing he could not do in considering the motion. Counsel quite naturally accepted this unusual invitation and withdrew the motion, with the result that, while a serious accident had occurred, a young woman had been badly injured, an automobile had been demolished, the plaintiff in an action to recover for the loss of the car was in moral effect denied a trial on the merits. He was also denied compensation for an admitted loss, one for which it was decided that his daughter, the driver of the car, was not responsible, a strange outcome, indeed.

In disposing of cases upon appeal it is usually necessary for courts of review to suffer in silence over exhibitions of the idiosyncracies of some trial judges, but in the interests of justice it seems proper that silence be broken in the present instance. We should take the time and the space necessary to condemn this novel method of making disposition of attempts to procure justice at the hands of the courts.

I concur: THOMPSON, J.

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91 Cal. App. 428

CALDWELL et al. v. RICHARDS et al.
(Civ. 6162.)

District Court of Appeal, First District, Division 2, California. April 30, 1928.

1. Appeal and error 🔑1011(1)—Conflict in evidence must be resolved in favor of trial court's findings.

On appeal, conflict in evidence must be resolved in favor of the findings of the trial court.

2. Partnership 🔑20—Pledge by defendants of their credit to enable plaintiffs to secure loan for purpose of assisting promoter held not to have constituted "partnership" transaction (Civ. Code, § 2395).

Where defendants, in signing promissory note payable to plaintiffs, merely pledged their credit to enable plaintiffs to secure a loan for purpose of assisting promoter in building a factory, *held* that transaction did not constitute a "partnership" within Civ. Code, § 2395.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Partnership.]

3. Joint adventures 🔑4(2)—Partnership 🔑84—Either partner or joint adventurer may, on proper showing, claim contribution (Civ Code, §§ 1432, 2412).

Since either a partner or a joint adventurer may, under Civ. Code, §§ 1432 and 2412, on a proper showing, be entitled to contribution it was immaterial whether evidence in action on promissory note, wherein plaintiffs claimed contribution, established a partnership or a joint adventure.

4. Joint adventures 🔑4(2)—Plaintiffs held not entitled to contribution for loss of money loaned to promoter, on theory of joint adventure, where loss was result of unwarranted actions of plaintiffs.

Where defendants signed promissory note, payable to plaintiffs, to enable plaintiffs to secure loan for purpose of assisting promoter in building factory, *held* that plaintiffs were not entitled to contribution on loss of such loan on theory of joint adventure, where money was to have been disbursed by plaintiffs on certain conditions and with certain safeguards, but none of them was followed by plaintiffs.

5. Joint adventures 🔑4(2)—That one of plaintiffs, seeking contribution on theory of joint adventure, did not sign note executed to obtain loan until later, held not to entitle him to recover.

In action for contribution on theory of joint adventure on promissory note executed by defendants to plaintiffs to enable latter to secure loan for purpose of assisting promoter in building a factory, fact that one of plaintiffs did not sign note payable to bank which loaned money until after it had been signed by other plaintiffs, and after money had been paid, did not entitle such plaintiff to recover, where such plaintiff attended meetings, and knew of agreement for loan of money.

6. Trial 🔑62(1)—Sustaining objection to testimony in rebuttal of good faith of plaintiffs held not error, where good faith was admitted by defendants, and propriety of testimony as rebuttal was not shown.

In action on promissory note executed by defendants to plaintiffs to enable latter to secure loan for purpose of assisting promoter in building a factory, and which money said promoter absconded with, sustaining objections to testimony of one of plaintiffs in rebuttal tending to show good faith of plaintiffs *held* not error, where defendants admitted the good faith of plaintiffs, and it was not shown that such testimony was in rebuttal.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action on a promissory note by I. E. Caldwell and others against J. S. Richards and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

E. A. Klein and R. W. Henderson, both of Bakersfield, for appellants.

F. E. Borton, James Petrini, and Borton & Petrini, all of Bakersfield, for respondents.

BURROUGHS, Justice pro tem. This is an action upon a promissory note. The answer admits the execution of the note, but as a special defense alleges that the same was understood and intended between the plaintiffs and the defendants to operate as a contract of indemnity, and not otherwise; and that no liability has been incurred by the defendants by virtue thereof. The court found in accordance with said special defense, and adjudged that plaintiffs take nothing by their action, and that defendants recover their costs of suit.

Plaintiffs appeal from the judgment, and in support thereof contend that the court erred in concluding that the facts constituted "a contract of indemnity" and not "a partnership arrangement."

A fair statement of the case as shown by the evidence follows: At the time of the transaction hereinafter set out, the plaintiffs and defendants were business men and property owners in Oildale, Kern county, Cal., and were mutually interested in the welfare and progress of the community.

A short time prior to November 28, 1923, one H. E. Gove represented to the parties hereto that he was a manufacturer engaged in the business of manufacturing water heating appliances in the city of Los Angeles; that he intended to move his factory from Los Angeles to Oildale or Bakersfield. He discussed the subject with the people of Oildale with the result that a meeting was called to be held in the community club of the schoolhouse. This meeting was attended by all three plaintiffs and a large number of the defendants. At this meeting Gove outlined his project and asked the citizens to loan him the sum of $5,000 and secure him a factory site. No definite action was taken at this meeting.

[1] Later another meeting was held in the office of Justice of the Peace Ed. Gilroy. This meeting was also attended by all three plaintiffs and a large number of the defendants. There is considerable disagreement among the witnesses as to what transpired at the meeting, but, under well-settled principles of law, the conflict must be resolved in favor of the findings of the court. Moss v. Smith, 181 Cal. 519, 185 P. 385; Estate of Johnson, 182 Cal. 642, 189 P. 280. With this cardinal principle of law in mind, the evidence shows that the parties present at the meeting undertook to raise the loan for Gove and also procure him a factory site. The money was to be procured by a loan evidenced by the promissory note of all the parties in favor of the Security Trust Company of Bakersfield, where they expected to obtain the money. In accordance with said understanding, such a note was prepared and signed by the plaintiffs and all of the defendants who were present at the meeting. A factory site was also purchased at a cost of $900, and another promissory note for that sum was executed in favor of the owner of the land. This land was conveyed to Gove, but, due to some defect in the instrument of conveyance, title never vested in Gove, and it was subsequently sold for $1,200; the proceeds of the sale being used to pay the $900 note and accumulated interest, and the balance being applied by Mr. Caldwell to the note here in suit. A document was also prepared at this meeting containing the conditions under which the $5,000 was to be used. This instrument could not be produced at the trial, and the court received parol testimony of its contents. It was written in long hand by the plaintiff Johnson, and provided that the money, after being procured from the bank, should be placed in escrow along with $10,000 which Gove was to raise in Los Angeles, and that the full amount should constitute a building fund to be paid out as work on the factory progressed, the money to be disbursed upon the signature of said Gove and the defendant Asa Arratt, said disbursements also to be approved by the plaintiff I. E. Caldwell. This evidence was contradicted, but it was found by the court to be true. There was evidence that, before the money was to be placed in escrow as a building fund, said Gove was to take it with him to Los Angeles, with the deed to the land, for the purpose of showing the parties from whom he expected to obtain the $10,000 that he actually had the sum of $5,000 and a building site. However, this evidence was contradicted, and, as we have already pointed out, the court having found against it, we are bound thereby.

Plaintiffs Gann and Johnson were appointed to negotiate the loan at the bank. Subsequently they called upon the Security Trust Company at its banking house, but were advised by an officer of the bank that it would not accept the note with so many signatures, but would loan the money on the note of the three plaintiffs, and it was suggested by the officer that the plaintiffs obtain a note from the other signers to protect themselves. A note was thereupon prepared to the bank and also a note to the three plaintiffs. The latter was passed around for the signatures of the original signers to the $5,000 note. It was signed at various places, and the names of those signing the new note were erased from the original note. Thereafter the note executed to the bank was presented by Johnson and Gann, and the money obtained and delivered to Gove without any of the safeguards provided for by the agreement between the parties which the court found to exist. It appears, from the evidence of the plaintiff Caldwell, that he did not sign the note to the bank until two or three days after it had been signed by his coplaintiffs. It also appears that Gove has disappeared, and that no factory has been built. It is further in evidence that upon the completion of the factory the $5,000 loan was to be secured by a mortgage thereon.

[2] Plaintiffs claim that the facts constitute the transaction one of partnership, and cite in support of this theory section 2395 of the Civil Code, which provides:

> "Partnership is the association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them."

No decisions are cited in support of this view, but we are of the opinion that the recital of the foregoing facts in conjunction with the section of the Civil Code just cited negatives this contention. Under the findings of the court, the parties merely pledged their credit to secure a loan for the purpose of assisting Gove in building a factory in Oildale, and it does not constitute a partnership transaction.

[3, 4] Plaintiffs claim that the action was tried on the theory of contribution. Conceding, without deciding, that in an action upon a promissory note, without further or different pleadings, the plaintiffs may claim contribution, it then becomes immaterial whether the evidence establishes a partnership or a joint adventure, for in either case, upon a proper showing, the plaintiffs would be entitled to contribution. Section 2412, Civ. Code; section 1432, Civ. Code; Sears v. Starbird, 78 Cal. 225, 20 P. 547; Kazman v. Light, 53 Cal. App. 732, 200 P. 768.

The trial court found that plaintiffs were not entitled to contribution or to a judgment because the loss incurred was not a loss for which the defendants were responsible or to which they agreed to contribute. The court found upon substantial evidence that the money was to be disbursed by plaintiffs upon certain conditions and with certain safeguards, none of which was followed. Therefore the money having been lost, not as a result of the joint adventure of the parties, but by the independent and unwarranted action of the plaintiffs, the latter cannot recover.

[5] It is also claimed that in any event the plaintiff Caldwell was entitled to recover. This contention is based upon the fact that Caldwell did not sign the note at the bank until two or three days after it was signed by the other plaintiffs, and after the money had been paid to Gove. Conceding these facts to be sustained by the evidence, it is undisputed that Caldwell was present and participated in the meeting at which the agreement concerning the method of handling the money was reached; also that he was one of the payees named in the note. It is therefore clear that his signing the note at the bank was not an afterthought. If the money had been paid to Gove previous to said plaintiff affixing his name to the note, his failure to ascertain that fact and refuse to become a party to the deal could not add to the liability of the defendants.

Another ground urged for a reversal of the judgment is that the court's findings numbered 8 and 9 are not sustained by the evidence. Finding No. 8 is to the effect that there is no evidence to establish the fact that recovery of the money so delivered by plaintiffs to Gove cannot be recovered or that plaintiffs have made a reasonable effort to recover the same. Finding No. 9 is that plaintiffs have not paid the promissory note signed by them and delivered to the Security Trust Company. Having held that under the agreement between the parties the defendants are not liable to the plaintiffs, these findings become immaterial, and no useful purpose would be served by examining the evidence and passing upon said findings. Brison v. Brison, 90 Cal. 323, 27 P. 186; Coyle v. Lamb, 123 Cal. 264, 55 P. 901; Dalton v. Pacific Electric Ry. Co., 7 Cal. App. 510, 94 P. 868.

[6] The last assignment urged is that the court erred in sustaining an objection to the following question asked of the plaintiff Caldwell, on his examination in rebuttal of the defendants' case:

> "Q. After you learned that—you came to the conclusion that Mr. Gove was not acting in good faith, did you consult an attorney with regard to bringing any proceedings against him? A. Yes, sir.
>
> "Mr. Borton: Objected to as irrelevant and immaterial, not in rebuttal of anything.
>
> "The Court: I don't see what that is rebuttal of; what difference does it make?
>
> "Mr. Henderson: I just want to show he acted in good faith in the matter.
>
> "Mr. Borton: I don't doubt that at all.
>
> "The Court: I don't care to go into that.
>
> "Mr. Henderson: All right, your honor."

In support of this alleged error, appellants say in their brief:

> "It may fairly be assumed that they proposed to show just what they did to recover the $5,000 advanced to the promoter, Gove, and that they learned that no recovery could be had against him. The plaintiffs were certainly entitled to present these matters. The court refused to allow them to present this line of evidence, and then proceeded to make an additional and voluntary finding against them, negativing such testimony as they introduced. It was, of course, necessary and proper that the plaintiffs should show that they had in good faith exhausted all means to recover the $5,000 loaned to the promoter and that the sum could not be recovered and that sum was hope-

lessly lost. The ruling of the court deprived them of that right."

There are several answers to this claim. Finding 8, toward which counsel's objection is directed, has already been held to be an immaterial finding. One of the grounds upon which the court sustained the objection was that the evidence sought to be elicited was not in rebuttal. Counsel have not pointed out, nor have we been able to find, any evidence in defendants' case of which the foregoing would be rebuttal testimony; and no request was made to allow it to go into the record as part of the plaintiffs' main case. Counsel for plaintiffs further stated that the object of the offered evidence was to show the good faith of the witness, whereupon counsel for defendants admitted the good faith of the witness. Under these circumstances the ruling of the court did not constitute error.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

91 Cal. App. 400

KLEIN v. LANGE et al. (Civ. 6190.)

District Court of Appeal, First District, Division 1, California. April 30, 1928.

1. Fraudulent conveyances 🔑295(1)—Evidence held to support conclusion that client fraudulently conveyed land in which attorney had interest under contract giving such interest for services.

In action to establish ownership of interest in real property under contract giving attorney interest therein as fee for services, evidence *held* sufficient to support conclusion that litigation mentioned in contract was settled prior to trial, and, as result, property was deeded to client, and that various transfers were made in furtherance of conspiracy to defraud attorney.

2. Appeal and error 🔑1011(1)—Finding of trial court on motives of defendants in making conveyances, based on conflicting evidence, held conclusive on appeal.

In action to establish ownership of interest in real property, finding of trial court on motives of defendants in making conveyances based on conflicting evidence *held* conclusive on appeal.

3. Attorney and client 🔑147—Contract giving attorney interest in realty for services which did not prevent settlement, and provided for payment in that event, held legal.

Contract providing that attorney receive interest in realty as fee which did not prevent client from settling case at any time, and contained provision for payment to attorney of agreed amount in case of settlement, *held* not illegal.

Appeal from Superior Court, Kern County; Erwin T. Owen, Judge.

Action by E. A. Klein against Carl J. Lange and another, to establish ownership of real property. Judgment for plaintiff, and defendants appeal. Affirmed.

Joseph Scott and A. G. Ritter, both of Los Angeles, for appellants.

H. E. Schmidt and Emmons & Aldrich, all of Bakersfield, for respondent.

KNIGHT, J. The purpose of this suit was to obtain a decree adjudging plaintiff to be the owner of an undivided one-fourth interest in a tract of land in Kern county, of which interest he claimed to be the owner under the terms of a written contract entered into between him and the defendant Carl J. Lange, as attorney and client respectively; also to reform the description of the land set forth in said contract. A decree was granted as prayed, and defendants appeal.

The contract is dated May 8, 1919, and recites that Lange, claiming to be the owner of the land in question, the record title to which stood in the name of his codefendant, Anna A. Lange, instituted suit against the latter to establish his title thereto, but "had no means to proceed with said action," and that therefore, in consideration of the past services rendered by respondent as Lange's attorney in connection with the institution of such suit, it was agreed as follows:

> "That the party of the first part (respondent) shall receive as and for his compensation for services already rendered and to be rendered including the trial of said action, if the same shall go or proceed to trial, 25 per cent. of whatever the said party of the second part shall receive or be allowed in the way of a settlement, or, if no settlement shall be reached before the trial of said action, one-third of whatever may be awarded to said party of the second part (Lange) by way of a judgment or decree of settlement after trial. The selection of said lands hereby transferred to said Klein shall be by mutual selection, but, if the said parties cannot agree upon said selection, then a selection should be made by lot of such percentage, but said land to be in a compact situation."

Then, after providing for the payment of respondent's services in cash in lieu of an interest in the property, at Lange's option, and for the advancement of costs by respondent, also that respondent had the right to substitute other attorneys in his place at his expense, the contract continues as follows:

> "The said party of the second (part), therefore, hereby conveys, transfers, and assigns, absolutely and forever, free and clear from any and all incumbrances, such percentage as aforestated out of said lands described as above."

The contract contains additional provisions, but the same are unimportant so far as the determination of this appeal is concerned.

The complaint alleged that plaintiff fully performed his part of the contract, but that, after the contract had been executed, Lange and Mrs. Lange "made and entered into a settlement wherein and whereby the said Carl J. Lange received a conveyancé of said lands and the whole thereof." It was further alleged:

> "For the purpose of deceiving and defrauding the plaintiff out of his share and portion of the said lands, under the terms of said agreement, the said defendants conspired together and caused the said conveyance of said lands to be made to one Johan Jarchow; that the name Johan Jarchow is fictitious, and that in truth and fact, the said Johan Jarchow and the said defendant, Carl J. Lange are one and the same person and that the said fictitious name, Johan Jarchow was used by the said Carl J. Lange as a subterfuge to conceal from this plaintiff the fact that the said defendant Carl J. Lange had recovered and acquired the said lands and the whole thereof as conditioned in the said agreement, all of which was well known to the said defendant Anna A. Lange at the time of the execution of the said conveyance;" and "that plaintiff did not discover the said fraudulent acts of said defendants until within 60 days immediately preceding the commencement of this action."

The answer consisted of denials of the allegations of the complaint.

The court found for plaintiff on all contested issues, and a decree was entered accordingly, correcting the description of the property, adjudging plaintiff to be the owner of an undivided one-fourth interest in said land, and impressing the same with a trust for the benefit of respondent's interest.

Summarizing the main points urged by appellants for a reversal, they are to the effect that the judgment is contrary to the evidence; that the proof adduced shows that the litigation which respondent was employed as attorney to institute and carry on did not terminate in such a manner as to entitle respondent to any relief under the contract; and that consequently respondent was restricted in the exercise of his remedies against Lange to either an action on quantum meruit for the services performed or to an action for damages for breach of contract.

The record discloses that the action of Lange v. Lange, which respondent was employed to prosecute, was instituted April 27, 1919; that, after a demurrer to complaint had been filed and overruled, the defendants answered, and the cause was set to be tried on September 25th of the same year; that respondent was ready to proceed with the trial, but, on account of a criminal case having the right of way, the case was dislodged from the calendar. In the meantime, the evidence shows, respondent had expended approximately $300 in connection with the case, $230 of which was money advanced to Lange. Subsequent to September 25, and shortly after the case had been displaced on the trial calendar, Lange requested respondent to substitute other attorneys, which the latter refused to do, and thereafter, on October 6, 1919, pursuant to a notice of motion made by Lange to that effect, other attorneys were substituted by court order, but on October 27, 1919, the substituted attorneys withdrew from the case, and on the same day Lange, in propria persona, filed a dismissal of the action.

About a year subsequently, the evidence shows, Lange and Mrs. Lange started to juggle the title to the property by means of a series of transfers executed through the instrumentality of two fictitious persons admittedly created by them for that purpose. One of the fictitious persons was designated "Johan Jarchow," and the other was "Mrs. Marie McGinnis, a widow," and appellants further admit that they represented themselves before notaries public as being respectively Johan Jarchow and Mrs. Marie McGinnis, a widow, and as such executed and acknowledged instruments of conveyance and powers of attorney, which they caused to be recorded, and pursuant to which the title to said property was transferred.

The details of these transactions were as follows: On March 22, 1920, Anna Lange executed a grant deed of the property to the fictitious Mrs. Marie McGinnis. On May 19, 1920, Marie McGinnis by and through her attorney in fact, Carl J. Lange, and Carl J. Lange and Anna A. Lange, his wife, as trustors, made a deed of trust covering the lands in question to a Los Angeles bank, as trustee, to secure the payment of a promissory note, attorney's fees, costs, etc. On September 14, 1920, Lange and his wife made a quitclaim deed to the property to Mrs. Marie McGinnis. On September 25, 1920, Mrs. Marie McGinnis executed a quitclaim deed before a notary covering the property to Johan Jarchow, and on the same day a power of attorney was executed by Johan Jarchow to Lange, after which, and still on the same day, Johan Jarchow executed a grant deed conveying said property to Mrs. Anna A. Lange, but the deed last mentioned, to Mrs. Lange, was not recorded until March 17, 1921. It thus affirmatively appears that on September 25, 1921, the entire property was deeded to Lange in the fictitious name of Johan Jarchow, and that title of record remained in that status until March 17, 1921, during which period of time, the evidence further shows, a suit for an injunction was instituted in Jarchow's name against the tenants of the property, and that the complaint therein was verified by Lange as the agent of Jarchow. It was further established that, subsequent to the recordation of the deed from Jarchow to Mrs. Lange, Lange and his wife joined in certain leases and contracts involving the property to various persons, one of whom afterwards assigned his lease, and the assignee subsequently deeded the same to the Langes.

[1] The foregoing evidence is amply sufficient, in our opinion, to support the conclusion reached by the trial court that the litigation mentioned in the contract was settled by the parties prior to trial, as a result of which settlement the property in question was deeded to Lange on September 25, 1920, in the fictitious name of Johan Jarchow, and that the various transfers made by the Langes in the names of the fictitious persons were consummated in furtherance of a conspiracy between them to defraud respondent out of the share of the property he became entitled to under the contract with Lange, as a result of such settlement.

[2] So far as the record discloses, no evidence was offered by appellants before the trial court in support of their case, and consequently no explanation whatever has been given by them as to their peculiar actions in dealing with the title to the property, except that during the presentation of respondent's case it was stipulated that about the time these transfers were being made Mrs. Lange was sued for malicious prosecution by a man whose indictment she had secured by the grand jury of Kern county, but which indictment was afterwards dismissed without trial; and it was suggested by appellants' counsel at the trial court, as here in the briefs, that the operations of the Langes under the guise of fictitious names may have been due to bad legal advice given them by attorneys then representing them (but who are in no manner connected with the present action), coupled with the fear which Mrs. Lange may have entertained for the result of the suit against her for malicious prosecution. The question of the motives which prompted the Langes in making the transfers in the manner described, however, was in the last analysis one for the trial court to determine, and therefore the matters suggested by appellants' counsel, at most, raised but a conflict which the trial court upon sufficient evidence has resolved adversely to appellants. The decision of the trial court on that issue is consequently conclusive on appeal.

[3] Appellants have cited a number of cases relating to the question of the legality of contingent contracts made between attorneys and their clients, some of which contained provisions affecting the right of a client to compromise the litigation without the consent of the attorney, and in others no provision was made for payment of the attorney's services in case of compromise prior to trial. The contract involved in the present case is not open to the objections made in those cases, because here there was nothing contained in the contract which prevented the client from settling the case at any time, and an express provision was inserted therein for the payment to the attorney of an agreed amount in case of such settlement, whether made before or after trial.

The action was one to establish respondent's interest under the terms of the contract, and therefore the rules of pleading relating to the specific performance which appellants endeavor to invoke against the sufficiency of the complaint are not pertinent.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

91 Cal. App. 460

DAVENPORT et al. v. NATIONAL RESERVE INS. CO. OF ILLINOIS, DUBUQUE, IOWA.★

(Civ. 3458.)

District Court of Appeal, Third District, California. April 30, 1928.

Hearing Denied by Supreme Court June 28, 1928.

1. Appeal and error ⇨1001(1)—Power of appellate court, where verdict is attacked for insufficiency of evidence, is limited to determining whether conclusion was supported by substantial evidence.

When a verdict is attacked for insufficiency of evidence, power of appellate court begins and ends with inquiry as to whether there was substantial evidence, contradicted or uncontradicted, which in itself supported conclusion reached by jury.

2. Insurance ⇨665(3)—Evidence as to insured's gross exaggeration of loss by fire held to sustain verdict denying recovery.

In action on fire policies insuring lumber and cordwood on tract of timber land, evidence as to gross exaggeration by insured relative to loss by fire *held* sufficient to sustain verdict denying recovery.

3. Appeal and error ⇨971(2)—Evidence ⇨546—Admission or rejection of expert evidence lies largely within discretion of trial court, and action will not be reviewed unless discretion is abused.

Admission or rejection of expert evidence lies so largely within discretion of trial court that its action thereon will not be reviewed on appeal, in absence of clear showing of abuse of that discretion.

4. Evidence ⇨520—Admitting expert testimony as to quantity of cordwood that could be cut from given area and whether forest fire could burn green pine stumps held not abuse of discretion.

Trial court *held* not to have abused discretion in admitting expert testimony relative to quantity of cordwood that could be cut from a given area and as to whether or not a forest fire could have burned out green pine stumps, after permitting opposing attorney to cross-examine expert witnesses at length as to their qualifications, particularly since testimony given was largely cumulative.

★Hearing denied by Supreme Court.

5. Insurance ⊂⇒669(13)—Instruction relative to appraisement, following exact language of policies, held not erroneous.

In action on fire policies insuring lumber and cordwood located on timber land, instruction relative to appraisement, following exact language of policies, *held* not erroneous.

6. Appeal and error ⊂⇒1170(9)—Error in instruction does not require reversal, in absence of showing of prejudice (Code of Civ. Proc. § 475).

Under Code of Civ. Proc. § 475, error in instruction does not require reversal, in absence of showing of prejudice; there being no presumption that error is prejudicial or that injury is done by merely showing error.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by N. E. Davenport and another against the National Reserve Insurance Company of Illinois, Dubuque, Iowa. Judgment for defendant, and plaintiffs appeal. Affirmed.

W. J. Burns and W. H. Slade, both of Auburn, Howe, Hibbitt & Johnston and O. F. Meldon, all of Sacramento, for appellants.

Miller & Thorton, of San Francisco, for respondent.

PRESTON, Justice pro tem. The plaintiffs brought this action in the superior court of Placer county to recover $28,692, alleged fire loss under two policies of fire insurance. The case was tried by a jury, and a verdict was rendered in favor of defendant. From the judgment entered upon this verdict, the plaintiffs prosecute this appeal.

The complaint is in two counts. The amount sought to be recovered under the first count is $15,000; the amount sought to be recovered under the second count or second policy is $13,692. The property insured under the first policy for $15,000, according to the recitals in the policy, consisted of 500,000 feet, more or less, of lumber, manufactured, unmanufactured, or in process of manufacture. The property insured under the second policy for $14,500, according to the recitals in the policy, consisted of 1,200 cords of wood, more or less. Both of these policies were issued to appellants on July 12, 1923, and were both to run for a period of two months from the said 12th of July, 1923. All the insured property was supposed to be located upon a 110-acre tract of forest or timber land adjoining the built-up portion of the city of Auburn. On the 3d day of September, 1923, which was only nine days before the policies would expire, and during the early hours of the morning, a fire was discovered to be raging upon this 110-acre tract in the vicinity of what is referred to in the evidence as "Rattlesnake Canyon." This fire did not entirely subside for several days, and broke out anew on September 5, 1923. Both fires burned over considerable area and destroyed nearly all of the piled wood and all of the manufactured lumber, lumber in process of manufacture, and cut logs, within the burned area.

In October, 1923, appellants presented to the respondent insurance company their claims and proofs of loss under both of these policies. Under the first policy, appellants claimed that there had been burned and totally destroyed by the fire 452,248 feet of lumber and 13,063 feet of logs, the value of which was estimated at $18,442. Under the second policy, appellants claimed there had been burned and totally destroyed by fire cordwood which was estimated at $13,692.

The respondent strenuously contends that both policies are void for a number of reasons; among them being that appellants were guilty of misrepresentations, concealment, and fraud, not only in the procurement of the policies, but in the proofs of loss thereunder, and that appellants were also guilty of false swearing in their claims, etc. All of these contentions and separate defenses were elaborately set forth in respondent's answer.

Appellants contend that the evidence is insufficient to support the verdict of the jury.

[1] When a verdict is attacked for insufficiency of the evidence, our power begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached by the jury. If, upon any material point, the testimony is in conflict, it must be assumed that the jury resolved the conflict in favor of the prevailing party. The authorities supporting this rule are legion, among them being Gjurich v. Fieg, 164 Cal. 429, 129 P. 464, Ann. Cas. 1916B, 111; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Wilbur v. Wilbur, 197 Cal. 1, 239 P. 332; Rocha v. Rocha, 197 Cal. 396, 240 P. 1010; Union C. Co. v. Madera, etc., Irr. Co., 179 Cal. 774, 178 P. 957; and Steinberger v. Young, 175 Cal. 81, 165 P. 432.

[2] With this rule in mind, we have made a careful examination of the record, and we are fully convinced that there is abundant evidence to support the verdict of the jury. We see no reason, however, to go into a detailed analysis of the great volume of evidence embodied in the record which contains 953 typewritten pages.

The testimony shows that appellants lost by fire approximately 5,019 feet of lumber, and in their proof of loss they claimed to have lost 452,248 feet; they lost between 18 and 25 cords of wood, and in their proof of loss they claimed to have lost 1,182 cords; that they actually lost 4,718 feet of logs, and by their proof they claimed to have lost 13,063 feet. From the size and condition of the mill, the variety and character of the timber on the land, and other physical facts proved,

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⊂⇒For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes it seems impossible for appellants to have had the amount of lumber and cordwood claimed by them. Furthermore, the jury made a personal inspection of the entire premises.

The appellants made a motion for a new trial upon the ground, among other things, that the evidence was insufficient to support the verdict, which motion was denied by the trial court.

It is also significant to note that in 1921 appellants had a fire on this same tract of land, and collected $1,383 from an insurance company for 153 cords of wood claimed to have been cut from one acre of this 110-acre tract. Appellants also had a fire on this same tract of land in 1922, and collected from insurance companies $9,000 for 900 cords of wood claimed to have been cut from 5.79 acres of said tract.

We think that the jury and the trial judge must have been convinced, as we are, that appellants' claims in the case at bar were grossly exaggerated, if not entirely fabricated.

It is next contended by appellants that the court erred in its rulings during the course of the trial. The only rulings that are claimed to be erroneous are: (1) The qualifications of the witness Oest to testify as to the quantity of cordwood that could be cut from a given area; (2) the qualifications of the same witness to testify as to whether or not a forest fire could have burned out green pine stumps; (3) the qualifications of the witness Maretsas to testify as to the amount of cordwood which could have been cut from a given area; (4) the qualifications of the witness Skinner to testify to the amount of cordwood which could be cut from a given area; and (5) the qualifications of the witness Maas to testify to the amount of cordwood which could have been cut from a given area.

[3, 4] There is no merit in any of these contentions. The rule is well settled that the admission or rejection of evidence of this character lies so largely within the discretion of the trial court that its action thereon will not be reviewed on appeal, in the absence of a clear showing of an abuse of that discretion. Maris v. H. Crummey, Inc., 55 Cal. App. 573, 204 P. 259; Vallejo & Northern Railroad Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238; Kirstein v. Bekins Van & Storage Co., 27 Cal. App. 586, 150 P. 999; Hood v. Bekins Van & Storage Co., 178 Cal. 150, 172 P. 594. There is no such showing here made. It was for the trial court to determine whether the witnesses were qualified to testify as to the quantity of lumber and wood that could have been taken from the burned area and the value of the same, etc. The trial court permitted appellants' attorney to cross-examine all of the expert witnesses at length as to their qualifications before they were permitted to give their opinions, and the record shows that all of said witnesses were reasonably well qualified to testify concerning the matters about which they were interrogated. The objections made by appellants went to the weight rather than to the competency of the evidence. Moreover, the evidence given by these witnesses was largly cumulative; other expert witnesses were permitted to testify without objection to the amount of lumber and cordwood that could have been cut from the land in question.

[5] Lastly, appellants contend that the court erred in giving an instruction relative to an appraisement, in the event the insurance company and the insured could not agree as to the amount of the loss. The portion of the instruction assailed is in the exact language of the policies, and, under the evidence, the whole instruction was entirely proper. A careful examination of all the instructions satisfies us that the jury was fully and correctly instructed as to all phases of the case.

[6] If it be conceded, for the sake of argument, that it was error for the court to have given this instruction, still it is not shown to be prejudicial. We cannot see that any different verdict could or would have been returned by the jury had this instruction not been given. There is no presumption that error is prejudicial or that injury is done by merely showing error. Section 475, Code Civ. Proc.; Peavey v. Mutual Realty Corporation (Cal. App.) 255 P. 858; Gill v. Southern Pacific Co., 174 Cal. 84, 161 P. 1153.

The judgment should be affirmed, and it is so ordered.

We concur: HART, Acting P. J.; PLUMMER, J.

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91 Cal. App. 278

PIONEER ABSTRACT & TITLE GUARANTY CO. v. FERAUD, County Registrar, et al.

SUVERKRUP v. FERAUD, County Registrar, et al.

(Civil Nos. 3512, 3513.)

District Court of Appeal, Third District, California. April 24, 1928.

1. Records ⟹9(13¼)—Judgments and certificates of execution on registered lands are only contractual until things authorizing their registration are done (Torrens Land Act, §§ 55, 60, 91, 92, 98).

Under Torrens Land Act (St. 1915, p. 1932), § 55, judgments and certificates of levy of execution on registered land take effect only by way of contract between parties until things required by sections 60 and 98 to entitle them to registration under sections 91 and 92 are done.

2. Records ⟹9(3)—Purpose of registration is to disclose all interests in land, with all charges specifically shown by title certificate (Torrens Land Act).

Purpose of Torrens Land Act (St. 1915, p. 1932) is not only to create and perpetuate a marketable title to land sought to be registered in true owner thereof, but also to enable registration of each tract in such a way that all interests therein may be disclosed thereby, and exact status of lands, with nature, extent and amount of all charges or other dealings against or with them specifically shown by certificate of title and memorials thereon.

3. Records ⟹9(13¼)—Judgment in action between strangers to registered land and certificates of execution thereon cannot be entered on title certificates, when not indicating that judgment debtors had interest therein (Torrens Land Act, §§ 91, 92).

Judgment rendered in action between strangers to registered land, and certificate of levy of execution thereon, cannot be filed and entered as memorials on certificates of title, under Torrens Land Act (St. 1915, p. 1932), §§ 91, 92, in absence of any indication therein that judgment debtors had any interest in such lands or anything indicating extent of such interest.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Proceedings by the Poineer Abstract & Title Guaranty Company, and by Emma D. Suverkrup, against Fulton G. Feraud, as Registrar of the County of San Bernardino, and others. Judgments for petitioners, and respondents appeal. Affirmed.

Oliver O. Clark and Dan. V. Noland, both of Los Angeles, for appellants.

Frank T. Bates and Walter E. Byrne, both of San Bernardino, for respondents.

JAMISON, Justice pro tem. By stipulation of the attorneys for the respective parties these two proceedings were tried together, the petitioner in cause No. 9265 being the Pioneer Abstract & Title Guaranty Company, a corporation, hereinafter termed the respondent, and in cause No. 9266, the petitioner being Emma D. Suverkrup, hereinafter termed the respondent, and the parties against whom the said proceedings were had being Fulton G. Feraud, registrar of titles of San Bernardino county, Walter A. Shay, sheriff of said county, E. M. Whitaker, and certain fictitious defendants termed respondents in the trial court, but hereinafter designated appellants.

Judgments were rendered in favor of each of the petitioners and against the said Feraud, as said registrar, and against the said Shay, as sheriff, and against the said Whitaker, and from both of said judgments said last-named parties have appealed.

Each of these proceedings were brought under the provisions of the Land Titles Act, commonly known as the Torrens Title Law (St. 1915, p. 1932), for purpose of having canceled, and removed from certain certificates of registration in the office of the registrar of titles of San Bernardino county certain memorials indorsed thereon by said registrar.

Respondents offered in evidence certificate of title No. 1340, brought under first registration by certificate No. 52 on the 11th of May, 1917, by decree of the superior court of said county of San Bernardino and standing in the name of respondent Emma D. Suverkrup, showing her to be the owner of certain lands therein described, upon which certificate appeared memorials showing judgment of E. M. Whitaker v. Larchmont Investment Co. et al., for $49,038.53, and execution, W. A. Shay, Sheriff, v. Larchmont Investment Co. et al., date of registration of said judgment and execution being October 8, 1925.

Respondents then offered in evidence certificate of title 1350 and certificate of title 1351, standing in the name of the respondent Pioneer Abstract & Title Company, showing said company to be the owner of the lands therein described and each dated August 12, 1925, upon which appeared memorials identical with those appearing on certificate of title No. 1340.

The judgment and execution referred to in said memorials were then introduced in evidence.

The judgment being in favor of E. M. Whitaker and against Larchmont Investment Company, a common-law trust, E. A. Ely, W. W. Sears, T. M. Oehrlin, and L. W. Clark, as trustees of an alleged trust estate, the Larchmont Investment Company, a copartnership composed of E. A. Ely, W. W. Sears, T. M. Oehrlin, and L. W. Clark, and E. A. Ely, W. W. Sears, T. M. Oehrlin and L. W. Clark as individuals, rendered by the superior court of Los Angeles county, Cal., dated August 11, 1925, filed for record in office of registrar of said county of San Bernardino on October 8, 1925, and entered on said certificates of titles Nos. 1340, 1350, and 1351 by Fulton G. Feraud, registrar of said county of San Bernardino as aforesaid.

The execution upon said judgment was issued by the clerk of said county of Los Angeles directed to the sheriff of said county of San Bernardino, was dated August 27, 1925, and was filed for record by said registrar on October 8, 1925, and entered on said certificates of title 1340, 1350, and 1351 by Fulton G. Feraud, as registrar of said county of San Bernardino, to which execution was attached the certificate of said Walter A. Shay, sheriff, of said county of San Bernardino, that he had levied said execution upon certain lands, including those covered by said certificates 1340, 1350, and 1351.

This was all the evidence introduced by respondents. Appellants thereupon made a motion for a nonsuit. Same being denied, they declined to offer any evidence, and judgments were thereupon entered for respondents.

There being no evidence that any of the judgment debtors named in the judgment in the case of E. M. Whitaker v. Larchmont Investment Co. et al. had any interest, registered or otherwise, in the land covered by certificate of titles Nos. 1340, 1350, and 1351, it appears to the court that the question to be determined is whether or not, where the lands have been registered under the provisions of the Land Title Act, an execution issued upon a judgment in an action between persons who do not have any interest in the registered land can be levied upon said registered land and said judgment and execution filed in the office of the registrar of titles and entered as memorials on the certificates of title of said registered land.

Appellants claim that sections 91 and 92 of the Land Title Act furnishes ample authority to the registrar to file the judgment and certificate of levy under the execution and to enter them as memorials upon the certificate of title covering the land levied upon under the execution.

The provisions of these two sections are as follows:

> Section 91. "No judgment, or decree, or order of any court shall be a lien on or in any wise affect registered land, or any estate or interest therein, until the certified copy of such judgment, decree, or order, under the hand and official seal of the clerk of the court in which the same is of record, is filed in the office of the registrar, and a memorial of the same is entered upon the register of the last certificate of the title to be affected."
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> Section 92. "Whenever registered land is levied upon by virtue of any writ of attachment, execution, or other process, it shall be the duty of the officer making such levy forthwith to file with the registrar a certificate of the fact of such levy, a memorial of which shall be entered upon the register; and no lien shall arise by reason of such levy until the filing of such certificate and the entry in the register of such memorial, any notice thereof, actual or constructive, to the contrary notwithstanding."

It will be noted that section 91 does not specify what judgments shall or shall not be entitled to be filed in the office of the registrar, but merely that no judgment, decree, or order of the court shall be a lien or in any wise affect registered land until a certified copy thereof has been filed with the registrar. It will also be noted that section 92 of said act provides that when any registered land is levied upon by virtue of any writ of execution the officer making the levy shall forthwith file with the registrar a certificate of the fact of the levy, a memorandum of which shall be entered upon the register.

Upon its face this section of the act would appear to authorize the placing of the memorial of the levy upon the certificate of title regardless of whether or not any of the judgment debtors appear from the certificate of title to have any interest in the land registered under said certificate. However, in order to determine when and under what circumstances the officer making the levy is authorized to file with the registrar his certificate of the fact of such levy and to determine under what circumstances the registrar is authorized to enter a memorial of the fact of such levy upon the register, the other sections of this act bearing upon this question must be examined and considered.

The only theory conceivable upon which appellant Whitaker caused the execution to be issued upon said judgment and levied upon said registered lands is that these judgment debtors, or some of them, had an interest in the said registered lands.

[1] Respondents claim that before appellant Whitaker had the right to cause a levy to be made upon said registered lands, and before appellant Shay had the right to make said levy, and before appellant Feraud had the right to file the judgment and certificate of levy and enter the same as memorials on the register, proceedings should have been taken under the provisions of the Torrens Act to have the interest or interests of the judgment debtor or debtors in said registered lands determined and registered.

Section 55 of said act is as follows:

> "A deed, mortgage, lease, or other instrument purporting to convey, transfer, mortgage, lease, charge, or otherwise deal with registered land, or any estate or interest therein, or charge upon the same, other than a will or a lease not exceeding one year where the land is in the actual possession of the lessee or his assigns, shall take effect only by way of contract between the parties thereto, and as authority to the registrar to register the transfer, mortgage, lease, charge, or other dealing upon compliance with the terms of this act. On the filing of such instrument, the land, estate, interest, or charge shall become transferred, mortgaged, leased, charged, or dealt with according to the purport and terms of the deed, mortgage, lease, or other instrument. The registrar shall immediately upon the filing of such instrument, stamp or write upon the original and duplicate certificates of title the word 'transferred,' 'mortgaged,' 'leased,' or otherwise, as the case may require, with the date of filing such instrument and sign such indorsement."

Substantially this section means, when applied to facts appearing in the cases under consideration, that the instrument purporting to charge or otherwise deal with the registered land or other estate or interest therein, takes effect only by way of contract between the parties thereto and as authority to the registrar to register the charge or other dealing upon compliance with the terms of the act. In other words, supposing that the said judgment debtors or any of them had an agreement with the registered owner of the lands giving to said debtor or debtors an interest in said registered land, which interest is unregistered, in that event it would be effective between the parties only as a contract until those things were done that are required by the act to be done to entitle it to be registered.

To gather the meaning of the words "upon compliance with the terms of this act," as used in section 55, we must look to other sections of this act. Section 60 is as follows:

> "On the filing of an instrument intended to create a charge in the registrar's office and upon the production of the duplicate certificate of title, whenever it appears from the original certificate of title that the person intending to create the charge has the title and right to create such charge and the person in whose favor the same is sought to be created is entitled by the terms of this act to have the same registered, the registrar shall enter upon the original and duplicate certificates a memorial of the purport thereof, and the date of filing the instrument, with a reference thereto by its file number, which memorial shall be signed by the registrar. The registrar shall also note upon the instrument on file the number of the certificate of title where the memorial is entered. No new certificate of title shall be entered and no memorandum shall be made upon any certificate of title by the registrar in pursuance of any deed or other voluntary instrument, unless the owner's duplicate certificate of title is presented with such instrument, except in cases expressly provided for in this act, or upon the order of the court, for cause shown, and whenever such order is made, a memorial thereof shall be entered upon the new certificate of title and on the owner's duplicate. The production of the owner's duplicate certificate, whenever a voluntary instrument is presented for registration, shall be conclusive authority from the registered owner to the registrar to issue a new certificate or to make a memorial in accordance with such instrument and the new certificate or the memorial shall be binding upon the registered owner and upon all persons claiming under him in favor of every purchaser for value in good faith."

This section provides a method showing such compliance with the terms of the act as would entitle the unregistered interest in land, or charge upon the same, to be registered. Section 98 of the act provides that a registered owner, or other person in interest, or the registrar may at any time apply by petition to the court upon the ground that the registered interests of any description, whether vested, contingent, expected or inchoate, have terminated or ceased, or that new interests have arisen or been created which do not appear upon the certificate, for an order correcting or altering any certificate to comply with the true facts as shown by the petition and proof adduced and the court shall have jurisdiction to hear and determine the petition after notice to all parties in interest, and if it appears to the satisfaction of the court that the relief as petitioned for should be granted, it shall order and direct the registrar to make such correction or modifications on such certificates or memorials as may be necessary.

By the provisions of these two sections, we have methods by means of which the instrument purporting to charge or otherwise deal with the registered land, or other estate or interest therein, and which takes effect only by way of contract between the parties, may be made to comply with the terms of this act and become entitled to registration.

[2] Thompson, in his work on Real Property, volume 5, § 4154, says that Sir Robert Torrens, who formulated the system of judicial registration of land titles, known as the Torrens System, stated that the purposes of the law which he advocated are "to simplify, quicken and cheapen the transfer of real estate and to render titles safe and indefeasible." These objects he planned should be accomplished by means of registration of title and the use of certificates which conclusively show the state of the title at all times.

In the case of Robinson v. Kerrigan, 151 Cal. 40, 90 P. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829, where the constitutionality of this act was upheld, the Supreme Court stated that the purpose of the act was to establish a system for the registration of title to land whereby the official certificate will always show the state of the title and the person in whom it is vested.

In the case of In re Seick, 46 Cal. App. 363, 189 P. 314, it was said that the act provided a complete scheme of procedure whereby, through a decree of the court, land may be brought under the operation of the act. "So that an intending purchaser, lessee, or mortgagee, or other person having dealings with the property, may go to the registrar's office, examine the leaf whereon the title to that property is registered, and at once, with safety, take a deed, lease, or mortgage from the owner of the property, file it, and have himself accordingly registered upon the leaf or folium as owner, lessee, or mortgagee." The purpose of the Torrens Land Act is not only to create and perpetuate a marketable title to land sought to be registered in the true owner thereof, but also to enable the registration of every tract in such a way that all interests therein may be disclosed by the registration. Title Guarantee & Trust Co. v. Griset, 189 Cal. 382, 208 P. 673; Frances Investment Co. v. Supreme Court, 189 Cal. 107, 208 P. 105.

In this last-named case, at page 116 (208 P. 109), in speaking of the benefit derived by the owner of land registered under the Torrens Act, the court said:

> "An act framed pursuant to such a purpose would lead to the issuance of a certificate of title worth having, one which would vouch to the world that the holder was the owner of the land described in it, that a merchantable title was vested in him. A statute framed without such an end in view would be of but scant value. It is to be remembered that the

law, according to its title, is not purposed merely for the certification of land titles. It is also designed to provide for the simplification of the transfer of real estate and no considerable simplification results in such transfers if after obtaining a decree of the superior court that he has title to property and obtaining a certificate to that effect, one who has resorted to the procedure sanctioned by the law is compelled afterward to contend for additional decrees to secure to him a title which a buyer would accept on the market."

Unquestionably, it was the intention of the framers of this act that at all times the certificate of title of the owner of registered lands should show the exact status of the lands described in the certificates, that if there were memorials entered upon the certificate of title showing charges or other dealings against or with the registered lands, then the nature, extent and amount of such charges or dealings should be specifically set forth.

[3] Assuming that the judgment debtors in the aforesaid judgment claim some interest in the lands covered by the said certificates of title, there is no way of ascertaining or determining, from an inspection of these certificates, as they now stand, what the nature and extent of that interest is. The effect of this is that the title of the registered owner to said lands is thereby rendered uncertain, indefinite and unmerchantable.

It appears to the court that to permit a judgment rendered in an action between strangers to the registered land to be filed and entered as a memorial upon the certificates of title of said registered land and the certificate of levy thereon under an execution issued under said judgment to be also filed as a memorial on said certificates of title, there being nothing to indicate that the judgment debtors had any interest in said registered lands, nor anything indicating the extent of such interest, would be to nullify one of the important purposes for which said Torrens law was enacted.

Section 98 of the act authorizes the registered owner of the land to apply by petition to the court for the cancellation of any memorandum on a certificate when the same has been placed there by error or mistake. A consideration of this act clearly shows that it was the intention of its framers that no memorial, charge or lien should be entered upon the register without first complying with its terms and requirements.

To permit a practice that would sanction the unauthorized placing of said judgment and certificate of levy upon the register, that is to say, upon the certificates of title of respondents, would, as was said by the court in Curtis v. Haas, 298 Ill. 485, 131 N. E. 701, necessarily invite other such unauthorized acts of the registrar, which would precipitate a multiplicity of suits to protect the rights of the registered owner.

The trial court was right in denying the motion for a nonsuit.

The judgments are supported by the findings, nor are the findings inconsistent or contradictory.

The judgment in each of the cases is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

91 Cal. App. 327

CENTRAL CALIFORNIA CREDITORS' ASS'N v. SEELEY et al. (Civ. 6206.) *

District Court of Appeal, First District, Division 2, California. April 26, 1928.

Hearing Denied Supreme Court June 25, 1928.

1. Alteration of instruments 🔑11(1)—Pencil marks through words on bond obligating defendant to redeliver property attached, if made thoughtlessly by attorney, did not change obligation on bond.

Pencil marks by attorney on bond for release of attachment through words obligating defendant to redeliver property to officer to be applied to payment of judgment, if made thoughtlessly and for purpose of illustration, *held* not to change obligation on bond, since marks were merely accidental blot or tear.

2. Alteration of instruments 🔑11(1)—Written obligation held not changed by conduct of third parties or accidents to writing.

Written obligation of parties on bond for release of attachment is not changed by what third parties or accidents may do to writing.

3. Attorney and client 🔑91—Attorney held not authorized to alter bond releasing attachment.

Agency of attorney for party receiving bond for release of attachment *held* not to authorize attorney to alter bond, and careless act of attorney in running pencil marks through words of bond, unauthorized, and without knowledge of principal, cannot be *held* to be deliberate and unlawful act of principal, even though act was deliberate and intentional act of attorney, outside scope of agency.

4. Attorney and client 🔑103—Motion to amend attachment bond by striking provision for redelivery of property held not ratification of attorney's act crossing out such provision not known when motion was made.

Motion by plaintiff in attachment proceedings suing on bond for release of attachment to amend complaint to conform to proof by striking out of description of obligation of bond promise to redeliver attached property, which motion was granted, but amendment not made, *held* not ratification of acts of attorney testifying, after motion was made, to mutilation of bond by striking out provision for redelivery of property, there being no knowledge of attorney's act, which is essential element of ratification.

★Hearing denied by Supreme Court.

5. Pleading 🔑238(5)—Plaintiff's failure to amend complaint as permitted may be considered as abandonment of motion to amend.

Failure of plaintiff suing on bond for release of attachment to avail itself of permission to amend complaint to conform to proof by striking from complainant's description of bond promise to redeliver attached property may be considered as abandonment of motion to amend complaint.

6. Attachment 🔑263—Bond releasing attachment containing obligation to redeliver property or pay judgment given under statute not prescribing form held sufficient to obligate defendant to repay judgment (Code Civ. Proc. §§ 540, 554, 555).

Where bond for release of attachment, given pursuant to Code Civ. Proc. § 540, not prescribing form of bond, but merely requiring sheriff to accept bond in lieu of attaching, if defendant gives security, contained obligation in alternative to redeliver attached property to officer or pay judgment to extent of value of released property as required by sections 554, 555, and was accepted and attached property returned to defendants, bond was adequate to charge defendant with obligation to pay amount of judgment, if property was released.

7. Attachment 🔑263—Bond releasing attachment containing promise to redeliver property or pay judgment held sufficient as common-law bond.

Bond for release of attachment containing obligation in alternative to redeliver attached property to officer or pay judgment to full value of property released *held* sufficient as common-law bond.

8. Attachment 🔑261—Court order for release of attachment held unnecessary under bond from which it could be assumed that writ of attachment had not been returned (Code Civ. Proc. § 555).

Where bond for release of attachment recited that defendant, being desirous of obtaining release of attachment and return of property before return of said writ by sheriff, obligates himself to redeliver property to proper officer, or pay judgment to extent of value of released property, it could be assumed that, at time bond was given, writ of attachment had not been returned by sheriff, and hence no need existed to follow procedure of Code Civ. Proc. § 555, by obtaining court order for release of attachment.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by the Central California Creditors' Association against J. R. Phelps and another. Judgment for plaintiff, and defendant named appeals. Affirmed.

Owen D. Richardson, of San Jose, for appellant.

Fabian D. Brown, of San Francisco, for respondent.

KOFORD, P. J. Respondent recovered judgment upon an undertaking given to the sheriff to release an attachment. Respondent was plaintiff in the attachment suit. Cook Lumber Company was defendant. The lumber yard of said defendant has been attached, and the release bond sued on in this case was executed by the defendants in this action, A. L. Seeley and J. R. Phelps. J. R. Phelps alone appeals.

The undertaking recited the commencement of the action, the levying of the attachment, and that, "whereas the defendant is desirous of obtaining the release of said attachment and the return of said property so attached to him before the return of said writ by said sheriff: Now, therefore, we the undersigned, * * * in consideration of the premises and in consideration of the release from attachment of all the property attached, * * * undertake in the sum of $3,500, * * * and promise that in case the said plaintiff recovers judgment in said action the said defendant *will on demand redeliver such attached property so released to the proper officer, to be applied to the payment of the judgment, or in default thereof the said defendant and sureties* (italics ours) will on demand pay to the said plaintiff the full value of the property released not exceeding the amount of said judgment."

When this undertaking was offered in evidence at the trial of this action, the words which we have italicized had been scratched through with lead pencil marks, and bracketed off with parentheses. Most of the evidence at the trial relates to how, when, and where and by whom this alteration or mutilation was made.

The first witness was the deputy sheriff who received the bond. He testified more from his own habits than from recollection. He thought the alteration must have been made before he accepted the bond, and was made by the party who presented it with the consent and in the presence of the sureties. Judge P. F. Gosbey could not testify from recollection, but stated that he would have initialed the alteration if he had noticed it at the time he indorsed his approval on it.

The attorney who prepared the bond and appellant who signed it were called by defendants, and testified that the marks were not present at the time it was signed and sent on its way to the sheriff's office. When defendant rested, plaintiff also rested without offering further testimony. Whereupon defendant immediately asked to reopen the case and call Mr. Miller as a witness. This permission was granted over the objection of plaintiff, who specified that Mr. Miller had been present in the courtroom during the course of the trial.

Mr. Miller testified that he was an attorney at law, and that he had represented, and had appeared for, respondent in this action, having argued upon the hearing of the two demurrers interposed to the first and second complaint; that, while the legal points concerning bonds given to release an attachment before and after a return of a writ of attachment by the sheriff were being discussed by himself and Under Sheriff Thompson, he himself made all the pencil marks upon the bond—thoughtlessly and for the purpose of illustration.

The amended complaint which is printed in the supplement of appellant's opening brief alleges that the bond was given while the writ of attachment was in the possession of the sheriff, and describes the obligation of the bond in the alternative, i. e., promises redelivery of the attached property or payment of the judgment obtained.

The findings of the court on this subject state "that defendants to procure a release of said attachment and the property seized thereunder executed an undertaking conditioned that, if said property be released from said attachment, they would pay to plaintiff the amount of the judgment." The findings also state that demand has been duly made on the judgment defendants and also on their sureties for the payment of said judgment or the return of the attached property.

[1-3] Appellant vigorously contends that the Miller story is the correct one, and attempts to demonstrate it in a manner which he states is conclusive. Assuming this contention to be correct, the pencil marks made by Miller on the bond amount to nothing in the direction of changing any clause or obligation of the bond. These marks, if made in the manner Miller described, must be considered as of no more importance than any accidental mark, blot, tear, discoloration, or even destruction. The written obligation of the parties is not changed by what third parties or accidents may do to it. Although Mr. Miller was apparently the attorney of record for the respondent herein at the time he let his lead pencil go astray, his agency as attorney did not authorize him to alter documentary evidence. We cannot say that his careless act, unauthorized by and without the knowledge of his principal, should be held to be the deliberate and unlawful act of his principal. The same result would follow if the act was the deliberate, intentional and unlawful act of an attorney clearly outside of the scope of his agency.

[4, 5] During the course of the trial, respondent made a motion to amend the amended complaint to conform to proof by striking out of the complaint's description of the obligation of the bond, the promise to redeliver the attached property. This motion was granted, but we have been unable to find anywhere in the record that any such amendment was actually made. This motion was made while the first witness was on the stand, and therefore before Mr. Miller testified. We do not regard this motion, therefore, as a ratification of the acts of Miller in mutilating the bond. Respondent did not know at that time what Miller had done. Such knowledge would be an essential element of ratification. Respondent's failure to avail itself of the permission to amend may be considered an abandonment of his motion, which may have been induced by Miller's testimony.

[6, 7] We therefore must consider whether the bond, disregarding the lead pencil marks, will support the judgment. The bond was not given pursuant to an order of release of attachment pursuant to Code of Civil Procedure, §§ 554, 555, made where the writ of attachment has already been returned by the sheriff, but was given pursuant to Code of Civil Procedure, § 540. The alternative form of bond, promising either redelivery of the attached property or payment of the judgment to the extent of the value of the released property, is required by Code of Civil Procedure, § 555. It is not prohibited by Code of Civil Procedure, § 540, which does not prescribe the form of the bond, but simply requires the sheriff to accept an undertaking in lieu of attaching, if the defendant "give him security by the undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand, against such defendant, besides cost, or in an amount equal to the value of the property of such defendant which has been or is about to be attached." While appellant contends that he is not liable upon the bond, unless statutory requirements are followed, he does not attempt to point out wherein this bond does not comply with section 540 of the Code of Civil Procedure. The bond served its purpose. It was accepted, and the attached property was returned to the defendants in the attachment suit. Its language is quite adequate to charge the appellant herein with the obligation upon which the judgment appealed from is based. It is also sufficient as a common-law bond. Gardner v. Donnelly, 86 Cal. 367, 24 P. 1072.

[8] We are justified by the pleadings and by the recitals in the bond itself in assuming that at the time this bond was given the writ of attachment had not been returned by the sheriff, and consequently no need existed to follow the procedure of Code of Civil Procedure, § 555, by obtaining a court order for the release of the attachment.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

COPE v. SUTTER COUNTY. (Civ. 3453.)★

District Court of Appeal, Third District, California. April 23, 1928.

Hearing Granted by Supreme Court June 21, 1928.

1. Counties 🔑129—Fact that bridge plans contained corporation's name held not to warrant finding that they were not prepared by engineer hired for that purpose.

In action by engineer against county for county's breach of contract to hire engineer to prepare plans and specifications and superintend construction of bridge, fact that name of corporation appeared on plans and specifications did not warrant court's finding that plans were not prepared by defendant, where his testimony that he prepared them was not contradicted.

2. Counties 🔑129—Finding that bridge plans submitted by engineer to county supervisors were incomplete and objectionable held not sustained, where supervisors ordered payment of substantial sum on plans submitted.

Finding, in action by civil engineer against county for breach of contract to employ him for preparing plans and specifications and superintending construction of bridge, that plans furnished were incomplete and not acceptable to county supervisors, was not sustained, where evidence showed that $2,000 was ordered to be paid engineer after submission of plans, and $2,000 after amendments thereto, and where plans were not rejected, but merely disregarded by supervisors.

3. Counties 🔑127—County held not entitled to terminate at will contract for employment of engineer to superintend construction of bridge.

County board of supervisors *held* not entitled to terminate at will contract employing engineer to prepare plans and specifications for, and to superintend construction of, bridge, where there was no provision in contract permitting county to discontinue the work or discharge the engineer.

4. Counties 🔑129—County which disregarded engineer hired to submit plans and superintend construction of bridge, and built bridge under others' plans, held liable for breach of contract.

County, having employed civil engineer to prepare plans and specifications for, and to superintend construction of, bridge, *held* liable for breach of contract to engineer, who submitted plans, and was ready to carry out his part of contract, where board of supervisors went ahead with building of bridge under plans submitted by county surveyor without declaring engineer's work insufficient or engineer incompetent.

5. Counties 🔑113(2)—Contract of old board of county supervisors, executed after election, held binding on newly elected board.

Contract of old board of supervisors, made between time new board was elected and the time such new board took office, was binding on the new board, and was not against public policy as depriving new board of its legislative function, since in legal contemplation the new board is identical with board entering into contract.

6. Counties 🔑122(1)—County's contract for employment of one not licensed architect for preparation of plans for bridge held valid (Pol. Code, § 4041).

Contract between county supervisors and civil engineer for preparation of plans and specifications and estimates for proposed bridge *held* not void on ground that engineer was not a licensed architect, since Pol. Code, § 4041, gives supervisors general authority to employ any one thought to be competent to do the work.

7. Counties 🔑129—Engineer held entitled to damages for contract price less cost of performance on county's repudiation of contract hiring him to prepare plans and superintend construction of bridge.

Civil engineer, who proved contract with county engaging him to prepare plans and specifications and to superintend construction of bridge, performance thereof on his part by preparing the plans and offering to superintend construction, and county supervisors' refusal to proceed with their part of contract, established prima facie case, entitling him to damages, in suit against county for full contract price, less the cost of performance.

8. Counties 🔑129—Burden to prove mitigation of engineer's damages on county's breach of contract employing him to superintend construction of bridge was on county.

Where engineer, employed by county to prepare plans for, and superintend construction of, bridge, proved performance of contract on his part and county's repudiation, burden to prove facts in mitigation of damages, representing the full contract price, less cost of performance, was on county.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Erle L. Cope against the County of Sutter. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

W. H. Carlin, of Marysville, and Arthur Coats and Lawrence Schillig, both of Yuba City, for appellant.

Hadsell, Sweet & Ingalls, of San Francisco, for respondent.

PRESTON, Justice pro tem. This is an appeal by plaintiff, Erle L. Cope, from a judgment in favor of defendant, County of Sutter, in an action brought by plaintiff to recover damages for breach of contract.

The plaintiff and appellant is a civil engineer. On December 5, 1922, he was employed by the board of supervisors of Sutter county to prepare plans and specifications for, and to superintend the construction of, a bridge to be built by the county and known as "Nicolaus causeway." The contract of employment was in writing, and is as follows:

★For opinion of Supreme Court adopting opinion of Court of Appeal, see 274 P. 750.

"This agreement made and entered into this 5th day of December, 1922, by and between Erle L. Cope, of Berkeley, Cal., and A. E. Schellenger, acting for and on behalf of the county of Sutter, and in the capacity of chairman of the board of supervisors of Sutter county, witnesseth:

"That, whereas it is necessary to extend the Nicolaus bridge from the present truss spans westerly to the river levee; and

"Whereas, at a regular meeting of the board of supervisors of the county of Sutter held on the 15th day of November, 1922, said board of supervisors decided to build this extension of reinforced concrete, and instructed Erle L. Cope to prepare plans and specifications for and to have borings made for said bridge; and

"Whereas, at a regular meeting of said board held on the 5th day of December, 1922, the chairman of the board was authorized to enter into a contract with Erle L. Cope, civil engineer, to draw plans and specifications and to superintend the construction of said bridge:

"Now, therefore, said Erle L. Cope hereby agrees to and with said county of Sutter to draw all plans and specifications and superintend the construction of a reinforced concrete bridge from the end of the present truss spans of the Nicolaus bridge westerly to the river levee, said bridge to be complete in all respects, including approaches, and to be in accordance with the requirements of the state reclamation board. Said plans and specifications to include copies not exceeding fifteen (15) in all, and to be complete with drawings and working plans in all respects for receiving bids for such construction.

"It is understood that by superintendence is meant that said Erle L. Cope shall make a visit to said bridge during the building thereof as often as required, and that he will at all times give his advice to said board concerning the construction of said bridge.

"And it is further understood that the inspectors on construction shall be selected by, and work under the direction of, said Erle L. Cope, and shall be paid by the county of Sutter.

"It is further agreed that, if said board chooses to make alterations or extensions in connection with said bridge, said Erle L. Cope will provide plans and specifications for such work, and shall superintend the same.

"And said county of Sutter, acting by and through the chairman of said board, hereby agrees that if, said Erle L. Cope shall fulfill all the terms and agreements of his employment herein contained, then it will pay said Erle L. Cope six (6) per cent. of the cost, said cost is understood to be the lower of engineer's estimate or accepted bids of said bridge with approaches as follows, to wit: Two thousand ($2,000) dollars on February 6, 1923, or on such earlier date that plans and specifications may be adopted by said board of supervisors; two thousand ($2,000) dollars on June 4, 1923; and the balance thereof monthly when payment is made for labor or materials, in the proportion that said payment bears to the total cost of the work.

"In witness whereof said parties have hereunto set their hands this 5th day of December, 1922. Erle L. Cope. A. E. Schellenger, as Chairman of the Board of Supervisors of the County of Sutter."

In accordance with the terms of this agreement, the appellant prepared plans and specifications and estimates of cost for the construction of this proposed bridge and also, at the request of said board of supervisors, prepared amended or supplemental plans and specifications, etc. The original plans and specifications, and estimates of costs, were filed with the said board of supervisors on February 6, 1923. The amended plans, specifications, and estimates were prepared by the appellant and filed with said board on March 5, 1923. None of these plans and specifications, etc., have ever been rejected, nor does it appear from the record that any of them were actually approved or adopted by said board of supervisors. The testimony shows that the two sets of plans and specifications were merely "ordered filed and taken under advisement by the board."

After appellant filed the original plans and specifications on February 6, 1923, he presented his claim to said board for $2,000; it being the first payment called for under the contract. The board passed the claim and ordered it paid, but the auditor refused to draw his warrant upon the treasurer therefor, and appellant instituted mandamus proceedings against the auditor, in which proceedings appellant finally prevailed, and received from the county this payment of $2,000. Cope v. Flannery, 70 Cal. App. 738, 234 P. 845.

After the decision in Cope v. Flannery, the second payment of $2,000, called for in the contract, was allowed by the board of supervisors, and paid by the auditor without litigation. Therefore, up to date, appellant has received $4,000 on account of said contract.

After filing the amended plans and specifications in March, 1923, appellant attended many meetings of the board of supervisors and insisted that he be allowed to proceed with his contract. He also wrote many letters to the board, requesting that he be allowed to proceed with the contract and superintend the construction of the bridge. The board of supervisors, however, entirely ignored appellant and his plans and specifications and said contract, and on January 7, 1924, passed the following resolution:

> "On motion, it was ordered that William Shearer, the county surveyor, be and he is hereby instructed and directed to prepare plans for a grade and bridge across Barrow Pit, at the approach of Nicolaus bridge."

Thereafter, plans and specifications were prepared by Mr. Shearer, the county surveyor, adopted by the board, and the bridge was constructed according to such plans and specifications at a cost of $169,850. The bridge was constructed at the same general location as contemplated in appellant's plans and specifications, but entirely according to the plans and specifications, and under the supervision, of the county surveyor.

After the board of supervisors had placed the superintending of the construction of the bridge entirely in the charge of Mr. Shearer, the county surveyor, appellant still insisted that he be allowed to carry out his contract and superintend the construction of the bridge, so, on March 16, 1925, said board of supervisors passed the following resolution:

> "On motion, it was ordered that Mr. Erle L. Cope be notified that Mr. William Shearer, county surveyor, will continue as representative and engineer of the county, on the construction of the 'Nicolaus causeway,' and that the contractor on said construction is not authorized to recognize any other person as such engineer and representative of the county. The foregoing order passed and adopted by unanimous vote of all members of said board."

This resolution was served upon appellant, and he was ordered off of the job. Appellant made no further attempt to superintend the work or attend any further meetings of the board of supervisors or have anything further to do with the construction of said bridge, but on the 1st day of June, 1925, presented his claim, which is the basis of this action, to the board of supervisors for $5,610, claiming that this amount is due him under the contract, calculated as follows:

Total fees, 6% of $166,000	$9,960 00
Less payments	4,000 00
	$5,960 00
Less expenses to fulfill	$ 350 00
Balance being damages sustained	$5,610 00

This claim was rejected by the board of supervisors, and this action followed. The case was tried by the court sitting without a jury, and the court made findings and rendered judgment in favor of the defendant.

The execution of the contract is admitted.

[1] Appellant strenuously insists that the material findings of the court are not supported by the evidence. The court, among other things, found that the plans and specifications for the bridge were prepared by Cope, Rand, Means Company, a corporation, under the supervision of the appellant, and not by the appellant, and for this reason appellant had violated the contract. The only testimony upon this question was that given by the appellant, which is as follows:

> "By the Court: Under whose direction were they drawn (plans and specifications)? A. My direction, and a good part of it was drawn by me personally.
>
> "Mr. Sweet: And are these the amended plans that you allege in your complaint you filed with the board of supervisors? A. Yes, sir."

It is true that the name of Cope, Rand, Means Company appears on the plans, but that is no proof that the plans were not prepared by, or under the direct supervision of, appellant, as he testified, and there is no testimony in the record that Cope, Rand, Means Company had anything to do with the original plans and specifications or the amended plans and specifications. Furthermore, these plans were before the board of supervisors when they ordered the two $2,000 payments made to appellant, and no objection whatever was then raised by the board that the plans and specifications were not prepared by appellant.

[2] The court also found "that said plans and specifications were incomplete and objectionable to said board of supervisors, and not satisfactory or acceptable to them, and were in violation of the terms of said contract." These plans and specifications were filed, and the board of supervisors made no formal order either approving or rejecting the same, but ordered appellant's claim for $2,000 paid. The board requested amended plans and specifications, which were furnished, and then the board ordered that appellant's second claim for $2,000 be paid. No other conclusion can be drawn from this action of the board than that the plans and specifications furnished by appellant were satisfactory to, and approved by, them. It would be unreasonable to assume that the board of supervisors would pay $4,000 of the county's money after receipt of the plans and specifications, and amended plans and specifications, if the same were not satisfactory, or were in violation of the contract. In view of this affirmative action by said board, certainly it could not be successfully contended that they rejected the plans, or that such plans and specifications were unsatisfactory to them, simply because no formal order of approval was entered on their minutes. The fact that the board called for amended plans is no evidence of dissatisfaction. The contract, on this point, provides:

> "It is further agreed that if said board chooses to make alterations or extensions in connection with said bridge, the said Erle L. Cope will provide plans and specifications for such work and shall superintend the same."

This simply indicates that the board reserved the right in the contract to have several sets of plans and specifications for the proposed bridge prepared, if necessary, in order to meet any changes or alterations that might be made in the construction of the bridge, which is a very common occurrence in the building of a bridge such as contemplated by said board. Therefore we are unable to find any evidence in the record that would support the finding that the plans and specifications furnished by appellant were incomplete or not acceptable to the said board of supervisors.

Other findings made by the trial court are also unsupported by the evidence. None of the supervisors testified in this case, and respondent has not pointed out any evidence that would in the slightest degree support the findings, and from a careful search of the entire record we are unable to discover any, but, on the contrary, find that all the evidence supports the contention of appellant, except on the question of damages, which we will refer to later.

[3, 4] Respondent contends that the board of supervisors had the right to terminate the contract at any time because there was no provision in the contract that the owner may not discontinue the work or discharge the engineer. There is no merit in this contention. There is no provision in the contract which permits the owner to discontinue the work or discharge the engineer, and, in the absence of such provision in the contract, it could certainly not be terminated and the engineer discharged without cause. Furthermore, the board of supervisors did not abandon the project; on the contrary, they built the bridge upon plans later prepared by the county surveyor. Neither did the board of supervisors declare the work of appellant insufficient or that the appellant himself was incompetent. They simply ignored the appellant altogether, as though he had no contract whatever with them, and proceeded without regard to their responsibility under the contract.

[5] Respondent also contends that, as the contract was made in December, between the time a new board was elected in November, and the time such new board took office in January, 1923, such contract is against public policy, because the outgoing board has contracted in advance what the new board shall do, and the new board thereby deprived of their legislative function, discretion, and power to act for the best interests of the county, in case the new board deems the bids too high or the plans unsatisfactory. There is no merit in this contention. In contemplation of law, it is wholly immaterial that the new board of supervisors had nothing to do with entering into the contract with appellant. In legal contemplation, the new board of supervisors is the same board that entered into the contract. California Highway Commission v. Riley, 192 Cal. 97, 218 P. 579. See, also, Cope v. Flannery, supra.

[6] The respondent contends, and the trial court found, that the contract was void because the appellant was not a licensed architect at the time he prepared the plans and specifications for said bridge. Respondent has cited no authority, and made no argument, in support of this finding. Section 4041 of the Political Code, which deals with the power of boards of supervisors to build bridges, etc., contains no provision that the board of supervisors, in securing plans and specifications and estimates for any proposed bridge, *shall only employ licensed architects*. Supervisors are given general authority, and may employ any one who, in their judgment, is competent to do the work. Cope v. Flannery, supra.

[7, 8] Appellant contends that the proper measure of damages is the full contract price, less the cost of performance, and offered evidence at the trial in support of this theory. His evidence tended to show that he had been damaged in the sum of $5,960. The county surveyor testified that, even under appellant's theory of damages, appellant would only be entitled to approximately $3,000.

No other testimony was offered on the question of damages; still, the trial court found that appellant had not been damaged in any sum whatever.

We are of the opinion that, when appellant has proven the contract, the performance thereof on his part by preparing and filing with the board of supervisors the plans and specifications, his offer to superintend the construction of the bridge, and respondent's refusal to proceed with the contract, then he has established at least a prima facie case, entitling him to recover as damages the full contract price, less the cost of performance. The record reveals that all these matters were fully established by appellant. This being true, then the burden was cast upon respondent to prove facts in mitigation of those damages. Vitagraph, Inc., v. Liberty Theatres, 197 Cal. 694, 699, 242 P. 709, and cases there cited. The finding of the court that "appellant has suffered no damages whatever" cannot stand, and it was incumbent upon the trial court to find the actual damages sustained by appellant from the evidence before it.

While there is no apparent reason for a retrial of any of the issues of fact, still, in view of the conflict in the evidence as to the amount of damages actually sustained by appellant and the erroneous finding of the court thereon, we think the judgment should be reversed, with directions to the trial court to render judgment in favor of appellant, either upon the evidence heretofore received or upon such further evidence as it may see fit to receive on the one question of damages, all future proceedings in the trial court to be in accordance with the views herein expressed, and it is so ordered.

We concur: HART, Acting P. J.; PLUMMER, J.

91 Cal. App. 596

LANINI et al. v. ROST et al. (Civ. 6076.)

District Court of Appeal, First District, Division 2, California. May 4, 1928.

Appeal and error ⚷766—Judgment will be affirmed for failure of record to show error, appellant on typewritten record claiming evidence insufficient, but not printing it or findings in brief (Code Civ. Proc. § 953a, and § 953c, as amended by St. 1923, p. 748).

Judgment appealed from a typewritten record under Code Civ. Proc. § 953a, must be affirmed for failure of record to show error, appellants, required by section 953c, as amended by St. 1923, p. 748, to print in their brief or supplement thereto such portions of the record as they desire to call to the attention of the appellate court, though basing their appeal on claim that the evidence is insufficient to support the findings, not printing any of the findings which they attack, or any of the evidence on which they were based; that is, they, not printing any evidence or referring to any portion of the record, tending to show that the indebtedness in suit did not, as they claim, come within that class of indebtedness of a nonprofit co-operative corporation, for which they concede that they, as members thereof, are liable in the proportion that it was apparently adjudged against them.

Appeal from Superior Court, Monterey County; Fred A. Treat, Judge.

Action by Charles Lanini and others against H. Rost and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Bacigalupi & Elkus, of San Francisco, and W. C. Theile, Chas. B. Rosendale, and W. S. White, all of Salinas, for appellants.

C. F. Lacey, of Salinas, for respondents.

NOURSE, J. The defendants were sued as members of the Salinas Valley Dairymen's Association, a nonprofit co-operative corporation, for their proportionate share of an indebtedness created under the authority of the board of directors of the corporation. Plaintiffs had judgment, from which the defendants have appealed upon a typewritten record under section 953a, Code of Civil Procedure.

The single ground urged on the appeal is that the evidence is insufficient to justify the decision, and that the decision is against law. We have said that this is a single ground, because the contention that the decision is against law is predicated wholly upon the theory that the decision is not supported by the evidence. The appellants have cited in their brief portions of the articles of incorporation and by-laws of the association, from which it appears that the organization was created for the purpose of marketing the dairy products of the members of the association, and that the property rights and interest of each member were unequal, being based upon the proportion which the amount of the membership fees actually paid in by each bore to the total amount of all membership fees paid by all members of the association. The by-laws contained a provision that all expenses of maintaining the association should be distributed over the entire volume and value of business, and charged against each member proportionately to the volume of business done by the association for each. We gather from the briefs that the trial court followed this method of apportioning the indebtedness found to be due the respondents, and rendered judgment against the respective appellants accordingly.

It is the contention of the appellants that each member of the association was individually and personally liable for an equal share of its debts and liabilities, unless a different measure of liability was fixed by the association in its articles of incorporation or by-laws. Having quoted one paragraph of the by-laws fixing the liability of the members for expenses of maintaining the association, the appellants then argue that the indebtedness upon which the respondents sue was created for a capital expenditure upon the plant of the association, which cannot be treated as an expense of maintenance under this provision of the by-laws. Respondents appropriately reply that the appellants have failed to quote other material portions of the articles of incorporation and by-laws; that they have failed to print in their brief any portion of the evidence heard by the trial court; that they have failed to print any of the twenty-one exhibits offered in evidence; and that this evidence and these exhibits were offered for the purpose of enabling the trial court to interpret the meaning of the articles of incorporation and by-laws touching the liability of the members of the association. For these reasons the respondents insist that the judgment must be affirmed because of appellants' failure to meet the terms of section 953c, Code of Civil Procedure, which require an appellant who has taken an appeal under sections 953a et seq. to print in his brief or in the supplement thereto such portion of the record as he desires to call to the attention of the appellate court. The failure of the appellants to comply with the terms of these sections is inexcusable in a case such as this, where the appeal is based upon a claim that the evidence is insufficient to support the findings of the trial court. They do not print any of the findings which they attack or any of the evidence upon which the findings were based. They concede that they are liable for the debts incurred by the association during their period of membership, but they do not contend that they were not members at the time that any of this indebtedness arose. They concede that they are liable in proportion to the amount of business done by the association

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

for them for all debts incurred in the maintenance of the association, but they do not print any evidence, or refer us to any portion of the record, which would tend to show that the indebtedness here in suit did not come within that category.

The case is controlled by Estate of Berry, 195 Cal. 354, 358, 233 P. 330, where the court had occasion to consider the failure of an appellant to comply with section 953c, Code of Civil Procedure, as amended in 1923 (St. 1923, p. 748), and held that a judgment appealed from in such manner should be affirmed on the ground that the record failed to show error. The rule of that case requires an affirmance of the judgment.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

91 Cal. App. 394

HASENJEAGER v. VOTH et al. (Civ. 3434.)

District Court of Appeal, Third District, California. April 28, 1928.

1. Fraudulent conveyances 🔑15—Pronounced insolvency is strong circumstance of fraudulent intent in conveyance.

While insolvency alone does not establish that conveyance was in fraud of creditors, pronounced insolvency is a strong circumstance of fraudulent intent.

2. Fraudulent conveyances 🔑261—Allegation that grantor in conveyance in alleged fraud of creditors was insolvent is sufficient, without alleging particular facts constituting insolvency (Code Civ. Proc. §§ 1589–1591).

In action under Code Civ. Proc. §§ 1589–1591, to set aside a conveyance as being in fraud of creditors, as regards allegation of insolvency, it is sufficient to allege that grantor was insolvent, without alleging the particular facts constituting insolvency under the Bankruptcy Act (11 USCA).

3. Evidence 🔑56—Solvency and not insolvency is presumed.

Solvency and not insolvency is presumed.

4. Fraudulent conveyances 🔑297—Plaintiff seeking to set aside alleged fraudulent conveyance must show grantor's insolvency by clear and satisfactory evidence.

The burden of establishing insolvency at time of conveyance in alleged fraud of creditors is on plaintiff seeking to set aside such conveyance, and such insolvency should be shown by clear and satisfactory evidence.

5. Fraudulent conveyances 🔑297—Evidence held sufficient to justify finding that grantor in alleged fraudulent conveyance was solvent (Code Civ. Proc. §§ 1589–1591).

In action under Code Civ. Proc. §§ 1589–1591, to set aside conveyance alleged to have been made with intent to defraud creditors, evidence, together with presumption of solvency, *held* sufficient to justify finding against plaintiff's allegation of insolvency of grantor.

6. Fraudulent conveyances 🔑300(1)—Evidence held to show valuable consideration for conveyance alleged to have been made with intent to defraud creditors (Code Civ. Proc. §§ 1589–1591; Civ. Code, § 3442).

In action under Code Civ. Proc. §§ 1589–1591, to set aside conveyance alleged to have been made by grantor to her daughter with intent to defraud creditors, evidence that value of land was $5,625, that grantee assumed debts amounting to a little over $3,500, and agreed to take care of grantor and her husband as long as they lived, *held* to show a sufficient and valuable consideration, removing transaction from operation of Civ. Code, § 3442.

7. Fraudulent conveyances 🔑277(1)—Fraud never being presumed, plaintiff seeking to set aside alleged fraudulent conveyance has burden of proving gross inadequacy of consideration.

Since fraud is never presumed, burden rested on plaintiff seeking to set aside alleged fraudulent conveyance to prove not a mere insufficiency but a gross inadequacy of consideration, while defendants were required neither to allege nor prove the adequacy of consideration.

8. Fraudulent conveyances 🔑15—Grant of temporary preference to local vendors of necessary goods, wares, and merchandise is not badge of fraud (Civ. Code, §§ 3432, 3451).

Under Civ. Code, §§ 3432, 3451, the grant of a temporary preference to local vendors of necessary goods, wares, and merchandise is not a badge of fraud.

9. Fraudulent conveyances 🔑295(1)—Evidence held to sustain finding that conveyance alleged to have been made with intent to defraud creditors was not fraudulent (Code Civ. Proc. §§ 1589–1591).

In action under Code Civ. Proc. §§ 1589–1591, to set aside conveyance alleged to have been made with intent to defraud creditors, evidence *held* to sustain finding that conveyance was not fraudulent.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by A. C. Hasenjeager, as administrator of the estate of Elizabeth R. Peters, deceased, against Helena Voth, A. D. Voth, and another, to set aside a conveyance. Judgment for the named defendants, and plaintiff appeals. Affirmed.

Emmons & Aldrich, of Bakersfield, for appellant.

Rowen Irwin and Rollin Laird, both of Bakersfield, for respondents.

BUCK, Justice pro tem. This is an action by an administrator to set aside a conveyance alleged to have been made by decedent to her daughter, the defendant Helena Voth, with the intent to defraud creditors. The action was brought under the provisions of sections 1589 to 1591, Code of Civil Procedure, and was brought to protest the claim of the First National Bank of Bakersfield in the sum of $3,205, which was the only claim filed in the estate. The defendant A. D. Voth was evidently joined in his capacity as husband of the defendant Helena Voth, while the defendant John R. Peters was the husband of the decedent and was jointly liable on the note in question. But the property covered by the conveyance was owned by the decedent, Elizabeth R. Peters, though the husband joined in the deed.

Findings and judgment were entered in favor of the defendants Helena Voth and A. D. Voth, and the plaintiff appeals.

The sole ground of appeal is that the evidence is insufficient to sustain certain findings of the trial court to the effect that the conveyance was not made with the intent to defraud creditors, but was made for an adequate and valuable consideration, and that the deceased, at the time of the conveyance, was in possession of other property sufficient to discharge all of her indebtedness due at that time. The findings attacked may be deemed to have been made in response to the allegation in the complaint "that the said conveyance was fraudulently made with intent to defraud creditors, and at the time of the making of said conveyance the said Elizabeth R. Peters * * * was insolvent, and the defendant John R. Peters was * * * and is insolvent." It will be noted that the complaint does not allege that the conveyance in question was a voluntary conveyance or made without adequate consideration. The answer, however, put in issue the allegations of the complaint touching the alleged insolvency of the defendants, as follows:

> "Defendants deny on their information and belief that said Elizabeth R. Peters or the said John R. Peters were either of them insolvent, but, on the contrary, upon their information and belief allege that the said Elizabeth R. Peters and John R. Peters owned and were in possession of other property sufficient in value to pay off and discharge all indebtedness both owing to said First National Bank of Bakersfield and other creditors."

And as regards the allegation that the "conveyance was fraudulent and made with intent to defraud creditors," the defendants in their answer "deny that said conveyance was fraudulent, made with intent to defraud creditors, but, on the contrary, allege the fact to be that said conveyance was made for a valuable and adequate consideration."

[1] At the outstart it may be noted that the complaint, since it failed to charge that the conveyance was without consideration, does not attempt by its allegations to charge fraud in law as designated in section 3442 of the Civil Code. Franck v. Moran, 36 Cal. App. 32, 171 P. 841. The complaint attempts simply to charge fraud in fact, without any further specifications of fact than to allege that the conveyance was made with intent to defraud and that the grantor was insolvent. And while insolvency alone does not establish fraud, "pronounced insolvency is a strong circumstance of fraudulent intent." Cook v. Cockins, 117 Cal. 140, 48 P. 1025.

[2-4] As regards the allegation of insolvency, it has been held that it is sufficient to allege that the grantor "was insolvent, without alleging the probative facts constituting insolvency under the Bankrupt Act [11 USCA]." Gray v. Brunold, 140 Cal. 615, 619, 74 P. 303, 305. But it is also the rule that solvency and not insolvency is presumed. 1 Jones on Evidence (2d Ed.) p. 425. Also the burden of establishing insolvency at the time of the conveyance is on the plaintiff. As stated in the case of Parkinson Bros. v. Figel, 24 Cal. App. 701, at page 711, 142 P. 135, 140, insolvency should be shown by "clear and satisfactory evidence to have warranted a finding." And in the case at bar, though the defendant did, after making a sufficient denial of insolvency, gratuitously allege that the defendants Peters "owned and were in possession of other property sufficient in value to pay off and discharge all indebtedness both owing to said First National Bank in Bakersfield and other creditors," the burden rested, not upon them to prove this gratuitous allegation, but the burden still rested upon the plaintiff to show, by clear and satisfactory evidence, that the said grantor was insolvent.

[5] The evidence pertaining to the financial situation of the grantors at the time of the conveyance, as stated by appellant, is as follows:

> "On February 1, 1924, Elizabeth Peters and John Peters, her husband, were the owners of approximately 25 acres of land near Shafter in Kern county. They owed the Fidelity Savings & Loan Association the sum of approximately $2,600 principal secured by a mortgage on the land. They owed about $500 in miscellaneous bills and the sum of $3,000 to the First National Bank in Bakersfield, evidenced by a note, all of which was unsecured. The value of the land was estimated at between $5,625 and $7,500."

It is alleged in the complaint and admitted in the answer that the land conveyed was owned solely by the decedent.

But, in addition to the foregoing, without any objection on the part of the appellant, there was testimony adduced to the effect that the grantors were the owners of 400 acres of land in Canada, and that "if they could sell it they would pay" the National Bank of Bakersfield, "and that, though she could not herself handle the Canada property from here," she "had to assign the land first to somebody else to make a loan. She was going to do that and then pay the bank off." The foregoing testimony, coupled with the presumption of solvency, would seem to be sufficient to justify the trial court in finding against plaintiff's allegations of insolvency. And, furthermore, learned counsel for plaintiff made no attempt to modify or qualify or in any way to weaken the inference that could be drawn from the foregoing testimony as regards the land in Canada. Cook v. Cockins, 117 Cal. 140, at page 155, 48 P. 1025.

[6, 7] As regards the finding based upon the gratuitous allegation in the answer that the conveyance to Helena Voth was made for an adequate and valuable consideration, there is evidence tending to show that the value of the land was $5,625, being 25 acres at a valuation placed thereon of $225 per acre, whereas the testimony showed that the amount of the debts assumed by the defendant in consideration of the transfer was "a little over $3,500." In addition to this, there was testimony to the effect that the defendant agreed to take care of her mother and father as long as they lived. But it is the claim of appellant that, by reason of this agreement to take care of the father and mother, there was no adequate consideration for the deed notwithstanding the fact that the defendant had agreed to assume and pay the indebtedness in the amount stated. But, as stated in numerous citations in 27 Corpus Juris, p. 533:

> "The assumption of bona fide debts of the grantor by the grantee is a valuable and sufficient consideration for the conveyance or transfer of the former's property, unless it is materially greater in value than the amount of the debts assumed."

Also, as stated in Manning v. App. Con. Gold Min. Co., 171 Cal. 610, at page 615, 154 P. 301, 303:

> "The promise of a grantee to pay a grantor's indebtedness is a valuable consideration. Saunderson v. Broadwell, 82 Cal. 133, 23 P. 36; Gladwin v. Garrison, 13 Cal. 332; Carty v. Connolly, 91 Cal. 19, 27 P. 599; Greenwalt v. Mueller, 126 Cal. 639, 59 P. 137. Such assumption removes the transaction from the operation of section 3442 of the Civil Code. The same principle was announced by the Supreme Court of Nevada in Ivancovich v. Stern, 14 Nev. 341."

And since fraud is never presumed, the burden rested upon the plaintiff to prove not a mere insufficiency but a gross inadequacy of consideration; while the defendants were required neither to allege nor prove the adequacy of the consideration. Denehy v. Stewart, 41 Cal. App. 88, 98, 181 P. 839.

It is therefore clear that the principle applied in the cases of Baxter v. Baxter, 19 Cal. App. 238, 125 P. 359, and Potts v. Mehrmann, 50 Cal. App. 622, 195 P. 941, does not apply in the instant case, because in each of those cases the future support was the sole and only consideration; and there was no evidence as in the case at bar tending to show other property.

[8, 9] As regards the court's finding that the conveyance was not fraudulently made or made with the intent to defraud creditors, the evidence is very far from establishing the fraud attempted to be relied upon, for the reason that there is neither any clear showing that the grantors were insolvent, nor that the value of the property was materially greater than the amount of the debts assumed, nor was there any evidence of any desire on the part of the grantors to hinder, delay, or defraud any of the creditors, nor any desire on their part, other than to protect the creditors; or possibly to grant a temporary preference to local vendors of necessary goods, wares, and merchandise. In this state such a preference is not a badge of fraud. Sections 3432, 3451, Civ. Code; Heath v. Wilson, 139 Cal. 362, 366, 73 P. 182.

Taking the evidence as a whole, it would seem that this is a case where the circumstances of the transfer comport at least equally with the theory of honesty and fair dealing, and that, therefore, the trial court was justified in refusing a finding that the conveyance was the result of fraud practiced either by the grantor or the grantee, or by both of them acting together. Byerley v. Conlin, 174 Cal. 40, 161 P. 1150; Arakelian v. Sears, 53 Cal. App. 646, 200 P. 757; Denehy v. Stewart, 41 Cal. App. 88, at page 96, 181 P. 839.

The judgment is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

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91 Cal. App. 388

In re BARKLEY'S ESTATE.

BARKLEY v. BANQUE BELGE POUR L'ETRANGER.

(Civ. 6211.)

District Court of Appeal, First District,
Division 1, California. April 28,
1928.

1. Homestead ⚷151—Laws relating to selection and limitation of probate homestead out of separate property of decedent held mandatory (Code Civ. Proc. §§ 1465, 1468).

Code Civ. Proc. §§ 1465, 1468, relative to selection of probate homestead out of separate property of decedent and limiting it to specified period, *held* mandatory in their operation requiring probate court on proper application to set aside such homestead, irrespective of any asserted adverse title.

2. Homestead ⚷140—Surviving husband held entitled to homestead for limited period in deceased wife's separate property, irrespective of rights of judgment creditor under execution sale (Code Civ. Proc. §§ 1465, 1468).

Surviving husband *held* entitled, under Code Civ. Proc. §§ 1465, 1468, to have set apart to

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

him as such surviving husband a homestead in wife's separate property for a limited period, irrespective of rights in property acquired by judgment creditor as against surviving husband as an heir at law by reason of execution sale under judgment.

3. Appeal and error 🔑843(2)—Question as to effect of sale under execution on probate homestead became moot after expiration of year to which homestead was limited (Code Civ. Proc. § 1468).

Where surviving husband's homestead in wife's separate property was properly limited to a period of one year, question arising on appeal relative to right of judgment creditor of surviving husband under execution sale of his interest as an heir at law became moot after expiration of limitation of one year placed on homestead; property thereon, under Code Civ. Proc. § 1468, becoming subject to further administration.

4. Homestead 🔑150(1)—Probate court, in determining limitation of homestead, may consider demands of family, value of homestead, financial condition of estate, and rights of creditors (Code Civ. Proc. § 1468).

Probate court, in determining question of limitation of homestead enjoyment, pursuant to Code Civ. Proc. § 1468, may take into consideration, outside from demands of family, the value of the homestead to be set apart, financial condition of the estate, and the rights of creditors, though demands of family are deemed paramount to those of creditors.

5. Homestead 🔑150(1)—Discretion of probate court in limiting period of homestead will not be interfered with on appeal, unless abused.

Probate court, in limiting period of homestead enjoyment, is not bound by wishes of claimant, but must exercise its own discretion and good judgment, which will not be interfered with on appeal, unless discretion is abused.

6. Homestead 🔑144—Probate court under facts did not abuse discretion in limiting surviving husband's homestead in wife's separate property to one year (Code Civ. Proc. § 1468).

Probate court did not abuse its discretion, under Code Civ. Proc. § 1468, in limiting homestead of surviving husband to period of one year under evidence showing that wife's separate property consisted of dwelling house purchased for $27,500, and incumbered by mortgages aggregating $22,750, and disclosing indebtedness in the sum of $6,000, with other property of the estate of an estimated value of $1,800.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Application by Thomas J. Barkley, administrator of the estate of Sannie S. Barkley, deceased, for an order setting apart a probate homestead, opposed by Banque Belge Pour L'Etranger, a judgment creditor of the administrator. From an order setting aside the homestead and limiting it to a period of one year, both parties appeal. Affirmed.

Garton D. Keyston and Walter Slack, both of San Francisco, for Barkley.

Derby, Sharp, Quinby & Tweedt, Derby, Single & Sharp, Joseph C. Sharp, and Lloyd M. Tweedt, all of San Francisco, for Banque Belge Pour L'Etranger.

KNIGHT, J. Pursuant to proceedings had in conformity with the provisions of part 3, title 11, chapter 5, article I, of the Code of Civil Procedure, the superior court in and for the county of San Mateo, on August 2, 1926, made an order setting apart to Thomas J. Barkley, surviving husband of Sannie S. Barkley, deceased, a probate homestead selected from the separate property of the deceased and limited to a period of one year, from which order two appeals have been taken, one by the said Barkley, claiming that the limitation placed upon the duration of the homestead constituted an abuse of discretion, and the other by Banque Belge Pour L'Etranger, a judgment creditor of Barkley's, claiming to have acquired whatever interest Barkley had in said property as an heir at law or otherwise, by virtue of an execution sale held subsequent to the death of Barkley's wife, and prior to the filing of his petition to set apart a homestead.

The essential facts are as follows: Sannie S. Barkley died October 1, 1922, intestate, survived by her husband, Thomas J. Barkley, and an adult son, William S. Barkley. On January 16, 1923, the Banque Belge Pour L'Etranger, hereinafter referred to as the bank, recovered a judgment against Barkley and his son, individually and as copartners doing business under the firm name of the Barkley Company, in the superior court in and for the city and county of San Francisco, for the sum of $26,763.91. Two days thereafter, and on January 18, 1923, Thomas J. Barkley was appointed administrator of the estate of his deceased wife by the superior court in and for San Mateo county. On October 8, 1923, the judgment obtained by the bank against the Barkleys was recorded in the office of the county recorder of San Mateo county, and two years thereafter, to wit, on October 29, 1925, a writ of execution issued, pursuant to which the sheriff of San Mateo county levied upon and sold all of the interests of said Thomas J. Barkley and William S. Barkley in the premises subsequently set apart to Thomas J. Barkley as a probate homestead. The bank became the purchaser at the sale, and on the same day the sheriff's certificate of sale was delivered to the bank, and recorded in the office of the recorder of San Mateo county. About six months subsequent to the recordation thereof, and on April 5, 1926, the said Thomas J. Barkley petitioned the court to set apart said premises to him as a probate homestead, and, after due notice, said petition was heard, and on August 2, 1926, was granted, the court limiting the period of the homestead, however, to one year.

The Code of Civil Procedure provides in effect that, if there has been no homestead selected and recorded during the lifetime of the decedent, of if one has been selected by the survivor out of the separate property of the decedent in which the decedent did not join, the court must select a probate homestead (section 1465); and that, if the property set apart as a probate homestead is selected from the separate property of the decedent, the court can set it apart for only a limited period, to be designated in the order, and, subject to said homestead right, the property remains subject to administration (section 1468).

[1] It has been held uniformly that the foregoing Code provisions are mandatory in their operation (Estate of Mason, 76 Cal. App. 315, 244 P. 629; Estate of Burton, 63 Cal. 36), and that it becomes the imperative duty of the probate court upon proper application to set apart such a homestead where the deceased was in possession of the property at the time of death (Estate of Shively, 145 Cal. 400, 78 P. 869; Estate of Burton, supra), irrespective of any question of asserted adverse title (Estate of Klumpke, 167 Cal. 415, 139 P. 1062; Estate of Kimberly, 97 Cal. 281, 32 P. 234; Estate of Groome, 94 Cal. 69, 29 P. 487), and even though the estate is insolvent, and the property set apart constitutes the entire estate of the decedent (Estate of Mason, supra; Estate of Levy, 141 Cal. 646, 75 P. 301, 99 Am. St. Rep. 92). The sole restriction imposed is that, if the homestead be selected from the separate property of the decedent, it can be set apart only for a limited period, to be designated in the order, and that, subject to such homestead right, the property remains subject to administration. Section 1468, supra. Furthermore, it is held that the right of the surviving spouse to a probate homestead is independent of, and in addition to, any other right or property he or she may have, whether acquired under the will of the decedent or otherwise (Estate of Firth, 145 Cal. 236, 78 P. 643); that the order setting apart such homestead confers but a privilege and vests in the homestead claimant no estate in law or equity in the homestead premises (Estate of Vance, 100 Cal. 425, 34 P. 1087; Estate of Burton, supra; Estate of Moore, 57 Cal. 437), which is the subject of sale (Estate of Moore, supra; 11 Cal. Jur. 598), the effect of the order being to withdraw the property designated therein from administration, but not operating to qualify or affect any title which may vest in the survivor at the instant of the death of the other spouse (Saddlemire v. Stockton Savings & Loan Society, 144 Cal. 650, 79 P. 381, and cases cited therein).

[2] In the present proceeding, therefore, it would appear that, irrespective of whatever rights in the property the bank may have acquired as against Barkley as an heir at law by reason of the execution sale, the latter was not deprived of the right under the mandatory provisions of said Code sections to have set apart to him as surviving husband a homestead for a limited period. Keyes v. Cyrus, 100 Cal. 322, 34 P. 722, 38 Am. St. Rep. 296.

The cases of Weinreich v. Hensley, 121 Cal. 647, 54 P. 254, and In re Lamb, 95 Cal. 397, 30 P. 568, cited by the bank in support of its contention that the right to have a probate homestead set apart for a limited period is not absolute, but rests in the discretion of the court, are entirely foreign to the issue here, having arisen under section 1474 of the said Code relating to the rights of the survivor to statutory homesteads selected during coverture. Nor does the fact that the value of the property in question exceeded $5,000 alter the situation; it being well settled that there is no specified limitation of value in case of a probate homestead. Estate of Levy, supra, and cases cited.

[3] For the reasons above stated, we are of the opinion that the grounds urged for reversal by the bank are without merit. Moreover, and in any event, it would appear that, if it be held on Barkley's appeal, as we think it must, that the probate court did not abuse its discretion in limiting the duration of the homestead period to one year, the question presented by the bank's appeal has become moot, because, whether or not the fact of the execution sale operated to divest the probate court of its power to set apart a homestead for a limited period, it is evident that the limitation of one year placed thereon by the court has long since expired, and consequently, pursuant to the provisions of said section 1468, upon the expiration of such period, the property became, and is now, subject to further administration. Estate of Krieg, 173 Cal. 721, 161 P. 257.

[4, 5] Turning, then, to the question presented by Barkley's appeal, it may be stated generally that the law establishes no fixed rules by which the probate court shall be controlled in the exercise of its discretion in fixing the length of time a limited probate homestead shall be enjoyed. Obviously, the purpose of the law in this respect is to make provision for the support and maintenance of the family. Keyes v. Cyrus, supra. But, in determining the question of the limitation of the homestead enjoyment, the probate court may take into consideration, aside from the demands of the family, the value of the homestead to be set apart (Phelan v. Smith, 100 Cal. 158, 34 P. 667), the financial condition of the estate (Estate of Levy, supra; Estate of Adams, 128 Cal. 380, 57 P. 569, 60 P. 965), and the rights of the creditors; and, although the demands of the family are deemed paramount to those of the creditors,

the rights of the latter are not to be entirely disregarded (Estate of Adams, supra). It is not bound by the wishes of the homestead claimant, but should exercise its own discretion and good judgment, and its decision in fixing the duration of the homestead period will not be disturbed on appeal, unless it is manifest that the discretionary power thus vested has been exercised in an unreasonable and arbitrary manner (In re Schmidt, 94 Cal. 334, 29 P. 714; Estate of Firth, supra); it having been held in one case that the action of the probate court in setting aside a homestead until final distribution only was not unreasonable under the circumstances there present (Estate of Levy, supra).

[6] The evidence adduced in the present proceeding shows that the property in question consisted of a dwelling house in the city of Hillsborough, containing fourteen rooms, and surrounded by grounds and gardens. The property was purchased by the decedent for a consideration of $27,500, and at the time of the hearing the same was incumbered with two mortgages aggregating $22,750. The evidence further discloses that the estate is indebted in the sum of $6,000, and that, aside from the personal property in the dwelling, which Barkley estimated to be of the value of $1,800, the property in question constitutes the entire assets of the estate; furthermore, that the taxes on the property had not been paid for several years, and that Barkley had continued to occupy the property ever since the death of his wife in 1922.

Under the foregoing circumstances, we are of the opinion that no abuse of discretion has been shown. The order appealed from is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

McCOLGAN v. BANK OF CALIFORNIA NAT. ASS'N et al. (Civ. 6247.)★

District Court of Appeal, First District, Division 1, California. April 27, 1928.

Hearing Granted by Supreme Court June 26, 1928.

1. Principal and agent 🔑43(1)—Agency, unless coupled with interest, terminates on principal's death.

Agency terminates on death of principal, unless agency is coupled with an interest.

2. Principal and agent 🔑43(2)—"Power, coupled with an interest," involves beneficial interest in subject or power given as security.

To create a "power coupled with an interest," which will survive death of principal, there must coexist with the power a beneficial interest in the subject which is enforceable in the name of the attorney in fact, or a power must be given as security for payment of money other than that arising as compensation through the exercise of the power, or as security for the performance of some act of value.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Power Coupled with an Interest.]

3. Brokers 🔑9—Contract between landowner and land company for subdivision of land into lots and sale thereof at minimum price, dividing profits over stated amount, held not to give company interest, surviving death of principal.

Contract by which landowner placed property in hands of land company to be subdivided into lots, and sold at not less than minimum price, with provisions for division of profits over stated amount, and for owner's limitation of amount of improvements which might become charged against the land, *held* to create agency which terminated on death of property owner, and not to give company interest in land involving "power coupled with on interest," which survives principal's death.

4. Brokers 🔑9—Power to subdivide land and sell lots, retaining portion of profits over certain amount, is not coupled with an interest.

One authorized to lay off land into lots and sell the lots dividing the proceeds above a certain amount with the owner does not have a power, coupled with an interest, such as will survive the death of the owner of the land.

5. Principal and agent 🔑43(2)—Agent must have interest derived from power or property in question to give him "power coupled with an interest."

In order that a power may be a "power coupled with an interest," agent must have an interest derived from the power or from something else in the property in reference to which the power is given; mere payment in consideration of power being insufficient.

6. Brokers 🔑9—Provision in contract authorizing agent to subdivide and sell lots that agreement was coupled with interest held ineffectual to give agent interest surviving owner's death.

Contract by which landowner authorized land company to subdivide land into lots charging improvements to the land, and selling the lots at a minimum price, dividing proceeds over stated amount, did not give land company a power coupled with an interest in the land surviving owner's death by virtue of provision in contract that "this agreement is coupled with an interest, and is only revocable by the consent of the parties hereto."

7. Trusts 🔑25(1)—Trust will not be impressed on realty to secure performance of personal contract, unless intent to do so is expressly stated.

Trust will not be impressed on realty to insure the performance of a purely personal contract, in the absence of words expressly showing such an intent.

8. Trusts 🔑1—Trust must require some act on part of trustee inuring to beneficiary.

Trust must have a purpose, and require for its fulfillment some act on the part of the trustee inuring to the beneficiary.

★For opinion of Supreme Court adopting opinion of Court of Appeal, see 274 P. 342.

9. Trusts 🔑30½(1)—Contract authorizing land company to subdivide land into lots, and sell lots to prospective purchasers, held not to create trust upon land.

Contract between landowner and land company by which the company was to subdivide land into lots, and transfer the property to purchasers which it should procure, *held* not to create either express or resulting trust, since no act was required on part of land company as trustee inuring to any beneficiary.

10. Brokers 🔑77—Land company, authorized to subdivide property into lots, and sell lots, charging owner's share of profits with moneys advanced, held not entitled to lien for advancements, where no profits were ever realized.

Land company, which failed to realize any profits for landowner under contract whereby it undertook to subdivide lots and sell them, retaining sufficient to liquidate its claim for money advanced from landowner's share of profits, *held* not entitled to lien for moneys advanced, though contract gave express lien for moneys advanced for particular purpose of laying out streets.

11. Brokers 🔑77—Land company held not entitled to lien for expenses in carrying property under contract given lien for moneys advanced for subdividing tract and laying out streets.

Land company, authorized to subdivide land into lots, and sell the lots, retaining part of profits, and deducting from owner's share sufficient to liquidate claims for moneys advanced him, and given lien for expense of subdivision and laying out streets, *held* not entitled to lien for expenses in "carrying" the property, in view of rule that the expression of the one is the exclusion of the other, especially where no profits had been realized.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by R. McColgan against the Bank of California National Association, the Co-operative Land Company, and others. From a judgment in favor of defendant last named, plaintiff appeals. Reversed.

George D. Collins, Jr., of San Francisco, for appellant.

John L. McNab and Byron Coleman, both of San Francisco, for respondent.

PARKER, Justice pro tem. This is an appeal from a final judgment and decree to the extent that the judgment is against plaintiff and in favor of defendant Co-operative Land Company, a corporation. The action, as instituted, was against other defendants, but since then plaintiff has acquired all of the interest of the remaining defendants.

The action was one to quiet title. The court below found and decreed that plaintiff was not entitled to have his title quieted against Co-operative Land Company, and found necessarily that said Co-operative Land Company had and has an interest in the real estate in controversy valid and substantial, and by the decree confirmed.

The entire controversy hinges about the construction of certain contracts, and the one definite question to be answered relates to the nature of the power created by these contracts. Therefore, with some particularity of detail, we relate the facts as the record here discloses them.

At the outset, we do not deem it necessary to give any description of the property involved other than to state that it comprises certain tracts of land situated in the town of Mayfield, county of Santa Clara, Cal. The land involved is rather extensive, and a surveyed description of it long, and no useful purpose can be served by further particularization. The real estate was formerly owned in fee by one Percy Beamish, and both parties here derive their title through him. It is conceded that the title of Beamish was good and sufficient, and comprised the fee. On October 28, 1904, Beamish entered into a contract with the Co-operative Land & Trust Company (a corporation). Here it may be noted that this corporation subsequently changed its name to Co-operative Land Company, respondent here. To avoid further specification or confusion, whether referring to it before or after the change of name, this corporation will hereinafter be called the land company. This contract was substantially as follows: Beamish, in consideration of the covenants and agreements on the part of the land company, and in consideration of services and money advanced by said land company, by the terms of this agreement, agrees to place the following described property in the hands of the land company, with power to control the same as hereinafter stated: [Here follows description of the lands, being lands here involved.] Beamish further covenants and agrees that the control of said property shall remain and be exclusively in the hands of the land company until the lands are finally sold and disposed of, and all the terms and conditions of this agreement are fulfilled, settled, and adjudged, and all the affairs in connection therewith fully concluded. Out of the proceeds of the sale of said property, it is agreed and understood that Beamish shall receive not less than the sum of $300 per acre, and the tract contains approximately 20 acres. Beamish covenants and agrees to give, and does give, full power and authority to the land company to lay out streets and avenues on the property, and subdivide said property into lots and acres, or in any way, and to sell the same in any part or parts, piece or parcel, or in any manner, the land company sees fit, and Beamish ratifies and confirms all acts and deeds of the land company in regard to laying out of streets, subdivisions, and sales. Beamish further agrees to make a good and

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

sufficient deed to any part of said land to any party named by the land company.

Beamish agrees that the land company shall have full power and control of the selling price of the land, and that the land company may fix or change said price at will, provided, however, that the prices to be fixed for subdivisions by the land company shall not be fixed so as in the aggregate to produce a less sum than $9,000 for the entire tract, plus the amount to be expended in improvements as hereinafter stated by the land company. If at any time it shall be necessary to reduce the prices of subdivisions of said tract below the figure stated, it is understood and agreed that it may be done only after the written assent of Beamish shall have been given. Beamish covenants and agrees to give the land company 5 per cent. commission on the selling price of said land, also that one-half of the net profits on the sales of said land above the average price of $300 an acre shall belong to the land company, after deducting 5 per cent. commission on the gross selling price. Also that all interest on sales, mortgages, and notes above the average price of $300 per acre shall be considered as profits, and equally divided between the parties. No division of profits shall take place until Beamish shall have been paid $6,000, plus all taxes paid by him, and the land company shall have been reimbursed for money expended in making the improvements herein specified. Thereafter the profits shall be divided every 90 days.

All deeds shall be given by Beamish or his trustee for that purpose created, or their heirs, executors, administrators, or assigns. All trust deeds, mortgages, and notes shall be made to Beamish, and the same and all papers in connection therewith shall be deposited with, and kept by, First National Bank of Palo Alto in trust for all parties concerned; and for said purpose it is hereby agreed that said bank shall be the trustee of the parties hereto.

It is agreed that all expenses and costs of surveying said tract and the cost of laying out, grading, turnpiking, and graveling, and other improvement of streets, is to be paid for by the land company, and is to be considered and become a charge against the land, and added to the net selling price of $300 per acre; provided, however, that the land company shall begin the work of improving said tract within 30 days from the signing of the contract, and shall complete the same, and place said tract on the market for sale within 3 months thereafter. It is further agreed that the land company shall expend no greater sum in making said improvements than $500 without first obtaining the consent in writing of Beamish; it being the purpose of this clause to give Beamish the power to limit the amount which by improvement may become a charge against the land.

It is agreed that all taxes shall be paid by Beamish and be a charge on the land, and added to the net selling price of $300 per acre. The expense of advertising and selling the land shall be at the proper cost and charge of the land company. At any time Beamish may demand a statement of account and conditions from the trustee and the land company, and it shall be the duty of either or both to furnish such a statement when demanded.

It is further agreed that the terms of sale may be cash, or that purchaser of land may pay one-fourth in cash at time of sale, one-fourth in one year, and one-half in two years after the date of sale, with privilege of paying any amount at any time, any unpaid balance of the purchase price to be secured by mortgage on the property sold, with note bearing interest at 8 per cent. per annum; or sales may be made on contract for deed on the payment of one-tenth of the selling price in cash, and the balance in twenty-four monthly payments, with interest at 6 per cent. added pro rata to each monthly payment. Where a mortgage is given, the mortgagee to pay the taxes; where contract for deed is taken, the purchaser is to pay the taxes.

This agreement is coupled with an interest, and is only revocable by the consent of the parties hereto; but it is understood that for breach of covenant either party may rescind.

On February 28, 1905, a rider was executed by the parties to this agreement and affixed to the first contract. This rider provided that the land company shall have, and is thereby given, power to execute contracts for the sale of the land described, which said contracts shall be binding upon Percy Beamish. All contracts, however, are to be made subject to the terms of the first agreement, and this authority is to be considered and construed as a part of the original agreement.

On the 6th day of November, 1908. this contract with the rider was recorded in miscellaneous records of Santa Clara county.

Thereafter on June 10, 1907, Percy Beamish entered into another contract with the land company, which latter contract is substantially as follows:

Beamish, in consideration of the agreement thereafter contained, and for and in consideration of the contract of October 28, 1904. makes these additional covenants and agreements to be added to, and make a part of, the agreement of October 28, 1904, and this present agreement shall be made a part of, and construed with, the former agreement, and, whenever the agreements may conflict, this later agreement shall control.

Beamish agrees that the land company shall have full power and control of the selling price and terms of sale of the lands, and may make and fix or change said price at will, and this control of the selling price by the land company shall be absolute, and Beamish ratifies and confirms all that the land company may do in making agreements of sale of said land and fixing the price thereof.

It is further agreed that, after Beamish has been paid the full sum of $6,000 as provided in original contract, all money received thereafter for the sale of the land shall be divided equally between the parties. The land company waives the 5 per cent. commission as specified in the original contract. It is further agreed that all expenses of surveying and subdividing the land, and the cost of laying out, grading, turnpiking, and graveling, laying sidewalks, water pipes, and other improvements of streets, commissions of agents other than the land company, advertising and selling said tract, shall be paid equally share and share alike by the parties hereto. There is then a provision that an outstanding mortgage in the sum of $2,250 shall be paid by Beamish, together with the taxes for 1906 and 1907.

It is then agreed that the land company may retain from the one-half of net profits that may become due to Beamish a sufficient sum to pay the mortgage referred to or to make partial releases thereof, together with interest and taxes thereon. It is also provided that the land company shall retain from the Beamish profits sufficient sums to liquidate any claim for money that has been advanced to Beamish by the land company. All sales made by the land company heretofore are ratified and confirmed.

It is understood by this agreement that it is the intention that it shall be so considered and construed that all the expenses of any kind and nature attending the sale of the land shall be borne equally between the parties, and that thereafter the net profits shall be divided share and share alike, providing the share of the net profits belonging to Beamish shall be first charged as hereinbefore specified.

This contract was likewise recorded on November 10, 1908, in miscellaneous records of Santa Clara county, Cal.

On March 12, 1912, Percy Beamish conveyed the real property by deed of trust to R. McColgan and C. H. Williams, as trustees for D. A. McColgan as beneficiary, and as security for a loan to Percy Beamish. On March 22, 1915, the trustees under the trust deed conveyed the property by deed to D. A. McColgan. Thereafter, on or about September 19, 1924, plaintiff, R. McColgan, became the record owner of said property by reason of various mesne conveyances subsequent to said conveyance to D. A. McColgan by the trustees.

Prior to the commencement of this action, there had been fully paid to the land company all expenses and costs of surveying and subdividing the tract of land, and said Beamish also fully paid the land company all expenses and costs of laying out, grading, turnpiking, graveling, and other improvement of streets mentioned in the clause of the contract as being a charge on the land. The charge and lien given said land company by said contract were fully satisfied and discharged by said payments.

From time to time the land company advanced for other purposes, in accordance with the terms of the contracts, sums amounting to $3,252.62, and the accrued interest thereon up to October 1, 1924, equals $1,914.15. Also the land company advanced moneys for the use of Beamish in the sum of $1,916.43, and the interest thereon computed $1,650.29. No part of either of the sums advanced or the interest on either has been repaid.

Percy Beamish died on March 14, 1916.

The judgment and decree of the trial court adjudged as follows: That plaintiff is the successor in interest of Percy Beamish in and to the lands involved; that plaintiff is entitled to take nothing by the action, and is not entitled to have his title quieted as against the land company; that the land company is the owner of an interest in said real property in accordance with the terms and conditions of the contracts hereinbefore set forth; that the land company is entitled to a charge and lien against the property and the proceeds of any sales thereof as security for the repayment of $3,253.62 principal and $1,914.15 interest, and also is entitled to a lien and charge against the half interest in the property remaining in Percy Beamish and the proceeds of any sales in the sum of $1,916.43 principal and $1,650.29 interest; that the land company is entitled to carry into effect, and fully perform, and cause to be fully performed, the provisions of the contracts with Percy Beamish; that under the terms of the first agreement Percy Beamish, or his trustee for that purpose created, was to execute all deeds that might be necessary under the performance of the contract; that by the terms of the contract it was agreed that First National Bank of Palo Alto should be trustee of the parties.

The decree then provides that the land company is entitled to demand and receive and cause to be executed and delivered by plaintiff any and all deeds and conveyances which may be necessary to secure to purchasers from the land company a good and sufficient title, such deeds to have the same force and effect as if executed by Percy Beamish in his lifetime, and if, upon demand, plaintiff shall neglect or refuse to execute and deliver such deeds and conveyances, or in the event of the death or incapacity of plaintiff the land company is entitled upon application to the court to have appointed a trustee or administrator under the orders of the court to execute the necessary deeds, and in the event of the appointment of such trustee or commissioner, all the expenses in connection therewith shall be charged to plaintiff, his personal representative, successor or assigns. Any balance over and above all of these claims and charges and expenses, if any there be, to which Percy Beamish may have been entitled during his lifetime, shall be paid to plaintiff.

The record before us consists of the judgment roll and the engrossed bill of exceptions, which latter shows the fact herein stated to the effect that the amounts hereinbefore referred to have been paid; that is to say, the bill of exceptions discloses that the amounts listed as costs of surveying and subdividing the tract, and all expenses and costs of laying out, grading, turnpiking, graveling, and other improvement of streets, have been fully paid and discharged.

Appellant's reasons advanced on this appeal are stated thus: Either taken separately, or read together, the contracts are nothing more than agreements of agency by which plaintiff's predecessor, Beamish, as owner of the land, gave to the land company exclusive right to sell the land for a compensation, to be measured by the price realized; that, Beamish having died in 1916, the power of the agent land company at that instant ceased, and the agency came to an end.

Next appellant urges that in any case defendant land company is not entitled to a lien upon the land as decreed.

Without further analyzing the contention of appellant, as regards the first claim, the question presented is whether the agency created, or the power given, was or was not coupled with an interest.

[1] If the rights of the respondent land company were all embraced within a mere naked agency, it is settled that the agency ceased with the life of Beamish. If, however, we find what in legal parlance is denominated an agency or power coupled with an interest the conclusion is different.

This brings us, therefore, to an inquiry as to what an agency coupled with an interest means. In Mechem on Agency (2d Ed.) §§ 570–575, we find the subject well discussed. The author finds a general loose use of the word "interest," and cites illustrations. Those illustrations pertinent to this discussion may be given, viz., (1) an interest, not amounting to a property or estate in the thing itself, but still an interest in the existence of the power or authority to act with reference to it, not for the purpose of earning a commission by the exercise of the power, but because the agent has parted with value, or incurred liability, or assumed obligations, at the principal's request or with his consent, looking to the exercise of the power as the means of reimbursement, indemnity or protection; (2) an interest or estate in the thing itself, concerning which the power is to be exercised, arising from an assignment, pledge, or lien created by the principal, coupled with which is the power to deal with the thing itself in order to make the assignment, pledge, or lien effectual.

These two interests illustrated differ from each other in the fact that in the latter the agent has an estate or interest in the subject-matter of the power, while in the former his interest is rather in his right to exercise the power over the thing in order to make it available for the security or protection contemplated. Each of these illustrations might be called a power coupled with an interest, and each has been so called, though the interest in the respective cases is of a different nature. The leading case on the subject, and the one most quoted and relied upon, is the case of Hunt v. Rousmanier, 8 Wheat. 174, 5 L. Ed. 589. The opinion was written by Chief Justice Marshall, and the reasoning thereof stands unchallenged, and, in fact, both appellant and respondent here concede the controlling force of the decision. The opinion reads:

> "We hold it to be clear, that the interest which can protect a power, after the death of a person who creates it, must be an interest in the thing itself. * * * The words themselves would seem to import this meaning. 'A power coupled with an interest,' is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases, when the interest commences, and therefore, cannot in accurate law language, be said to be 'coupled' with it. * * * The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name."

[2] In a review of the authorities, it will be found that on almost every occasion when the question of a power, coupled with an interest, has arisen, the case of Hunt v. Rousmanier has been accepted as the leading authority. Without reviewing these cases, we may turn to the California authorities on the subject, which are in complete accord in accepting the rule of Hunt v. Rousmanier, supra; Barr v. Schroeder, 32 Cal. 609; Flanagan v. Brown, 70 Cal. 254, 11 P. 706; Cox v. Hughes, 10 Cal. App. 553, 102 P. 956; Boehm v. Spreckels, 183 Cal. 247, 191 P. 5; Todd v. Superior Court, 181 Cal. 414, 184 P. 684, 7 A. L. R. 938. From all of these authorities but one conclusion may be reached. However it may be phrased, the rule remains that to create a power coupled with an interest there must coexist with the power a beneficial interest in the subject thereof which is enforceable in the name of the attorney in fact and will survive the constituent; or the power must be given as security for the payment of a sum of money other than that which arises as compensation through the exercise of the power, or as security for the performance of some act of value. Todd v. Superior Court, supra.

[3] Testing the contracts here involved by

the rule, we conclude that the respondent acquired no interest in the subject-matter of the contracts, namely, the lands; and, having acquired no interest coupled with his power, the power was terminated upon the death of Beamish. This conclusion is compelled from the language of the contracts themselves. For instance, in the original contract, which remains in that respect unchanged, the land company was restricted in the amount to be expended without first obtaining the consent of Beamish; and it was expressly stated that the purpose of this clause was to give Beamish the power to limit the amount which by improvement *may become a charge against Beamish's land.* Likewise it was agreed that deeds were to be given by Beamish or *his* trustee for the purpose named. Further still, the agreement provides specifically "Beamish covenants and agrees that the control of the property shall be exclusively *in the hands of the land company* until finally sold, etc.; the phrase thus italicized being indicative of an agency; likewise the provision in the first contract for commissions.

The rider of February, 1905, in no way changes the relationship. The final agreement, rather than altering the legal relationship of principal and agent, tends to confirm its existence. A fair reading of the last contract indicates its purpose to be only to enlarge the powers of the agent, manifestly on the theory that, in the absence of those later provisions, no such powers were originally given. It will likewise be noted that in this last agreement, while the land company was to receive its compensation in a mode exclusive of commissions as such, nevertheless the contract expressly provides for commissions to agents *other than the land company.*

Scrutinizing carefully the provisions of all the contracts, it cannot be found where the land company has acquired, or was given by Beamish, the slightest vestige of interest in the lands themselves. By various methods of construction, natural and forced, it might be held that a relationship possibly greater than that of mere principal and agent resulted from the agreements. But no interest in the premises such as contemplated in the doctrine of a power coupled with an interest can be created in the land company.

In Walker's American Law of Real Estate Agency (2d Ed.) at page 23, § 16, we find the law again stated thus:

> "An interest in the land itself, as distinguished from the proceeds of it, is the distinguishing feature of a power coupled with an interest."

[4] One authorized to lay off land into lots and sell, the proceeds above a certain amount to be divided with the owner, has not a power coupled with an interest. Le Moyne v. Quimby, 70 Ill. 399; Atlantic Coast Realty Co. v. Townsend, 124 Va. 490, 98 S. E. 684; Hall v. Gambrill (C. C. A.) 92 F. 32.

[5] In order that a power may be a power coupled with an interest, the agent must have an interest derived from the power or from something else in the property or thing in reference to which the power was given; that he paid a valuable consideration for the power will not be enough. Coney v. Sanders, 28 Ga. 511, 513.

In passing, it may be noted that in most of the decided cases the question is presented on facts similar to those in the case at bar. It should be borne in mind that the doctrine of agency, coupled with interest, is in itself an exception to the general rule that the power of the agent ceases upon the death of the principal. As an exception, it should not receive a construction that would destroy the rule. It would be economically unsafe to extend the rule to the end that a condition might result where the real estate of a nation should be held under agency or power given by deceased persons. To have property and property rights controlled and handled under the principalship of past generations is manifestly destructive of progress, and can result only in chaos and confusion.

In Hicks v. Post, 154 Cal. 22, 96 P. 878, we note this language applicable here:

> "The case is simply one of an agency to sell land. * * * The agent, in the hope and belief that he will be able to sell the land at a profit, * * * agrees to and does make certain expenditures upon the land. If he is able to make the sales he will be reimbursed for these expenditures out of the proceeds of the sales. If he fails to make the sales he loses the expenditures which he has made. This is the element of chance which necessarily inheres in a contract of this character."

The agency in the instant case was first conferred in 1904, and the record indicates that it still remains unexecuted in full. There is nothing to indicate that any of the powers were executed, though we may assume that some lots have been sold and other things done. There is nothing inequitable in the doctrine of Hunt v. Rousmanier, supra, or in its application. One desirous of subdividing the property of another can purchase the same, and thus end all questions of agency or power. Or, if unable to do so, he may readily secure a sufficient interest to protect his investment against sudden revocation. Or, in lieu of either of these, he may still, with his eyes open, take the chances.

[6] In support of its claim that there was a power coupled with an interest, respondent contends that the language of the contract should govern. The contract, as noted, reads:

> "This agreement is coupled with an interest and is only revocable by the consent of the parties hereto."

This may be influential in determining the revocability of the agreement by either party, and particularly by Beamish during his lifetime. It may be conceded that Beamish could not revoke the power conferred under the agreement. However, this would not have the effect of avoiding the rule that the power came to an end upon the death of Beamish. The statement in the contract that the agreement that the power is coupled with an interest means nothing. Evidently the one drawing up the agreement had some idea that to give the agreement the capacity of survival after Beamish's death the power must be so coupled. Yet the bare statement did not accomplish this result. The fact is not to be established by a mere characterization. The statement is a general, loose one. It may reasonably mean that the interest remained in Beamish, in the absence of anything to the contrary in the contract appearing. Surely there is nothing to indicate what the interest is; and, if we did accept the phrase in the contract as binding, we would still be left to surmise as to what actually passed to the land company other than the naked power.

[7-9] Respondent argues that, if it is determined that the agency or power was not coupled with an interest, and therefore ceased on the death of Beamish, nevertheless the facts show that an express trust was created in the lands, and that such trust should be enforced, and was equitably enforced by the terms of the decree herein. All of the cases hereinbefore cited negative this contention.

In the case of Miller v. Lerdo Land Co., 186 Cal. 1, 198 P. 778, a situation sufficiently similar to permit quotation arose. There the court says:

> "Respondent's rights * * * are: That he shall receive one-third of the selling price of any and all of the said lands; that this one-third of the selling price shall be paid to respondent at the times and in the manner and according to the same terms as the remaining two-thirds are paid to appellant. * * * It is apparent * * * that the contract conferred upon respondent nothing more than a right to one-third of the proceeds when * * * sold. There is a distinction between an interest in the land itself and an interest in the money obtained from the sale of the land. * * * The contract relied upon by respondent * * * does not, by any possible construction, purport to pass a present interest in the lands to respondent nor to provide for the holding of the lands or any interest therein for the benefit of respondent, nor is there anything from which any such intention can fairly be inferred. There is, therefore, no express trust."

A trust will not be impressed upon the realty to insure performance of a purely personal contract in the absence of words expressly manifesting such intent. A trust, whether express or resulting, must have a purpose, and require for its fulfilment some act on the part of the trustee inuring to the beneficiary. Here there is no act required of Beamish other than to transfer the property to purchasers procured by the Land Company when and if procured. We hold this not to be a trust upon the land.

[10] Lastly, appellant attacks the judgment and decree which impresses a lien upon the property for certain sums of money. The contract provided for a lien as follows:

> "It is further covenanted and agreed that all expenses and cost of surveying and subdividing said tract, and the cost of laying out, grading, turnpiking and graveling and other improvement of streets, is to be paid for by the land company, and is to be considered and become a charge against the land."

The engrossed and certified bill of exceptions before us states that plaintiff proved to the satisfaction of the trial court that all charges incurred for purposes in the clause recited have been fully paid and discharged before the commencement of the action. The lien impressed upon the property by the decree, pursuant to the findings, is for advancements and expenditures for other purposes. The contract specifically provides that the land company shall retain from the one-half of net profits due Beamish sums sufficient to liquidate any claim for money advanced to him. For the sum found to have been advanced, the court below decreed a lien against the lands in favor of the land company. The contract will not justify such a lien, and impressing it upon the lands as against the plaintiff is unsupported by any authority. Indeed, none is cited. This is purely a matter of accounting between Beamish and the land company, and, if no profits accrue, there is no fund out of which the land company may be reimbursed. It is obvious that the main purpose of the arrangement was to subdivide the lands and sell the same. This was the understanding of the land company, and, if the undertaking failed to the extent that there were no profits, the contract of Beamish to repay moneys only out of the profits did not then become a burden upon the lands.

[11] The remaining sum of money for the repayment of which a lien is impressed upon the lands is, as expressed in the findings, money advanced "to carry said property in accordance with the terms of the contracts." There is absolutely no provision in the contract to which these advancements refer. The nature of these advancements is not disclosed. The clause of the contract last set forth determines the kind and character of expense chargeable to the land. The ancient rule of construction "expressio unius," etc., applies. Whatever the term "carrying the property" may mean, no lien or charge arises against the land by virtue of moneys expended in that enterprise under the contract.

Respondent at the oral argument agreed that the main point in the appeal was the determination of whether or not the land company acquired any interest in the lands under the contract. No attempt has been made by respondent to justify the lien.

The judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

91 Cal. App. 440

MURRAY v. KUNDE. (Civ. 3201.)

District Court of Appeal, Third District, California. April 30, 1928.

1. **False imprisonment 🔑31—Evidence held to sustain verdict for plaintiff in action for wrongful arrest.**

In action for wrongful arrest, evidence *held* sufficient to sustain verdict for plaintiff.

2. **Appeal and error 🔑1002—Appellate court must accept verdict based on substantial conflict in evidence.**

Appellate court must accept verdict of jury, based on substantial conflict in evidence.

3. **False imprisonment 🔑39—In action for damages for wrongful arrest, question of probable cause is for court, while malice is for jury.**

In action for damages for wrongful arrest, question of probable cause is one of law, to be determined by court, while question of malice is one of fact for jury.

4. **Appeal and error 🔑928(4)—Where record does not show who requested instructions, presumption is that they were given at request of appellant.**

Where record does not show at whose request instructions were given, presumption is that they were given at request of appellant.

5. **Appeal and error 🔑882(12)—One cannot predicate prejudice on erroneous instructions given at his request.**

Party cannot predicate prejudice on erroneous instructions submitted by court to jury at his request.

6. **Trial 🔑295(4)—Where instruction taken as whole correctly stated law in action for wrongful arrest, it was not erroneous because portion thereof implied that probable cause was for jury.**

In action for malicious prosecution, instruction which, as a whole, correctly and clearly stated the law pertinent to issues, *held* not erroneous because portion taken alone implied that question of probable cause was for jury's determination.

7. **Trial 🔑295(2)—Where there are several instructions on same proposition, and one or more is erroneous, they should be read with instruction stating rule correctly.**

Where there are several different instructions upon same legal proposition, and any one or more, but not all, of them, unless considered with other correct, given instructions, would involve erroneous statement of rule, they should be read together and with any given instructions stating rule correctly.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Action by P. Murray against A. L. Kunde for damages for wrongful arrest. Judgment for the plaintiff, and the defendant appeals. Affirmed.

Carl Barnard and W. F. Cowan, both of Santa Rosa, for appellant.

H. B. Churchill and W. F. Geary, both of Santa Rosa, for respondent.

HART, J. The plaintiff brought this action for damages in the sum of $10,000 for the alleged wrongful arrest of his person upon a process alleged to have been maliciously caused by defendant to be issued by one Marvin T. Vaughan, justice of the peace in and for Santa Rosa township, in the county of Sonoma, this state. The cause was tried before a jury and a verdict returned in favor of plaintiff in the sum of $1,000. Upon the verdict so rendered, judgment was entered in favor of plaintiff for said sum.

The appeal here is by the defendant from said judgment.

The alleged false arrest was founded on a complaint filed by the defendant against the plaintiff in the above-named justice's court, on the 9th day of June, 1923, and which charged that on that day the plaintiff (defendant in the criminal action) did, in said county of Sonoma, commit a misdemeanor in that he "willfully, unlawfully and maliciously exhibit, draw, and use a deadly weapon, in a rude, angry, and threatening manner, and not in necessary self-defense, in the presence of A. L. Kunde and Mrs. Archer Murray." Pen. Code, § 417. The plaintiff, having been arrested on a warrant issued on said complaint, was arraigned before said justice's court, and the date of his trial fixed for June 23, 1923. At the request of the accused, on June 15th, the trial was postponed to June 28, 1923, at 10 o'clock a. m. The complainant, Kunde (defendant here), in said original action failed to appear at the hour fixed for the trial on the 28th day of June. After waiting for some time for his appearance and he (Kunde) not appearing, the justice of the peace made an order dismissing the complaint and discharging the defendant therein (plaintiff here) from the further custody of the law; he then being under bail for his appearance at the trial.

The circumstances out of which the arrest of the plaintiff developed may thus be briefly stated: The plaintiff, Murray, was an employee of Kunde, defendant here, on the latter's ranch in Sonoma county. His family consisted of himself, wife, and four young children. They resided in a "bunkhouse" on the defendant's ranch. This house consisted of three rooms. The plaintiff kept in the house two weapons—one a rifle, which, at the time of the difficulty leading to his arrest, stood in the corner of the kitchen, and the other a revolver which plaintiff kept under a pillow on his bed. In the month of January, 1923, the Murrays went to the ranch of Kunde, and there took up their residence. Murray had been employed by Kunde as a "ranch hand," and Mrs. Murray was at the same time employed to do the cooking for the men employed on the ranch. Thus the Murrays were employed until the 8th day of June, 1923.

On the 8th day of June, 1923, the plaintiff and Kunde were together in the "cow barn" situated on the ranch. At that time and place Murray notified Kunde that he (Murray) intended to terminate his employment by the former, and was going to leave the ranch. The next morning, near the hour of 7 o'clock Kunde appeared in the house of Murray, opening the door and stepping into the room, without knocking at the door or giving any other warning of his intention to enter, and immediately ordered Murray to pack his belongings, and, with his family, depart from the premises. Replying, Murray, addressing Kunde in a very civil manner, stated that it would not be possible for him to move then, as he had not had an opportunity to arrange for housing his family and furniture elsewhere, and that, if he was to be ejected from the premises then, it would have to be done by the sheriff or other officer, who certainly would under the circumstances allow him to remain in the house until the following day. Thereupon Kunde, in language too foul and abominable to be repeated, under any circumstances, in the presence of persons of the least refinement and decency, without a shudder, declared that he would himself put them out then. At the same time he picked up a chair and menacingly approached Murray, who slowly retreated to the bedroom. Mrs. Murray, fearing lest her husband intended to procure the pistol under the pillow, followed her husband with the intention of preventing or attempting to persuade him not to take the weapon from the bed; but Mrs. Murray had taken but a few steps into a bedroom when Murray, without touching or getting the pistol, returned to the room where Kunde was, and started in the direction of the corner of the room where the rifle was standing. He did not take hold of the rifle, however. Kunde had put the chair to the floor and for a time thereafter attempted to strike Murray with his fists, but Mrs. Murray got hold of his trousers and pulled him from her husband, or at any rate prevented him getting near enough to Murray to strike him. During all this time Kunde was very angry and in a furious rage. The children of the Murrays, from the excitement and fear, were almost in a state of hysteria. Kunde finally stepped out of the house, but, after taking a few steps therefrom, returned and asked Murray if he would permit him to see his (Murray's) rifle or pistol. Murray refused to do so. Kunde at that time also asked Mrs. Murray if she did not see her husband menacingly brandish a "gun" about while the altercation in the house was in progress and she positively replied in the negative. The Murray family and Kunde were the only persons in the house while the trouble was going on. The foregoing statement was taken from the testimony of both Murray and his wife, given at the trial of this action.

Kunde and a boy named Beeson, who was of the age of about 9 years, and who claimed to have been in the bunkhouse when the altercation occurred, testified that Murray had a gun in his hands at the time, and Kunde said that he was handling it in a threatening manner. Kunde's version of what occurred in the bunkhouse at the time was entirely different from that of Murray and his wife. According to his testimony, the plaintiff was the aggressor, and abused and with a gun in his hands threatened Kunde. He stated on direct examination that in the swearing to the complaint against Murray he was not actuated "by ill will or any motive of oppressing or injuring Murray," but only because "I wanted the public to know what kind of a man he was." The Beeson boy was unable to remember anything that occurred during the controversy between the two men, except that Murray procured and had a gun in his hand. On observing the gun, he became frightened and hurriedly left the house. Both Murray and his wife stated young Beeson was at no time in the house while the difficulty was going on, nor was he in the house, they said, at any other time that morning.

R. H. Bonham, also an employee on the ranch of Kunde at the time of the trouble between plaintiff and defendant, testifying for the former, said that within a very brief time after the occurrences in the bunkhouse, and on the same day, Kunde met witness and told him about the trouble between him and Murray; that at that time Kunde stated that he had just been in to see Murray, and had asked him (Murray) to leave the place, and they got into a little argument; that he (Kunde) said to witness that Mr. Murray "went in the other room he (Kunde) thought after a gun," and that he (Kunde) then "turned around and walked out."

[1, 2] There is, as thus it is made to appear, a substantial conflict in the evidence as to what occurred in the bunkhouse between Kunde and Murray, and this court must hence accept the verdict of the jury upon the proposition that the altercation in said house occurred substantially as Murray and his wife described it in their testimony.

[3] There is but one general point, involving several of the instructions given to the jury by the trial court, presented here for a reversal of the judgment. The instructions attacked by appellant relate to the question of probable cause for causing the arrest of the plaintiff. It is the settled rule in cases for damages for malicious prosecution that the question of probable cause is one of law, to

be determined by the court, while the question of malice is one for the jury. The instructions which were read to the jury, and of which the defendant complains, so counsel for the plaintiff say in their brief, are "*plaintiff's* instructions Nos. 4, 5, and 10."

[4-7] The record does not show at whose request the criticized instructions were given —whether at the request of the plaintiff or that of the defendant. "The presumption is, therefore, that they were given at the request of the defendants. Gray v. Eschen, 125 Cal. 1, 5, 57 P. 664; Sutter-Butte Canal Co. v. American Rice & Alfalfa Co., 182 Cal. 549, 553, 554, 189 P. 277. A party cannot predicate prejudice on erroneous instructions submitted by the court to the jury by his request." Bognuda v. Pearson, 71 Cal. App. 105, 234 P. 857. See, also, Finkelstein v. Cosgrove (Cal. App.) 256 P. 608. The statement by counsel for the plaintiff that the instructions complained of here are "plaintiff's instructions" is no part of the record. But, since the counsel have in effect conceded that the instructions were given by the court at the request of their client, we will briefly consider the assignment. The specific contention is that the court in effect instructed the jury that it was within their province to determine whether the arrest was made with or without probable cause. The court, at the request of plaintiff, instructed the jury as follows:

> "If you find from the evidence in this case that the plaintiff, P. Murray, did not exhibit, draw, or flourish a deadly weapon in the presence of two or more persons, to wit, A. L. Kunde and Mrs. Murray, as alleged in the criminal complaint filed in the justice's office of Santa Rosa township, county of Sonoma, state of California, then I instruct you that there is want of probable cause, and, if such want of probable cause was accompanied by malice, your verdict should be for the plaintiff."

The court elsewhere in different instructions in its charge instructed the jury what facts, as a matter of law, were essential to be shown to constitute probable cause for the filing of the charge against the plaintiff, and further instructed them that, if they found "by a preponderance of the evidence" that the facts so stated actually occurred, it would then be their duty to find for the defendant here; but that, if they found from the evidence that the facts necessary to constitute probable cause as set forth in such instructions did not occur, then they should find for the plaintiff. The complaint urged against the court's charge involve the three following instructions:

> "Malice is a fact to be proved in the case, as any other fact is proved, and you are the judges of that fact and must determine the fact of malice from the evidence alone, and, if you find, by a preponderance of evidence, that the defendant, in commencing and prosecuting said criminal charge, was actuated by malice in so doing, your verdict will be for the plaintiff, unless you find that there was probable cause for the commencement and prosecution of said criminal charge, in which event your verdict must be for the defendant."
>
> "The burden of proof of both malice and want of probable cause is on the plaintiff in this case, and, if you find, by a preponderance of evidence, that the plaintiff has proved that the defendant in commencing and prosecuting said criminal charge, acted without probable cause, and with malice, your verdict must be for the plaintiff."
>
> "If the jury should find from the testimony that the prosecution of the plaintiff by the defendant was without probable cause, then you may justly infer that it was prompted by malice; that would be a presumption or inference, and, being merely a presumption, may be removed by evidence showing that even without probable cause there was no malice."

The above instructions, taken alone, would imply that the question of probable cause was solely one for the jury's determination, and, as so understood would be erroneous. Where, however, there are several different instructions upon the same legal proposition, and any one or more, but not all of them, unless considered with other correct given instructions, would involve an erroneous statement of the rule, they then should be read together and with any other given instruction stating the rule correctly. As so read, they plainly imply this, and certainly the jury, composed, as we may assume, of persons of average intelligence, would so understand them: That, if they (the jury) found from the evidence that the facts as stated elsewhere by the court in its charge as constituting probable cause were true or occurred, then it would be their duty to find in favor of the defendant; that if, on the other hand, they found that such facts were not true or did not occur, then it would be their duty to find for the plaintiff. In some five of six different instructions embraced within its charge, the court clearly stated that, if the jury found that the plaintiff, on the occasion of the altercation between him and defendant, exhibited a deadly weapon in a threatening and angry manner in the presence of two or more persons, there would then be probable cause for his arrest, prosecution and punishment, and the jury would, therefore, be required to find for the defendant. The record does not show at whose request those instructions were given. The plaintiff in his brief states that they were given on the proposal of the defendant. It is easy to imagine that they were. They stated concretely the law of the case so that anybody could readily grasp and understand it. Indeed, considering the charge in its entirety, it would be difficult to understand how the jury, guided by the law of the case as so given, could have had any trouble in keeping themselves within the limits of their sphere as triers of the facts in passing upon and determining the issues which they were required to decide. The verdict implies that there was want of probable cause for plaintiff's arrest. This means that the jury found that the facts necessary to constitute probable cause, as the court pointed them out, did not occur, as the defendant claimed.

The instructions, as a whole, correctly and clearly stated the law pertinent to the issues, the case seems to have been fairly and well tried, and the verdict is well supported by the evidence.

The judgment is affirmed.

I concur: PLUMMER, J.

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91 Cal. App. 599

PEOPLE v. KEEL. (Cr. 1609.)★

District Court of Appeal, Second District, Division 1, California. May 4, 1928.

Hearing Denied by Supreme Court July 2, 1928.

1. Homicide ⟹300(7)—Whether court should instruct on self-defense when defendant denies killing depends entirely upon evidence introduced.

Whether it is duty of court in prosecution for homicide to instruct jury on question of self-defense when defendant denies killing depends entirely upon nature of evidence introduced at trial, and if evidence tends to raise issue of self-defense, although defendant denies killing instruction based on theory of self-defense is proper and should be given.

2. Homicide ⟹300(8)—In prosecution for homicide, evidence held to entitle defendant to instruction on self-defense.

In prosecution for homicide, where evidence was presented to effect that defendant was threatened with open knife, that he was assaulted by several men with automobile tools, *held* that such evidence entitled him to have jury decide whether cutting of decedent was justifiable in law on ground of self-defense.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Leonard Keel was convicted of manslaughter, and he appeals. Reversed.

Frederic H. Vercoe, Public Defender of Los Angeles County, and G. A. Benedict, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

WOOD, Justice pro tem. Defendant was accused of the murder of Reuben Brice and was convicted of manslaughter. He appeals from the judgment and from an order denying his motion for a new trial. About midnight of September 3, 1927, a number of people of both sexes were attending a party at 1236 East Twenty-Fifth street, in the city of Los Angeles, at which the guests were dancing. Defendant arrived late at the party in company with Mrs. Gertrude Simpson. He objected to her dancing with two of the men present, McAfee and Brice. Later an altercation took place in the street in front of the house and a fight ensued, in which a number of men were engaged and in which several were cut. In the course of the fight Brice received a cut which caused his death. Statements of the various witnesses as to what occurred at the time of this trouble are in hopeless conflict. They differ as to the number and location of the "fights," the number of participants therein, and the part taken by each participant. Not only did the eyewitnesses contradict each other, but most of them, if not all, gave testimony in conflict with their own sworn statements. No witness could swear that he saw the first blow struck in the fight or the actual cutting of Brice. As we search further and further into the record it becomes increasingly difficult to discover what actually occurred on this fatal night.

Appellant vigorously maintains that the trial court erred to his prejudice in refusing to allow counsel to argue to the jury the question of self-defense and in failing to instruct the jury on this subject. To properly pass upon this point a consideration of the evidence in some detail is necessary. The prosecution relied mainly upon the statement of the witness Blalock, who accompanied Brice to the party, and who testified, in brief, that he saw defendant pulling away from Mrs. Simpson in front of the house; that Mrs. Simpson was trying to detain him; that defendant went across the street, and in a few minutes witness heard somebody "holler fight"; that he looked across the street and saw defendant and Brice standing behind an automobile; that defendant "made a pass" at Brice with his hand and Brice jumped back; that defendant chased Brice back and forth across the street; that Brice picked up an automobile jack which was lying on the sidewalk and threw it at the defendant, but missed him; that defendant "ran back about 10 feet down the sidewalk from Brice"; that Brice "might have made one or two steps forward"; that defendant, using the words of the witness, "put his hand in his coat pocket, and got something, I don't know if it was a knife or a razor, but * * * I could see the blade shine"; that defendant ran after Brice; that "they went around and around the trees, and finally Mr. Keel caught Brice and of course they locked and fell; that is as far as I could tell about it"; that defendant got up and ran; that Brice was lying in the street covered with blood. It was stipulated that at the preliminary examination Blalock had testified: "Mr. Brice turned after he dodged the lick and ran after Mr. Keel. Mr. Keel ran for about 5 feet into the open.

★Hearing denied by Supreme Court.

So, at the time that Mr. Keel opened the knife, Mr. Brice was after him. Sure, he had run; yes."

Witness Mrs. Simpson testified that Brice and McAfee were dancing improperly and that defendant had told her not to dance with either of them; that they asked her to dance but she refused; that McAfee then said to Brice: "Give me your knife and I will go out and cut that black ——— ——— ——— ——— heart out"; that Brice gave McAfee the knife, which was open, saying, "Go on, boy, I am with you;" that several more said, "I am with you," and that all went out; that while defendant was in the middle of the street five or six people, including Brice, McAfee, and Blalock, secured automobile tools from the rear of a car standing on the north side of the street and threw them at defendant, who picked up the tools and threw them back. The witness further testified:

"When Keel would pick things up and throw them back, they would chase Keel around the cars from the north side of the street to the other side of the street, and then they ran around the cars and threw the—and threw these tools at Keel, and Keel would pick them up and throw them back across, and then they went to some trees."

"Q. By the Court: Who started running for the trees first? A. Keel. They started throwing things at him, and he got the pump and ran to the trees and was dodging around the trees with the pump in his hand, and hitting at the other five or six with Keel.

"Q. When you say 'five or six with Keel,' you mean six including Keel? A. Yes; including Keel.

"Q. Tell us what happened at the trees? A. Then the boys would hit at Keel, and Keel would hit at them with the pump he had, and they chased all around the trees, and finally one of the boys, I don't know which one it was, picked up a piece of iron, or something—it was one of the tools that was thrown out of the car—and hit Keel, struck Keel, across the head. * * * And I screamed and said, 'Oh, don't you do that! You boys quit; some of you people help me stop these boys from fighting. And they all ran away and left me, and they would not stop, and this short fellow that they said was Brice—I don't know his name at all; I only knew since I was here—but this fellow picked up a big piece of something and struck Keel in the side and knocked him down, and then the other boys fell on him, and then I screamed and ran in the house and called the policemen to come."

Witness Mary Smith testified:

"I was getting ready to go home, and I saw a bunch there across the street by a machine.

"Q. A bunch of what? A. I saw some people by a machine.

"Q. What were they doing? A. It seemed as if they were just standing about around the machine over there, and pretty soon I saw them running out into the street from the machine, coming over to this side, from the north side over to the south side of the street.

"Q. How many ran over there from the north side? A. It looked like five or six.

"Q. Where did they run? A. Over near the church between the two trees.

"Q. Are those trees on the south side or north side of the street? A. I don't know.

"Q. Well; are they on the side of the street Mrs. Fields' house is on? A. Yes.

"Q. What did you see around those trees? A. I saw Mr. Keel. He had a pump in his hand. He was running, and Reuben was after him.

"Q. Whom do you mean by Reuben; Reuben Brice? A. Yes; the deceased.

"Q. That is the man who is dead? A. Yes, sir.

"Q. Who was running after who? A. After Mr. Keel.

"Q. Reuben Brice was running after Mr. Keel? A. Yes, sir.

"Q. Then tell us what happened. A. So Mr. Keel threw the pump, and I was coming along by the curbing, and he threw the pump, and the handle of the pump hit me on the leg as I was coming, and in some way he fell down on the ground.

"Q. Who fell down on the ground? A. Keel; and Reuben jumped on top of him.

"Q. By Reuben, you mean Reuben Brice? A. Yes, sir.

"Q. The man who is now dead? A. Yes; he jumped on top of him, and I saw Mr. Keel doing that way to him (indicating); doing that way to Reuben Brice, the deceased.

"Q. At that time where was Mr. Brice? A. Mr. Brice was on top of Mr. Keel, and he was on his back on the ground between the two trees, and so he stayed there, I guess, about 15 minutes on the ground, and when he got up I saw some drops of blood on the sidewalk, but I thought the blood came from some one with the nose bleed.

"Q. Never mind what you thought. Tell us what you saw. A. I saw some blood.

"Q. By the Court: Who stayed on the ground about 15 minutes? A. Keel and Reuben Brice.

"Q. And Reuben Brice all the time on top? A. Yes, sir.

"Q. Were they going through some motions, or doing anything; what did you see? A. He was doing like this (indicating).

"Mr. Benedict: Raising her doubled hands up and down from the ribs to the height of her head several times.

"Q. By Mr. Dennison: By 'he,' whom do you mean?

"Q. By the Court: How was he on top, straddle of him? A. Yes.

"Q. Like you straddle a horse? A. Yes.

"Q. What else was Brice doing? A. Brice had, it seemed like he had his arms or something around his head, as much as I could see. It was dark, but I could see that Keel looked like he was doing that way ((indicating).

"Q. Trying to get loose? A. I don't know.

"Q. Did he get loose? A. Well; finally he did.

"Q. By Mr. Benedict: Then, what did he do? A. He ran back in between this driveway over back across the street."

Witness Annie Fields gave the following testimony:

"You went down there and saw Mr. Keel leaning against this tree and saw this (automobile pump) in his hand. Tell us what happened, what you did and what you saw, in your own words? A. When I walked up to him and put my hand on him I saw he had this thing in his hand, and I said, 'What are you boys doing out here?' and he said, 'you go on back in the house, Mrs. Fields;' and I said, 'I just think this is just terrible for you boys to come and act like this;' and he said, 'You go back in the house, I am not going to let these boys kill me;' and I walked away from him a little ways, and I looked around and I saw another boy come across the street, a boy or a man, I don't know whether it was a boy or a man—a boy came across street and jumped on him, and they went to the ground and wallowed over and over under this tree, and I left then and walked pretty brief to the sidewalk, to the entrance of my house, and this Mr. Lee ran across the street and said, 'Mrs. Fields, I am cut, can't you take me to a doctor?' and I said, 'Before I could get my car out and take you to the doctor you would bleed to death. You go in any of those cars over there to the doctor;' and he ran away and I went in the house."

The defendant was sworn as a witness and testified that McAfee had come out of the house with a knife directly toward him "mumbling something" which he could not understand; that he ran toward the street between two cars; that a man threw a "jack" at him; that some one came across the street and hit him over the eye. He further testified:

> "Shortly afterwards the other bunch followed, and some man struck me in the side and knocked me down.
> "Q. Did they hit you anywhere else in the meantime? A. Well, they hit me several licks; hit me on the arm, and another lick in my head.
> "Q. Where did that land? A. Right at my forehead.
> "Q. In the middle of the forehead? A. Yes.
> "Q. (Indicating the middle of the forehead at the edge of the hair). Go ahead. A. They knocked me down there, and by struggling and crawling on my hands and feet I got up and got away from them and ran back toward the north side of the street. After I got across to the north side of the street there was two men who followed me clean to the place, to the fence, and I didn't know it was there at that time."

Defendant denied that he cut Brice. Dr. Faubion, a police surgeon who examined defendant, testified:

> "At the time the patient, now the defendant, had an abrasion on the forehead on the left side upper region, and also one laceration an inch and a half long in the forehead."

[1, 2] The denial by defendant of the act of cutting Brice did not deprive his counsel of the right to demand that instructions on the law of self-defense be given to the jury if the justification therefor appeared elsewhere in the evidence. This is conceded by the Attorney General, who, in the proper spirit, gives us the following quotation from 13 Ruling Case Law, 813:

> "Whether it is the duty of the court in a prosecution for homicide to instruct the jury on the question of self-defense when defendant denies the killing seems to depend entirely upon the nature of the evidence introduced at the trial. If the defendant denies the killing and there is no evidence adduced by either party which tends to show that the killing might have been in self-defense, although other evidence shows quite conclusively that the defendant committed the crime, it is not the duty of the court to instruct as to self-defense; but if the evidence tends to raise the issue of self-defense although the defendant denies the killing, it seems that an instruction based on the theory of self-defense is proper and should be given. His denial of the act does not necessarily warrant the trial court in refusing to give an instruction based on the theory of self-defense."

In People v. Degnen, 70 Cal. App. 567, 591, 234 P. 129, 139, the court said:

> "And we can conceive of no reason why such evidence is inadmissible in a case in which the defendant contends, as appellant here contended at the trial, that he committed no lascivious assault whatever upon the prosecutrix. The two principal elements of the rape are, first, the commission of the act, and, second, the lack of consent of the victim to its commission. The burden is upon the people to prove both these elements, of course, and it is inconceivable that the defendant may not offer proof to rebut the evidence introduced by the prosecution in support of each of the two branches of the case. In civil actions it is the well-established rule, expressed, in fact, in the statute (Code Civ. Proc. § 441), that a defendant 'may set forth by answer as many defenses * * * as he may have'; and it is well settled that the terms of the section permit the allegation of inconsistent defenses (Calexico Lumber Co. v. Emerson, 54 Cal. App. 239, 201 P. 612). These, of course, are rules of pleading, but a similar rule, as a matter of evidence and independent of statute, would seem necessarily to apply in criminal cases under the issue presented by a plea of not guilty."

Applying the rule set forth in Ruling Case Law, supra, we are confronted with the question, Does the evidence tend to raise the issue of self-defense? A discussion of the evidence hereinabove referred to is unnecessary to convince that the jury, as reasonable men and women, might have found that defendant was justified in cutting Brice in the manner shown if the law of self-defense had been explained to them. If the testimony of any witness in the case is sufficient to raise the issue, it should be presented to the jury. Evidence was presented to the effect that defendant was threatened by McAfee with an open knife; that he was assaulted by several men with automobile tools; and that he was struck on the head with a heavy instrument which laid open his scalp. He is entitled to have the jury decide whether the cutting of Brice under the circumstances was justifiable in law.

Our disposition of the question of self-defense makes it unnecessary to discuss other points raised by appellant.

The judgment and order denying defendant's motion for a new trial are reversed.

We concur: HOUSER, Acting P. J.; YORK, J.

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91 Cal. App. 448

MEREDITH v. KEY SYSTEM TRANSIT CO. et al. (Civ. 3502.)★

District Court of Appeal, Third District, California. April 30, 1928.

Hearing Denied by Supreme Court June 28, 1928.

1. Trial ⟹260(1)—Refusing to give instructions substantially included in other instructions given held not error.

In action for damages for death of plaintiff's husband, court's refusing to give requested instructions, where substance of such instructions was included in other instructions given, *held* not error.

2. Street railroads ⟹112(2, 3)—Plaintiff, to recover for death of decedent when struck by interurban train, must show negligence of defendant proximately contributed to accident and decedent was without fault which might have proximately contributed to accident.

Before plaintiff could recover in action against transit company for death of husband when struck by an interurban train at street intersection, she was required to show by preponderance of evidence that defendant or servants thereof were guilty of some act of negligence which proximately contributed to the accident, and that decedent was without fault or negligence which might in any wise have proximately contributed to the accident causing his death.

3. Negligence ⟹80—If plaintiff's negligence contributes proximately to injury, it is defense, irrespective of degree.

If negligence of plaintiff contributes proximately to his injury, a defense is made out, irrespective of the degree of such negligence, as there is no standard by which such negligence can be measured.

4. Trial ⟹228(4)—Instruction that automobile driver must use senses of sight and hearing in crossing railroad, and could not recover if failure proximately contributed to injury, held not indefinite.

Instruction that driver of an automobile must use his senses of sight and hearing, when about to cross a railroad track, to ascertain whether a train is approaching, and, if he fails to take such precaution, and such failure proximately contributes in any degree whatever to his injury, he is guilty of contributory negligence, and no recovery can be had for his injury or death, *held* not indefinite and uncertain, in that it did not specify to what extent driver must use his senses of sight and hearing, and whether such use must or must not be continuous.

5. Appeal and error ⟹1170(7)—Admitting hearsay evidence in statement by witness, where witness was cross-examined as to same facts, though error, held not prejudicial (Code Civ. Proc. §§ 475, 1854; Const. art. 6, § 4½).

In action against transit company for death of plaintiff's husband when struck by interurban train, admitting in evidence the statement made by a witness to defendant shortly after the accident in which death was caused, where witness, on cross-examination at trial, was interrogated as to some of the answers in statement, though improper, and not admissible under Code Civ. Proc. § 1854, statement being hearsay, *held* not prejudicial within Const. art. 6, § 4½, and Code Civ. Proc. § 475, where a verdict for plaintiff under the evidence would have been unwarranted.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by Maude Meredith against the Key System Transit Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Preston & Duncan, Geo. Allen Smith, and Robert E. Hatch, all of San Francisco, for appellant.

Brobeck, Phleger & Harrison and Frank S. Richards, all of San Francisco, for respondents.

PLUMMER, J. This cause is before us on appeal by the plaintiff from a judgment entered in favor of the respondents in an action prosecuted to recover damages for the death of the husband of the plaintiff resulting from a collision between an automobile driven by the deceased and a train operated by the Key System Transit Company.

The record shows that on the morning of November 21, 1923, the deceased was driving in a westerly direction on Forty-Sixth street in the city of Oakland; that Forty-Sixth street is intersected by a certain other street known as and called Linden street, upon which latter street the Key System Transit Company maintains two sets of double railroad tracks, that is, four different tracks. Linden street, where it crosses Forty-Sixth street, extends in a northerly and southerly direction. At the intersection of Forty-Sixth and Linden streets, the roadway and the rails of the railroad are practically flush, but northerly therefrom the ties on which the rails are located are visible, and the rails themselves all stand above the surface of the street. Cross-arms and other silent warnings are shown by the testimony to be located on the intersection referred to showing the presence of the railroad lines. The trains of the respondent company are operated by electricity. It appears from the record that during the hours between 7 and 8 o'clock in the morning some twenty-four trains operated by the respondent cross the intersection of

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★Hearing denied by Supreme Court.

Forty-Sixth street. The collision which resulted in the death of the plaintiff's husband occurred at about 7:30 a. m. The morning was clear; apparently the atmosphere was free from fog; and it does not appear that there were any stationary or other objects to obstruct a view of moving trains for a distance of several hundred feet. On the easterly set of double tracks maintained by the respondent were operated the Northbrae and Claremont trains. On the westerly set of tracks were operated the Berkeley trains. On the morning in question the deceased, accompanied by one Henry Forsberg, was driving westward on Forty-Sixth street in a "Jewett" automobile. Upon reaching the intersection of Forty-Sixth street with Linden street, a train from the Oakland mole was observed traveling northward on the easterly track of the double set of tracks over which the Berkeley trains were operated. The automobile was halted between the two sets of double tracks, a space which has a width of a trifle over 21 feet. The testimony of Forsberg is to the effect that he and the deceased were working at the same place; had been going to work at about the hour referred to every morning for some two months and a half; that they frequently observed trains passing to and fro at the intersection of Forty-Sixth and Linden streets; that on the morning in question the deceased was operating the car, and stopped the same within a few feet of the track on which the north-bound Berkeley train was being operated; that they stopped there for a few seconds for the north-bound Berkeley train to pass by; that, after the north-bound Berkeley train had passed by, the deceased, who had the gear shift of his automobile in neutral, threw it into low gear, started the car across the westerly double set of tracks on which the Berkeley trains were operated, had cleared the easterly line of said tracks, and, as they reached a position on the westerly tracks upon which the south-bound Berkeley trains were operated, he observed a south-bound Berkeley train approaching, which, at the time he observed it, was so close upon them that he knew they were going to be hit. The collision threw the "Jewett" automobile a number of feet; some of the witnesses testifying 40 feet. The automobile rolled over and over, and the deceased received such injuries that he subsequently died therefrom. Some witnesses testified that the automobile which was being driven by the deceased did not stop for the passage of the north-bound Berkeley train, but only halted, and that the automobile, as soon as the rear car of the north-bound train had cleared the space in front of the automobile, was started forward. The statement is made by appellant that the automobile was not started until the rear end of the last car of the north-bound train had reached a point some 75 feet northward. We find no testimony, however, indicating just how far the rear end of the north-bound Berkeley train had cleared the crossing before the automobile was started westward. Practically all of the witnesses other than the witness Forsberg testified that the whistle of the south-bound train was being blown at intervals as it approached the crossing of Forty-Sixth street. The south-bound train which collided with the "Jewett" automobile was composed of five cars, three of which, the testimony shows, were 70 feet in length, and two of which were 80 feet in length, making a train of at least 370 feet in length, assuming that the length of the cars included bumpers and couplings. Otherwise the train would be a trifle longer. The record shows, also, that as one is approaching the tracks on Linden street where they intersect Forty-Sixth street both sets of double tracks are visible to the northward for a distance of some 800 feet, and that moving trains thereon can be observed for that distance.

The verdict of the jury was in favor of the respondents, and the appellant concedes that the evidence is sufficient to support the verdict. It is urged, however, that a new trial should be granted on the ground that the court misdirected the jury, and also erred in the admission of testimony. It being admitted that the testimony is sufficient to support the verdict, we have only to determine whether the alleged errors, if errors there were, resulted in a miscarriage of justice, as, under section 4½ of article 6 of the Constitution, no new trial can be granted for the errors alleged herein, unless there has been a miscarriage; and under section 475 of the Code of Civil Procedure it must appear that a different result would have been probable if such alleged errors had not occurred.

The appellant first alleges that the court committed error in refusing to give requested instructions numbers 2 and 6. These instructions are as follows:

"Request No. 2.

"I instruct you that, if you find by a preponderance of the evidence that a passing north-bound train so obstructed the view of travelers about to cross the Berkeley tracks at Forty-Sixth street, of the south-bound tracks and trains that were proceeding along them toward the Forty-Sixth street crossing, as to endanger the safety of travelers proceeding westerly along Forty-Sixth street to cross the Berkeley tracks, then it was the duty of the defendants, if reasonably necessary to protect such street travelers as were themselves in the exercise of reasonable care from being run down by a south-bound train, to either modify the speed of the south-bound train to such an extent as would be reasonably necessary for the protection of such street travelers; or to take such other reasonable precautions as would give to such travelers reasonable notice and warning of the approach of such south-bound train."

"Request No. 6.

"I charge you that, if the plaintiff has proven by a preponderance of the evidence any one of the charges of negligence mentioned in these instructions, and you find by a preponderance of the evidence that such alleged negligence was the proximate cause of the injury to and death of the decedent, then your verdict will be for the plaintiff; unless you further find, by a preponderance of the evidence, that the decedent was guilty of contributory negligence as defined in these instructions."

[1] An examination of the record, however, shows that all the matters contained in these refused instructions were included in other instructions given by the court, which were, if anything, more favorable to the plaintiff than the instructions requested. This is shown by instruction No. 16, which we set forth in full:

> "One of the grounds of alleged negligence charged in the complaint is that the defendant trustees of the traction system carelessly and negligently failed to place or maintain a flagman, or to show or give any signal, in addition to the blowing of the whistle at the Forty-Sixth street crossing to warn or notify persons crossing, or about to cross the tracks on Forty-Sixth street of the approach of said Berkeley train.
>
> "The law imposes upon a traction company the duty to use reasonable care, corresponding to the circumstances constituting the probable danger, to avoid injury to persons lawfully traveling upon the public highway crossed by the traction system tracks and trains.
>
> "If you find, from a preponderance of the evidence, that usually or frequently there are obstructions which interfere with the opportunity to see moving trains while travelers on the highway are approaching a crossing, that it is a much-traveled and dangerous crossing, that ordinarily prudent men would have taken extra precautions in addition to the whistle signals, that the defendant trustees of the traction system failed to take any precautions, other than the whistle signals to warn travelers at said crossing, then it is for the jury to determine from the evidence whether or not the failure to have at said crossing a flagman, wig-wag, or other means of warning in addition to the whistle signals, was negligence; and, if so, then whether or not such negligence was a proximate cause of the accident. If you so find, then your verdict will be for the plaintiff, unless you shall further find, from a preponderance of the evidence, that the decedent was guilty of contributory negligence as defined in these instructions."

[2] Refused instruction No. 6 is also covered as well by 8, 11, and 12 as by No. 16. As instruction No. 8 is alleged to be erroneous, we here set it forth:

> "Before the plaintiff can recover in this action, it must appear by a preponderance of the evidence, that the defendant or their servants were guilty of some act of negligence which proximately contributed to the accident. It must also appear likewise that the decedent was without fault or negligence on his part which may in any wise have proximately contributed to the accident."

Other instructions were given by the court which fully and clearly instructed the jury as to the law applicable to this case, and especially to the point that contributory negligence on the part of the plaintiff, as alleged by the defendants, was a matter of defense to be proved by a preponderance of the testimony.

A number of authorities are cited by appellant from states other than California courts, in support of the argument that instruction No. 8 is erroneous. However, it is well settled by the decisions in this state that instruction No. 8 given by the trial court to the jury in this case is a correct statement of the law. Without quoting therefrom, it is sufficient simply to cite the authorities so holding: Metcalfe v. Pacific Electric R. Co., 63 Cal. App. 331, 218 P. 486 (citing Robinson v. Western Pac. Ry. Co., 48 Cal. 409; Strong v. Sacramento & P. R. Co., 61 Cal. 326; Sinclaire v. Pioneer Truck Co., 51 Cal. App. 174, 196 P. 281; Needham v. S. F. & S. J. R. R. Co., 37 Cal. 409; 1 Shearman & Redfield, pp. 238 and 239).

[3] It is well settled by the foregoing authorities that, if the negligence of the plaintiff contributes proximately to his injury, a defense is made out, irrespective of the degree of such negligence, as there is no standard by which such negligence can be measured. All that is required is that the negligence of the plaintiff contributes proximately to his injury.

[4] Exception is also taken to the concluding paragraph of instruction No. 22, which reads as follows:

> "A driver of an automobile must use his senses of sight and hearing, when about to cross a railroad track, to ascertain whether a train is approaching, and, if he fails to take such precaution, and such failure proximately contributes, in any degree whatever, to his injury, he is guilty of contributory negligence, and no recovery can be had for his injury or death."

While it is admitted that this portion of instruction No. 22 is technically correct and supported by the authorities which we have cited, it is urged that it is indefinite and uncertain, in that it does not specify to what extent the driver must use his senses of sight and hearing, and whether such use must or must not be continuous. The objection we think untenable. Every day the necessity of an automobile driver using his senses of sight and hearing is enforced by the increasing number of moving vehicles upon the streets of our cities. Every street intersection, by reason of the increasing number of rapidly moving vehicles, has become a potential danger zone, and the driver of every automobile is becoming more and more under the necessity of using his senses of sight and hearing to escape possible collisions, and reasonable use of all his faculties to detect and avoid danger must be exercised by the drivers of automobiles. This we think is the true intent, meaning, and application of the language used in instruction No. 22.

We find no prejudice in the instructions given by the court to the jury in this case.

[5] It is finally urged that the court committed error in the admission in evidence of a statement made by the witness Glocker to the defendant shortly after the occurrence of the collision. This statement is in the following words and figures:

> "1. Name: F. Glocker. Age: 75. Occupation: Bank messenger. 2. Residence: 3130 King. Place of business: San Francisco, Calif. 2½. Home phone: Berkeley 517 W. Business phone: Douglas 8600. 3. Did you see the occurrence of the accident? Yes. 4. Exact place on car (or street) where I was located. First car; front seat behind motorman; right side of car. 6. Did the accident occur at a street crossing? Yes. 9. If vehicle was hit, what part? Side. 12. Within how many feet did the car stop after the accident? About 200 feet. 15. Did you feel the brakes applied before the collision? Yes. 16. Did you feel any collision or jar or impact? Yes. 19. In what direction was the street car going? South. 21. Was the street car moving slow, moderate, or fast speed? Usual speed. 23. Was the street car bell (or whistle) sounded? Yes. 25. Was the driver (or pedestrian) careless in your opinion? Careless. 26. Do you consider the motorman or conductor, or both, to blame? No.
>
> "The following is a general statement of the accident:
>
> "I was looking out of the side window towards Remar Bakery plant when I felt the air brakes working just as we approached Forty-Fifth. I just caught sight of an automobile front of train. It happened so quick, and the position I was in, I couldn't tell which way the auto was going. The motorman was blowing his whistle for more than a block; in fact was continually blowing before approaching crossing. No blame should be attached to motorman, as the party driving the automobile must have been deaf, dumb, or drunk to try and cross in front of that train, as they surely must have heard the whistle, or saw the train coming. Dated November 23, 1923. F. Glocker."

This statement was admitted immediately upon the conclusion of the cross-examination of the witness Glocker, which cross-examination was as follows:

> "By Mr. Preston: Q. Was this an emergency whistle, or an ordinary whistle? A. Oh, regular whistling going along. Well, they blow continuously there all the time on all the trains. It is pretty hard to say whether it was an emergency or not.
>
> "Q. In reality, Mr. Glocker, you are going more by the habit of trains to whistle by reason of the number of tracks, as you said? A. Yes.
>
> "Q. You say they generally whistle, or always whistle, which is it? A. My opinion is they always whistle. I am pretty positive they did whistle. And I think, if I am right, I made the statement when the card was sent to me by the Key Route Company, stating the whistle was blown. If you have that statement you may look it up.
>
> "Q. How far did you say the train traveled before it stopped? A. Well, about a car and a half length, or two lengths.
>
> "Q. What distance would that be in feet? A. That is pretty hard to say. I don't know how long those cars are. I know it was down to the next corner.
>
> "Q. Counsel for the defendant has kindly handed me this paper. Look that over and see whether or not that is what you gave, the statement after this accident? A. Yes, sir.
>
> "Q. Now in this statement you say that the air brakes were applied at what place? A. This side of the Remar Bakery.
>
> "Q. Didn't you say as follows: 'I was looking out of the side window towards the Remar Bakery plant, when I felt the air brakes working just as we approached Forty-Fifth street? A. You see, I made a mistake in the streets: Forty-Sixth.
>
> "Q. You say here, do you not, that you were looking toward the Remar Bakery Company. If you were at Forty-Sixth you would be looking back at the Remar Bakery plant, would you not?
>
> "Mr. Hynes: That clearly shows that it is a mistake.
>
> "Mr. Preston: He says he was looking toward the plant. A. Isn't that the Remar Bakery on Forty-Sixth or Forty-Fifth. Q. It is Forty-Sixth. This says: 'I was looking out of the side window toward the Remar Bakery plant?' A. Yes. 'When the air brakes were working, just as we approached Forty-Fifth street.' A. Well, that is where I made the mistake in putting down the wrong streets.
>
> "Mr. Preston: It should have been Forty-Sixth. The Court: I think that is correct, Mr. Preston. He was approaching Forty-Sixth and looked out and saw the Remar Bakery.
>
> "Mr. Preston: I believe we are both wrong, Judge, from looking at it again; 'I was looking out of the side window towards the Remar Bakery plant when I felt the air brakes working;' and then they made a period there. 'Just as we approached Forty-Fifth street I just caught sight of an automobile in front of the train.' A. I meant to say Forty-Sixth on that.
>
> "Q. 'It happened so quick that the position I was in, I couldn't tell which way the automobile was going.' A. That is true.
>
> "Q. I didn't understand you said this morning that you said you saw the automobile at all. A. I meant that when the train had collided with the automobile. I didn't know which way the automobile—which way it was going. That is true, too.
>
> "Q. Had you seen the automobile? A. No, I didn't; but I know they struck an automobile.
>
> "Q. You say here you caught sight of an automobile in front of the train. Now, then, you say this: 'The motorman was blowing his whistle for more than a block,' is that— A. (Witness interrupting.) Approaching the place, yes. They blow right there continually as a rule.
>
> "Mr. Preston: That is all."

Respondent attempts to justify the admission of the statement made by Glocker by citing section 1854 of the Code of Civil Procedure, which provides as follows:

> "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, con-

versation, or writing, which is necessary to make it understood, may also be given in evidence."

As we read this section, it does not support the respondent's contention. The statement in fact consists of twenty-six disconnected questions and answers. While the witness was, upon cross-examination, interrogated as to some of the questions and answers, they were not introduced in testimony, and the statement, being mere hearsay, and also the opinion of the witness, should have been excluded. We do not need to review the authorities cited by the appellant supporting the contention that the admission of the statement was error, as a careful reading of the section seems to us to show the statement inadmissible. This, however, does not necessarily lead to a reversal of the judgment. The testimony of the witness Forsberg heretofore referred to, the person who was riding with the deceased at the time of the collision, almost in and of itself precludes the possibility of the jury reaching a verdict in favor of the plaintiff. We here set forth the testimony of this witness in relation to the immediate facts attendant upon the collision:

> "I saw the train when we were quite near the other track. We were right close to it, or on it, one of the two. I knew we were going to get hit. We were within inches of the track; that was the first I saw of the train going the other way. The train looked like it was right on top of me when I first saw it.
>
> "Q. And do you know whether Mr. Meredith saw that train coming at that point or not? A. No; I do not.
>
> "Q. You don't know whether he looked in that direction, do you? A. No.
>
> "Q. How far away from you, that is, from the automobile, was this train when you first saw it? A. Looked to be like it was mighty close.
>
> "Q. I know, but was it as close as I am to you? A. I don't know. I knew we were going to get hit. That is all I remember. I do not know if Mr. Meredith saw the train.
>
> "Q. Mr. Meredith did not, as far as you were able to observe, did not make any effort to stop his automobile? A. No, sir.
>
> "Q. And he did not make any effort to back up? A. No, sir; not that I know of.
>
> "Q. From the time that you started the car, when the train went north, you were looking at the Remar Bakery? A. Well, I looked up the tracks too.
>
> "Q. Where were you when you looked up the tracks? A. Just when we started up.
>
> "Q. Just when you started. But you did not —when you came across the first track, that is the north-bound track on which the train had gone to Berkeley, you did not then look north again? A. No, I don't believe I did.
>
> "Q. And Mr. Meredith didn't look north as far as you know? A. Not as far as I know."

Add to this testimony the fact that an unobstructed view of the defendant's tracks was possible from Forty-Sixth street to a distance north of some 800 feet, also the fact that the five-car train moving southward on the Berkeley tracks was at least 370 feet in length, it would seem almost inconceivable that an automobile driver using his senses of sight and hearing would escape detecting the approach of a moving object of such dimensions. Had the driver looked, he would have seen; had he listened, he would have heard. If it be assumed that the driver started across the tracks immediately upon the clearing of the intersection by the last car of the north-bound train, then the conclusion would be unescapable that he so started without either looking or listening for a south-bound train. As we have stated, the testimony shows that the occupants of the automobile were familiar with the crossing, had been traveling on Forty-Sixth street where it intersects Linden street for some months at the same hour of the day, and thus had their attention drawn to the fact of the frequency of passing trains during the early morning hours of every day. With these facts before the jury, we do not very well see how any other conclusion could be reached than that the deceased was intent upon reaching his place of business as quickly as possible, and was thus led to disregard all reasonable precautions for his own safety, and like many other automobile drivers attempting to cross in front of trains, took the fatal chance.

It not being reasonably probable that any other verdict would have been reached in this case, we cannot say, under the provisions of section 475 of the Code of Civil Procedure and section 4½ of article 6 of the Constitution, that prejudicial error in the admission of testimony was committed by the trial court. If it be assumed that the jury should have accepted the theory of the appellant that the plaintiff's train was traveling in excess of 22 miles per hour, and therefore at an unlawful rate of speed, it would not in any manner lessen the force of the testimony and the circumstances showing that the occupants of the "Jewett" automobile failed to observe the "stop, look, and listen" doctrine, or to take reasonable precautions to ascertain whether it was then and there safe to cross the westerly set of double track lines upon which the defendant was then operating its Berkeley trains.

By reason of the alleged error in the admission of the statement referred to, we have taken the pains to read all the testimony set forth in the transcript, but have copied herein only such portions as we have considered necessary to show the necessity for the conclusion at which we have arrived.

The judgment is affirmed.

We concur: HART, Acting P. J.; JAMISON, Justice pro tem.

MARYLAND CASUALTY CO. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 6412.)★

District Court of Appeal, First District, Division 2, California. April 26, 1928.

Rehearing Denied May 23, 1928. Hearing Denied by Supreme Court June 25, 1928.

1. Dismissal and nonsuit 🔑53(1)—Alleged invalidity of contract sued on does not warrant dismissal, but requires trial on merits.

Fact that claim sued upon is founded upon a void contract does not require that action be dismissed, but judgment on issue of validity of contract must be rendered on the merits.

2. Mandamus 🔑43—Mandamus held not to lie to require trial court to dismiss action on ground of invalidity of contract sued on.

Mandamus *held* not to lie to require trial court to dismiss action on ground that contract sued on was void, since question of validity of the contract was an ultimate issue to be tried by the court upon the merits.

3. Mandamus 🔑172—On petition for mandamus to require dismissal, appellate court may not determine suit on merits.

On petition for mandamus to dismiss action, appellate court has neither right nor power to determine such action on the merits.

4. Pleading 🔑106(1), 111—Motion to dismiss on ground of plaintiff's incapacity constitutes plea in abatement which must be supported by facts warranting abatement at time of plea.

Motion to dismiss case on ground of incapacity of plaintiff constitutes plea in abatement which must be strictly construed, and which must be supported by facts warranting abatement at the very time of the plea.

5. Abatement and revival 🔑35—Motion to dismiss action by corporation on account of corporation's suspension for nonpayment of taxes held properly denied, where corporate powers were revived before motion was made (Corporation License Act, §§ 11, 14, and amendments [Deering's Gen. Laws 1923, Act 1743]; Pol. Code, § 3669c).

Motion to dismiss action by corporation on ground of incapacity to sue for failure to pay license and franchise taxes, under Corporation License Act, §§ 11 (St. 1915, p. 426, and amendments thereto [Deering's Gen. Laws 1923, Act 1743]), and Pol. Code, § 3669c, *held* properly denied where corporate powers had been revived before the trial was commenced and before the motion was made under Corporation License Act, § 14, notwithstanding their suspension during period of nonpayment, since suspension continues only until the tax is paid.

6. Corporations 🔑630(1)—Suspension of corporation for nonpayment of taxes at time of commencement of action held not to prevent corporation from maintaining suit after tax had been paid (Corporation License Act, §§ 11, 14, and amendments [Deering's Gen. Laws 1923, Act 1743]; Pol. Code, § 3669c).

Fact that corporation at time of commencement of action was suspended for nonpayment of license taxes, under Corporation License Act, § 11 (St. 1915, p. 426, and amendments [Deering's Gen. Laws 1923, Act 1743]), and Pol. Code, § 3669c, *held* not to prevent maintenance of action after taxes had been paid, where action was not previously dismissed, under Corporation License Act, § 14.

Application by the Maryland Casualty Company for mandamus to be directed to the Superior Court of the City and County of San Francisco and Hon. James M. Troutt, Judge. Writ denied, and proceeding dismissed.

John Ralph Wilson and Everette C. McKeage, both of San Francisco, for petitioner.

Esmond Schapiro, Jones & Dall, and Walter E. Drobisch, all of San Francisco, for respondents.

KOFORD, P. J. This is an original application for a peremptory writ of mandate to dismiss a certain action pending in the said superior court, wherein S. W. Towle Lumber Company (a domestic corporation) is plaintiff, and G. P. Anderson, Maryland Casualty Company (the petitioner), and others are defendants. The alternative writ was issued by the Supreme Court and made returnable in this court. The grounds upon which it is claimed the said action should be dismissed arise out of the fact that the plaintiff corporation in that action, Towle Lumber Company, had suffered the penalties prescribed by law for failure to pay its corporate license and franchise taxes to the state of California. The action is for breach of contract and foreclosure of mechanic's lien. The petitioner had executed, pursuant to the Mechanic's Lien Law, a bond to secure the payment of mechanic's liens and for that reason was a defendant in said action.

The facts made to appear to us on this hearing are that at the time of the execution of the contract under which the mechanic's lien arose, and also at the time the said action was instituted, the said Towle Lumber Company had not paid its license tax and franchise tax; but after the suit was instituted and a year before the trial of the action upon its merits the said corporation had paid and discharged the said taxes and had been reinstated.

Section 11 of the Corporation License Act, Statutes 1915, c. 190, p. 422, and amendments thereto (Deering's General Laws 1923, Act 1743), provides that the corporate rights, privileges, and powers of domestic corporations which have failed to pay the said tax shall be suspended and incapable of being asserted for any purpose (with certain exceptions not involved here) until said tax and all accrued penalties, etc., are paid. The section concludes with, "Every contract made in violation of this section is hereby declared to be void."

★Rehearing denied. Hearing denied by Supreme Court.

Section 3669c of the Political Code contains substantially the same language with respect to the franchise tax.

In the said action pending in the superior court the complaint alleged the due incorporation and existence of the plaintiff Towle Lumber Company. The defendant's answer merely denied this allegation on information and belief. During the course of the trial defendant discovered that the plaintiff corporation had suffered the suspension of its corporate powers as above set forth, and thereupon made a motion during the course of the trial to be permitted to amend the answer in said action so as to make the denial of the corporate existence of the plaintiff positive instead of upon lack of information and belief. Said motion was denied by the court. One month later the defendant, who is petitioner here, moved the said superior court for an order dismissing the said action upon the grounds that, owing to the suspension of the plaintiff's corporate powers, (1) the contract sued upon was void, and (2) that the corporation was legally incapable of instituting the said action at the time the complaint was filed. Said motion was supported by an affidavit setting forth the facts regarding the suspension and revival of the corporate powers of said plaintiff. This motion was also denied by the court. The petition herein alleges that the said superior court has the said action now under submission for decision and intends to render a judgment therein upon the merits thereof. The petition prays that the said court be compelled to dismiss the said action without rendering a judgment upon the merits thereof.

[1] To the contention that the action should be dismissed because it is brought upon a contract which by law is void, the respondent replies that the defendants in said action are estopped from denying the validity of said contract because of benefits received thereunder. These are issues of law and fact for the trial court to determine only at the trial of the action. A judgment on these issues is on the merits of the action. No reason exists why an action should be dismissed instead of being decided upon its merits because the claim sued upon is founded upon a void contract. This is not the practice with respect to suits brought upon contracts void for other reasons, such, for example, as being within the statute of frauds and not in writing. In such case the issue is whether or not the contract sued upon does or does not exist, and the issue is raised by pleadings which upon the one side allege the contract and on the other side deny it. There is no reason for a distinction in this respect between contracts void under one statute or void under another.

[2, 3] Whether the contract sued upon is void or not is merely one of the considerations for the trial court in connection with the evidence and all the pleadings in the case. Whether or not plaintiff has a valid chose in action is the ultimate issue to be decided by the court in any trial of an action upon its merits. Upon this petition for mandate to dismiss the action we have neither the right nor the power to determine the merits of the said action. That question is not legally before us. The evidence and pleadings in the action are not before us. Petitioner relies on Ransome-Crummey Company v. Superior Court, 188 Cal. 393, 205 P. 446, and Van Landingham v. United Tuna Packers, 189 Cal. 353, 208 P. 973. The former of these two cases holds that where the corporate powers of a corporation plaintiff, after the institution of an action and during its pendency, has been suspended for nonpayment of license and franchise taxes, the said corporation, during the period of such suspension of powers, is wholly unable to either give or receive a legal notice carrying forward the prosecution of the said action. In the Van Landingham Case, it is held that such a suspended corporation during the period of its suspension has no power to execute a contract; that the attempted execution of a contract by such a suspended corporation is void and cannot be treated as the valid contract of a de facto corporation. Under these authorities it may well be that the contract sued on in the action under consideration is void. There may be other issues in the case, however, not known to us which may give the trial a different aspect. The pleadings and evidence may be such that a recovery may be had notwithstanding the contract be void. There may be an estoppel. There may be a contract implied by law. The Constitution and statutes may give a lien. These matters we do not decide. If nothing in the case warrants a judgment in favor of plaintiff on the merits, petitioner may look forward to a judgment in its favor on the merits. The trial court has the jurisdiction and power to determine the issues which go to the merits of the action. To argue that the pleadings and evidence warrant a decision only in favor of petitioner is of no avail. Mandamus is not a substitute for an appeal from an erroneous judgment and is certainly not such before the judgment is made.

It is claimed by petitioner that a motion to dismiss the action, however, upon the ground of the incapacity of the plaintiff to institute the action will lie where the facts warrant it because the granting of such a motion is not a judgment upon the merits. The authorities are conflicting upon the question as to whether the lack of capacity of plaintiff to sue may be raised by a motion to dismiss or whether it must be raised by answer denying plaintiff's incapacity to sue. 18 Cor. Jur. 1185. Respondents' reply to the motion to dismiss, in so far as it is based upon the lack of capacity of the plaintiff to commence the action, is twofold: (1) It is claimed that the plaintiff's capacity to commence or maintain the action is only suspended and not absolutely forfeited. The corporate powers were revived before the trial of the action was commenced and before the motion was made. (2) It is urged that the trial court undoubtedly had jurisdiction to exercise discretion to deny petitioner's motion for leave to amend the answer in the action. 20 Cal. Jur. 576 and 579. The answer, standing then as originally filed, fails to deny the allegation of the complaint that the plaintiff corporation was duly existing. The purported denial, based upon lack of information and belief, is understood by both parties in this proceeding to be insufficient as a denial. Art Metal Construction Company (a corporation) v. A. F. Anderson Co., 182 Cal. 29, 186 P. 776. Therefore, as the record stood at the time the motion to dismiss was denied by the trial court, the pleadings in the case presented no issue as to the corporate existence of the plaintiff, although the affidavits read upon the motion showed without conflict that the corporate powers of the plaintiff were suspended both at the time of the execution of the contract sued upon and also at the time the action was instituted, but that they had been revived before the time of the trial and the motion.

[4] Taking it for granted, without deciding, that the incapacity of plaintiff to institute the suit is a defense which may be raised by the defendant upon a motion to dismiss and that the defendant is not compelled to raise this issue by his answer or waive it, and also taking it for granted that upon such a motion the facts before the court are to be ascertained only from the affidavits used on such motion to the exclusion of the allegations and admissions of the main pleadings in the case, such a motion is a plea in abatement which is not favored in law, is to be strictly construed, and must be supported by facts warranting the abatement at the very time of the plea. 1 Cal. Jur. pp. 38, 39, 40, 41, and 80; California Savings & Loan Society v. Harris, 111 Cal. 133, 43 P. 525; Ward Land, etc., Co. v. Mapes, 147 Cal. 747, 82 P. 426; McCann v. Children's Home Society, 176 Cal. 359, 168 P. 355; Rudneck v. Southern California M. & R. Co., 184 Cal. 274, 193 P. 775; Weyse, etc., v. Biedebach, etc. (Cal. App.) 261 P. 1092.

In California Savings & Loan Society v. Harris, supra, the plaintiff corporation had suffered the penalty prescribed by section 299, Civil Code, for failure to file articles of incorporation with the county clerk. The penalty prescribed was that such corporation "shall not maintain or defend any action * * * until such articles * * * shall be filed. * * *" This penalty is analogous to the penalty of the Corporation License Act. The corporation complied with the section of the Code before the defendant raised the point against it. It was held that a defense based upon the noncompliance with said section must be put forward during the time of the noncompliance with the section, and that, after the corporation had complied with the section, a defense based upon previous violation of the section would not lie. That and the nature of the disability created by the statute are the main grounds of the decision, although something is therein also said about the difference between maintaining and instituting an action. The authority last referred to has frequently been cited and followed by the Supreme Court in this state upon the main grounds of the decision.

In Kehrlein-Swinerton Construction Co. v. Rapken, 30 Cal. App. 11, 156 P. 972, an action was commenced in the name of a corporation which had forfeited its franchise for nonpayment of license tax. Under the statute as it then read, the board of directors of the corporation, upon the forfeiture of the charter, became the trustees of the stockholders and of the property of the corporation. The point being raised by the defendant, the plaintiff asked leave to substitute as parties plaintiff the corporation directors in place of the corporation itself. The motion was denied by the trial court and this decision was reversed by the District Court of Appeal. A petition for a transfer to the Supreme Court was denied. This case is, therefore, authority for the proposition that the filing of the action in the name of a corporation whose franchise had been forfeited is not an absolute nullity, but that it has at least enough vitality to go forward when the proper plaintiffs are substituted.

The case of Ransome-Crummey Co. v. Superior Court, supra, indicates that after a corporation has properly instituted a suit, its corporate power to maintain the action may be suspended for failure to pay license and franchise taxes for a period of time while the action is pending and then go forward with full vigor when reinstated.

The case of Van Landingham v. United Tuna Packers, supra, holds that the attempted execution of a contract by a corporation at a time when its corporate powers are suspended is a nullity, and that such a contract does not automatically spring into life when the corporate powers are revived.

[5] There is a difference between the prosecution of an action at law and the execution of a contract. A contract is executed at one instant—at the very instant that the meeting of minds occurs. If void or nonexistent at that time, there is good reason for saying that said purported contract cannot be revived. Nothing exists to revive. The prosecution of an action at law, however, is a continuous process which involves many acts. If the power of the corporation to prosecute the action may be suspended for a certain period of time intervening between the filing of the complaint and entering of final judgment, as held in the Ransome-Crummey Case, supra, and if the filing of the action by a corporation which has had its charter forfeited is not a nullity, but can be restored to vitality by the substitution of proper plain-

tiffs as held in Kehrlein-Swinerton Construction Co. v. Rapken, supra, it follows that the said period of suspension may include the day on which the complaint was filed, without destroying the vitality of the action after reinstatement of the corporation plaintiff. The motion to dismiss or abate the action in this case was therefore made after the disability of plaintiff no longer existed, was not well grounded at the time made, and was properly denied.

[6] Section 14 of the Corporation License Act provides that, upon paying the tax and certain penalties:

> "The state controller shall issue a certificate of revivor to such corporation and thereupon such corporation is revived and its powers restored to full force and effect."

Further:

> "The revivor of a corporation under the provisions of this section shall be without prejudice to any action or proceeding, defense or right, which has occurred (originally 'accrued') by reason of the original forfeiture."

The only defense or right petitioner ever had to dismiss the action by reason of the original suspension, as distinguished from its right to prevail in the action upon its merits, was a plea in abatement which, under established law and precedent, was a temporary right that could only be availed of during the period of plaintiff's incapacity. The revivor of the corporation does not prejudice the defense, which petitioner was at full liberty to use during the period of suspension, but restores the corporation so that no future defense can be made on that ground. After the corporation is restored, it has power to maintain an action not previously dismissed. This interpretation is in harmony with section 11, which suspends the corporate powers only until such tax is paid in accordance with the act. A different construction would extend the period of suspension beyond that expressly fixed by the act.

The writ is denied and the proceeding dismissed.

We concur: STURTEVANT, J.; NOURSE, J.

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91 Cal. App. 103

COLMA VEGETABLE ASS'N v. BONETTI et al. (two cases). (Civ. 5598, 6232.)

District Court of Appeal, First District, Division 2, California. April 18, 1928.

1. Appeal and error ⟹662(2)—On appeal on judgment roll alone, recitals and statements in findings and in judgments were conclusive as to defendants' appearance in trial court.

On appeal on judgment roll alone, recitals and statements in findings and in judgment were conclusive on question of defendants' appearance in trial court raised for first time on appeal.

2. Specific performance ⟹114(2)—Complaint in suit for specific performance of co-operative marketing agreement held to sufficiently disclose that contract was just, fair and reasonable.

Complaint in suit by co-operative marketing association against member for specific performance of contract *held* to set forth facts disclosing that contract was just, fair, and reasonable as to defendants.

3. Appeal and error ⟹907(3)—On appeal from judgment for plaintiff on judgment roll alone, court must assume allegations of complaint were sustained by competent proof.

On appeal from judgment for plaintiff on judgment roll alone, appellate court must assume, in absence of any record in case, that allegations of complaint were sustained by competent proof.

4. Appeal and error ⟹907(3)—On appeal on judgment roll alone, appellate court must presume in support of judgment there was ample, substantial, and competent evidence to support court's findings.

On appeal on judgment roll alone, there being no evidence before appellate court, it must be conclusively presumed in support of judgment that there was ample, substantial, and competent evidence to support findings in trial court.

5. Damages ⟹79(1)—Provision of contract between co-operative marketing association and member providing for liquidated damages for member's breach held not void as penalty; it being impracticable to fix actual damages.

Provision of contract between co-operative marketing association and member providing for $1,000 liquidated damages for breach by member *held* not void, as providing for penalty, where it was impracticable and extremely difficult to fix actual damages resulting from member's violating agreement.

6. Agriculture ⟹1—Constitutional law ⟹169—Co-operative Marketing Act authorizing liquidated damages and relief against members by specific performance held not unconstitutional as increasing liability of defendants under existing contract, since remedial statutes do not impair contracts (Civ. Code, § 653pp, subds. (a), (b), as added by St. 1923, pp. 229, 230, § 1).

Provisions of Co-operative Marketing Act (Civ. Code, § 653pp, subds. (a), (b), as added by St. 1923, pp. 229, 230, § 1) authorizing liquidated damages in contracts between co-operative marketing association and members and authorizing relief by specific performance and injunction *held* not unconstitutional as increasing liability of defendant members under existing contract, since remedial statutes which are retrospective in character do not impair contracts or interfere with fixed liability.

7. Agriculture 🔑1—Act creating remedy of specific performance and injunction against co-operative marketing association members and authorizing provisions for liquidated damages applies to prior, as well as future, contracts (Civ. Code, § 653pp, subds. (a), (b), as added by St. 1923, pp. 229, 230, § 1).

Provisions of Co-operative Marketing Act (Civ. Code, § 653pp, subds. (a), (b), as added by St. 1923, pp. 229, 230, § 1) creating remedy of specific performance and injunction by co-operative marketing associations against members and authorizing provision for liquidated damages in contracts applies to prior, as well as future, contracts.

8. Agriculture 🔑6—Specific performance 🔑68—Under statute, contract between co-operative marketing association and member can be specifically enforced and injunctive relief may be given (Civ. Code, § 653pp, subd. (b), as added by St. 1923, p. 230, § 1).

Under Civ. Code, § 653pp, subd. (b), as added by St. 1923, p. 230, § 1, contract between co-operative marketing association and member can be specifically enforced and injunctive relief may be given.

9. Agriculture 🔑6—Specific performance 🔑68—Remedies of specific performance and injunction were available to co-operative marketing association against member, where contract provided for such remedies (Civ. Code, § 3513).

Under Civ. Code, § 3513, providing that any one may waive advantage of law intended solely for his benefit, remedies of specific performance and injunction were available to co-operative marketing association against member, where contract provided that association should have such remedies, even if Co-operative Marketing Act, which provided such remedies, did not so provide.

10. Statutes 🔑77(1)—Classifications created for purposes of legislation must be reasonable.

Classifications created for purposes of legislation must be reasonable ones.

11. Statutes 🔑77(1)—Co-operative Marketing Act held not unconstitutional as special legislation.

Co-operative Marketing Act *held* not unconstitutional as being special legislation.

12. Damages 🔑85—Where contract between co-operative marketing association and member provided for liquidated damages of $1,000 for breach, court cannot award $500 damages on member's breach.

Where contract between co-operative marketing association and member provided for liquidated damages of $1,000 in case of breach of contract by member, court cannot award sum of $500 damages for member's breach, but must award $1,000 damages contracted for.

Appeals from Superior Court, San Mateo County; George H. Buck, Judge.

Action for damages for breach of contract by the Colma Vegetable Association against G. Bonetti and another. From the judgment, both parties appeal, and the appeals were consolidated. Judgment modified, and, as modified, affirmed.

Harry H. Baier, of San Francisco, for Colma Vegetable Ass'n.

Howard Harron, of San Francisco, for G. Bonetta and G. Bonetta & Co.

MURPHEY, Justice pro tem. This is an appeal upon the judgment roll alone. The facts, as developed by the findings, are substantially as follows: The defendant G. Bonetti & Co., is a copartnership of which G. Bonetti is a member and has been a member during all the time covered by the transaction involved in this litigation; that there were other members of said copartnership; that the defendant copartnership became a member of the Colma Vegetable Association, the plaintiff in this action, in May, 1922; that the plaintiff association, a nonprofit corporation, was at all the times mentioned in the complaint a co-operative marketing association without capital stock, organized and existing by virtue of the laws of this state; that it was the purpose of said co-operative marketing association to market vegetables and food products without profit to itself and with a reasonable profit to its membership; that at all said times the defendant copartnership has been engaged in and carrying on the business of farming, raising, and producing agricultural products for sale and during all said time transacted and conducted said business under the common or firm name of G. Bonetti & Co.; that in May, 1922, said copartnership, pursuant to the rules and regulations of said plaintiff's association, agreed to and did become a member of said Colma Vegetable Association and has ever since retained said membership; that in May, 1923, said copartnership, together with other members of the plaintiff association consisting of approximately 60 individuals and firms, all agriculturists, entered into a written agreement herein; under said agreement the plaintiff agreed to accept from its members all cabbage, lettuce, cauliflower, and potatoes produced by said members and to sell and market the same to the best advantage and to collect on said sales the money to become due thereon, which services it agreed to perform without compensation other than the expenses of marketing, which said expenses of marketing were to be apportioned among the members of the association and each of them; that plaintiff agreed to place the products of its members on the market in and outside of San Francisco in such manner as to avoid congestion of said products in any one place and to keep itself informed of the market conditions; that it would dispose of the products of its members to the best advantage and at a price which would enable them to make a reasonable profit on the sale thereof.

It was further provided by said agreement that the members would deliver to plaintiff all the cauliflower, cabbage, lettuce, and potatoes produced by them and each of them for a period of five years from the date of said agreement and permit the plaintiff to sell the same under its own name and fix the price thereof. It was further provided at the time the said agreement was executed and entered into that any sale by any member of said association to any person, firm, or corporation of any of said products should constitute a violation of said agreement, and that from the nature of the case it would be impracticable and extremely difficult to fix the actual damage suffered by plaintiff and the members of said association not violating the agreement, and it was agreed and provided that any member so violating the agreement should be liable to said corporation in liquidated damages in the sum of $1,000 to be used by the plaintiff for the benefit of the members not violating the agreement. It was further provided that the purpose of said agreement was to give the parties of the second part the benefit of co-operative marketing and co-operative sales of their products and it should not be construed as an attempt on the part of either of the parties to increase the market price of said product to such an extent that any of the parties of the second part, or either of them, would derive from the sale of said products an unreasonable profit; that on and since the 24th day of July, 1924, the defendants G. Bonetti and G. Bonetti & Co., although then engaged in the business of producing agricultural products covered by said agreement, delivered all their said products in violation and breach of the terms of said agreement to other persons, firms, and corporations and ever since that time have refused to deliver said products to plaintiff and refused to be bound by any of the terms of said agreement; that the plaintiff has fully performed all the terms and conditions precedent of said agreement on its part to be performed and has at all times and now is ready and willing to comply therewith and has at all times demanded performance thereof by the defendants G. Bonetti and G. Bonetti & Co.; that up to the 24th day of July, 1924, the defendants G. Bonetti and G. Bonetti & Co. performed and continued to perform all the terms and conditions of the aforesaid marketing agreement of May 23, 1923. It is further found as a fact that during the times covered by the complaint in this action many changes were made in the personnel of the copartnership G. Bonetti & Co., but that no notice of any kind of such change was given to the plaintiff and that the plaintiff never knew or had any knowledge of any such changes; that the said firm during all the times up to the 24th day of July, 1924, continued to accept the benefits accruing under said agreement; that all members of the firm at all times had full knowledge of the existence of and activities under said contract; that at no time was the copartnership G. Bonetti & Co. canceled or annulled or dissolved, nor was any new copartnership formed under said name; that the agreement of May 23, 1923, was not at any time procured by misrepresentations, concealment, or circumvention, or any unfair practices of any kind whatever, nor was the same procured through fraud, misrepresentation, or duress, or through any such means.

On this state of facts, conclusively determined as such in the absence of any record, statement, or bill of exceptions, the court rendered judgment in favor of the plaintiff and against the defendants G. Bonetti and G. Bonetti & Co., decreeing: (a) That the contract should be specifically performed; (b) that defendants be restrained during the life of the agreement from selling their products to any person, firm, or corporation; (c) for damages in the sum of $500. The defendants G. Bonetti and G. Bonetti & Co. appeal from the entire judgment and the plaintiff, by a separate appeal on the same record, appeals from that portion of the judgment whereby it is awarded only the sum of $500 in damages; it being its contention that it is entitled to the full award of liquidated damages provided for in the agreement of May, 1923. By stipulation of the parties these appeals were consolidated and have been heard together.

[1] The first contention of the appealing defendants is that there was no appearance in the trial court of the defendant copartnership. This point is raised for the first time in this court. In its findings and in its judgment the trial court states that Howard Harron appears as attorney for these defendants and the judgment is rendered against the defendants G. Bonetti and G. Bonetti & Co. In the absence of any record of the proceedings had at the trial of the action in the superior court, the recitals and statements in the findings and in the judgment are conclusive and we must determine this contention adversely to the appellants. If there was any question about proper appearance of said copartnership in the trial court, in view of the findings and judgment, that matter should have been settled by proper proceedings initiated and determined in the trial court at the trial of the action. In this court Mr. Harron stated that he appeared for and represented defendants G. Bonetti and G. Bonetti & Co., the appealing defendants.

[2, 3] It is next contended by the appealing defendants that the complaint, being one for specific performance, is fatally defective, in that it does not set forth the facts to disclose that the contract was just, fair, and reasonable as to the defendants. There is no substantial merit in this contention. The complaint set forth specifically the acts to be performed by the respective parties under the contract, the benefits to be derived by each,

and the burdens and responsibilities assumed by each. It may be said that under the particular kind of a contract involved in this litigation, co-operative marketing agreement, all the profits and benefits accrued to the participating members, the services of the corporation itself being nonremunerative and nonprofit sharing, and the court specifically and definitely found that all these allegations were true. In the absence of any record in this case, it must be assumed that these allegations were sustained by competent proof. In this connection we call attention to the language of the Supreme Court in the case of Baker v. Miller, 190 Cal. 263, at page 267, 212 P. 11, 13. The court says:

> "Viewed as a whole, we feel there is no escape from the conclusion that the complaint is insufficient and the general demurrer interposed by the defendant should have been sustained. [This is an action in specific performance in which the complaint was attacked in the same manner as it has been attacked in the instant suit. The trial court overruled the demurrer.] We are not inclined, however, to reverse the judgment for that reason. Whether the defendant called the attention of the court below to the infirmity of plaintiff's complaint, or only demurred as a matter of form, does not appear. After the demurrer was overruled, however, she answered, denying generally and specifically the averment of the complaint attempting to allege the adequacy of the consideration and the fairness of the contract. * * * With all of the evidence before it, the trial court found that the contract between the parties was fair and just and liberal in its provisions in favor of the defendant. The evidence, we think, amply supports the findings."

[4] In the instant case, of course, there is no evidence before this court and it must be conclusively presumed in support of the judgment that there was ample, substantial, and competent evidence to support the findings in the trial court.

[5] The next contention of the appealing defendants is that the provisions of the contract of May 23, 1923, with regard to liquidated damages, are in effect and in fact a contract providing for a penalty, and therefore void. Appellants cite many authorities in support of this assignment, none of which, however, are applicable to the facts of the instant case. In the case of Anaheim Citrus Fruit Ass'n v. Yeoman, 51 Cal. App. 759, 197 P. 959, a case similar in character to the one here under consideration, the court said:

> "Defendant sought to show at the trial that the damage which would accrue to the association by reason of any of its members failing or refusing to market their fruit through the association could be easily and exactly ascertained, and that such damage would consist wholly of a proportionate amount of overhead operating cost. By the line of questioning pursued, it was made clear that the association would suffer an actual monetary loss by reason of the failure of defendant to deliver his fruit at the association packing house for market, as he had agreed to do, but in the very nature of the case we do not think that such damage should be the only damage considered to have been suffered by the plaintiff. Other elements have already been suggested. The existence and life of the association itself depended upon its being furnished fruit to dispose of in the public market. A reduction in the amount of fruit so handled would not only tend to increase the overhead cost to the nontransgressing members, but, we may assume, to some extent affect the prestige and standing of the association as a marketing concern. The argument would be the same, regardless of the quantity of fruit which might have been delivered by the defendant, whether it composed but a small fractional part or one-half or more of the entire product designed to be marketed by the plaintiff agency. Enough has been said, we think, to show that the case falls within the class as to which the law permits damages to be liquidated by contract in advance of their occurrence. It follows as a necessary conclusion that plaintiff was entitled to recover the exact amount fixed in its contract as the sum per box which defendant should pay by reason of his failure to market this fruit in the manner agreed."

In the case of the Consolidated Lumber Co. v. Los Angeles, 33 Cal. App. 698, 166 P. 385, the court said:

> "Section 1671 of the Civil Code provides: 'The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.' * * * Whether 'it would be impracticable or extremely difficult to fix the actual damage' in a case in which the parties have attempted to agree upon liquidated damages in advance is a question of fact. It will be noted that the specific declaration is made in the contract here in question that the actual damages to be suffered from a breach would be difficult to ascertain, and that the parties are making provision for liquidated damages in lieu of actual damages. The decided cases in this state are uniformly to the effect that such a declaration tends strongly to establish the fact required by the statute to exist; and, further, tends to control the question as to whether the provision is one for liquidated damages or for a penalty, where the contract appears upon its face to be one allowed by the terms of section 1671. [Many cases are cited by the court in support of this doctrine.] There is nothing in the findings to negative the statement in the contract that the actual damages for a delay in delivery of the lumber would have been difficult of ascertainment. That declaration is therefore conclusive."

In the instant case the trial court specifically found that it is impracticable and extremely difficult to fix the actual damages accruing to the plaintiff by reason of the acts of said defendant in violating said agreement and, of course, in the absence of any record in this case there is and can be no evidence to contradict this finding of the trial court; on the contrary, it must be presumed that there was ample evidence to support this finding.

In the case of Poultry Producers, etc., v. Murphy, 64 Cal. App. 450, 221 P. 962, the court said:

> "Upon the question of damages the court found that under the provisions of the agreements it was impractical and extremely difficult to fix and determine the actual damages resulting to and suffered by the plaintiff from the failure and refusal of defendant to deliver eggs to plaintiff, and that the liquidated damages provided for in said agreements were valid liquidated damages. This finding, upon a question of fact, amply supported by the evidence, is conclusive upon us. If more need be said, it seems to be settled that the propriety of liquidated damages in a case such as this is recognized in Poultry Producers of Southern California, Inc., v. Barlow [189 Cal. 279, 208 P. 93]; supra, and Anaheim Citrus Fruit Ass'n v. Yeoman, 51 Cal. App. 759 [197 P. 959]."

[6, 7] It is next contended by the appealing defendants that at the time the agreement in question was made the provision for liquidated damages and relief by specific performance and injunction were ineffectual as at that time the provisions with respect to these matters were not a part of the Co-operative Marketing Act then in effect; it being the contention of appellants that the Co-operative Marketing Act containing these provisions did not become effectual until August, 1923. In this connection the court found:

> "That the plaintiff above named, Colma Vegetable Association, a corporation, is now and was during all times herein mentioned, and at all times mentioned in plaintiff's complaint, a nonprofit co-operative association and corporation, without capital stock, duly organized and existing under and by virtue of the law of the state of California, and pursuant to the act known as the Co-operative Marketing Act under the laws of the state of California, pursuant to Statutes of 1923, chapter 103, sections 653aa to 653xx, title XXIII, of the Civil Code of the state of California."

It is the contention of the appellant that the legislation above named increased the liability of the defendants under their contract. Remedial statutes which are retrospective in character do not impair contracts or interfere with fixed liability. They are not unconstitutional and the Legislature may from time to time change or modify the remedy provided. In so doing it does not affect any vested right. It may be generally said that when the defendant signed the agreement which is here sued upon he obligated himself to deliver all his agricultural products to the plaintiff. When he fails to do that he commits a legal wrong and thereby submits himself to the remedies provided by law.

Cooley's Constitutional Limitations (7th Ed.) p. 515:

> "As a general rule, every state has complete control over the remedies which it offers to suitors in its courts. * * * It may give a new and additional remedy for a right or equity already in existence. And it may abolish old remedies and substitute new; or even without substituting any, if a reasonable remedy still remains."

In the case of Aikins v. Kingsbury, 170 Cal. 674, 679, 680, 151 P. 147, 148, the Supreme Court of this state says:

> "The passage of an act providing a new remedy for the state as a contracting party does not necessarily deprive the other party to the contract of his rights. * * * A remedy may be given where none existed before and it follows that a new and more liberal remedy may be substituted for one which was in effect at the time the contract of sale was made. * * * 'In the proposition often stated in the decisions that parties contract with reference to existing laws, and that such laws become a part of the contract, the reference is to those laws which determine and fix the obligation of the contract, the correlative rights and duties springing from it and not to laws of mere procedure prescribing remedies. With reference to these, there is ordinarily no obligation arising, but the contract is made in contemplation of the power of the Legislature to change them. Of course, all remedy cannot be taken away, nor can the existing remedy be so altered as to take away or impair any of the rights given by the contract as interpreted by existing law.' * * *
>
> "'The distinction between the obligation of a contract and a remedy given by the Legislature to enforce that obligation exists in the nature of things, and without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct.'"

In the case of Brown v. Staple Cotton Co-operative Ass'n (Miss.) 96 So. 849, the court says:

> "It is true that said Co-operative Marketing Act, having been adopted after the contract here considered was entered into, does not and could not undertake to control the substantive rights of the parties to this cause. It is not true, however, that the remedies therein provided are not applicable to past as well as future transactions. It is too well settled to merit discussion that a remedy afforded by a statute passed subsequent to the date of the contract in question may be invoked by a party to the contract who has been wronged by its nonperformance. Such legislation does not impair the obligation of a contract. The obligation of a contract has reference alone to the rights of the parties arising thereunder and not to any remedy for their enforcement. A law creating a remedy applies to prior as well as future contracts and is constitutional."

There are many other cases holding to this same effect. Pignaz v. Burnett, 119 Cal. 157, 51 P. 48; Galland et al. v. Lewis, 26 Cal. 46; People v. Bank of San Luis Obispo, 159 Cal. 65, 112 P. 866, 37 L. R. A. (N. S.) 934, Ann. Cas. 1912B, 148; Buck v. Canty, 162 Cal. 226, 121 P. 924; Boggs v. Ganeard, 148 Cal. 711, 84 P. 195; 5 Cal. Jur. 781.

[8] The next contention of the appealing defendants is that the contract cannot be specifically enforced and injunctive relief may not be given under the laws of this state. In this connection the appellants quote from the case of Poultry, etc., v. Barlow, 189 Cal. 279, 208 P. 93, wherein the Supreme Court, while sustaining many features of the Co-operative Marketing Act, held that specific performance would not lie by reason of want of mutuality of remedies, and in this connection the court said:

> "Were it not for the doctrine of mutuality of remedy as a prerequisite to the equitable relief here demanded, there would seem to be no good reason for denying respondent the more adequate relief that would be thus afforded to marketing corporations such as this which are more or less dependent for their efficient maintenance and operation upon ability to specifically enforce the mutual obligations of their members. The individual stockholder thus contracting the delivery of his wares would seem to be adequately safeguarded by his legal remedy for damages."

This decision of the Supreme Court was rendered in July, 1922. In response, apparently to this suggestion of the Supreme Court, the Legislature at its succeeding session enacted section 653pp of the Civil Code (St. 1923, pp. 229, 230, § 1), which provides:

> "(a) The by-laws or the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract," etc.
>
> "(b) Injunctions. In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract and to a decree of specific performance thereof."

By this enactment the Legislature has granted to co-operative marketing associations the remedies of injunction and specific performance and deliberately abrogated all contradictory legislation and judicial determinations.

These co-operative marketing acts have been sustained in a great number of states. In Potter v. Dark Tobacco Growers' Co-operative Ass'n, 201 Ky. 441, 257 S. W. 33, the court said:

> "Farmers, if unorganized, necessarily act as individuals and not as groups in marketing their products, resulting in 'dumping' by the farmers, distribution by speculators, an unconscionable and uneconomic spread between producer and consumer in the necessities of life, and an inevitable demoralization of basic economic conditions, to the hurt directly or indirectly of every citizen.
>
> "With a clear recognition of this fact borne in upon the public conscience by the threatened economic collapse of the farming industry indispensable to public welfare and national stability, if not national existence, an enlightened public opinion unmistakenly demands that farmers be permitted to organize for the marketing of their crops, not merely for their own protection, but for the public good."

The Supreme Court of Kansas, in Kansas Wheat Growers' Ass'n v. Schulte, 113 Kan. 672, 216 P. 311, gives an enlightening exposition of this subject-matter. The court says:

> "This association was organized for the sole purpose of marketing the wheat raised by its members, and performing such functions as are incidental thereto. From the very nature of things it must have the wheat or it cannot exist. It has no power to buy wheat; hence it cannot go into the open market and purchase wheat to fill its contracts of sale, if the members fail to deliver, and thus sustain its existence or recoup its loss. Even the payment of damages of 25 cents per bushel stipulated to be paid by a member for each bushel he produces and sells elsewhere would not sustain the association and enable it to do the business for which it is incorporated. Hence, as a practical matter, it is of little consequence that the member is solvent and able to respond in damages. If the association received damages from all, or a substantial portion, of its members, it would cease as a going concern, or be so seriously handicapped as to destroy its usefulness. Wheat is the only commodity the association can use as a going concern. All it can do with money is to pay its expenses and disburse the balance among its members. It necessarily follows that there is no adequate remedy at law. The only adequate remedy is injunction, preventing the member from selling to others, and thus forcing the delivery of the wheat to the association. Washington Cranberry Growers' Ass'n v. Moore, 117 Wash. 430, 201 P. 773, 204 P. 811 [25 A. L. R. 1077]; Phez Co. v. Salem Fruit Union, 103 Or. 514, 201 P. 222, 205 P. 970 [25 A. L. R. 1090]; Owen County Burley Tobacco Society v. Brumback, 128 Ky. 137, 107 S. W. 710."

With respect to the remedial provisions the co-operative marketing laws have been specifically passed upon and affirmed in Oregon, Washington, Kentucky, and have been enacted in some 30 other states.

[9] It may fairly be said that, irrespective of the provisions of the Co-operative Marketing Act, the remedies of specific performance and injunction would seem to be available to the plaintiff for the reason that the defendants in their contract have agreed that the plaintiff may have such remedy. There are many authorities in support of the subject. California Civ. Code, § 3513; Allen v. Hance, 161 Cal. 189, 118 P. 527, holds that a statute designated for the protection and benefit of the property owner may be waived by him; Tebbets v. Fidelity & Casualty Co. of New York, 155 Cal. 137, 99 P. 501; Nunez v. Morgan, 77 Cal. 427, 19 P. 753; Bowen v. Aubrey, 22 Cal. 566.

[10, 11] The last contention that we shall consider as raised by appellant is that the law is unconstitutional because it is special

legislation. In the case of Poultry Producers' Ass'n v. Barlow, supra, in addition to holding that the law is not in contravention of the Cartwright Act (St. 1907, p. 984), the court generally sustained the constitutionality of the act except in so far as it applied to the remedies of specific performance and injunction. Agreements under the Co-operative Marketing Act, with these exceptions, have been sustained in a large number of cases and particularly in the cases of the Poultry Producers' Ass'n of Central California v. Murphy, 64 Cal. App. 450, 221 P. 962; Poultry Producers of Central California v. Nilsson, 197 Cal. 245, 239 P. 1086; Anaheim Citrus Fruit Ass'n v. Yeoman, 51 Cal. App. 759, 197 P. 959. In Re Martin, 157 Cal. 51, 106 P. 235, 26 L. R. A. (N. S.) 242, the Supreme Court says:

> "These various specifications are in effect directed to the same point—namely, that the law arbitrarily selects for its operation a special class of persons. It is, we think, unnecessary at this date to cite many authorities in support of the proposition that a law is not special or lacking in uniformity merely because it does not apply to every person or subject within the state. 'An act to be general in its scope need not include all classes of individuals in the state; it answers the constitutional requirements if it relates to and operates uniformly upon the whole of any single class.' Abeel v. Clark, 84 Cal. 226, 24 P. 383. The classification created for the purposes of legislation must, of course, be a reasonable one. The test of its propriety is well stated in City of Pasadena v. Stimson, 91 Cal. 238, 27 P. 604, where the court declared 'that although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.'"

In National Union Fire Insurance Co. v. Wanberg, 260 U. S. 71, 43 S. Ct. 32, 67 L. Ed. 136, Chief Justice Taft says:

> "The statute treats the business of hail insurance as affected with a public interest. In that country, where a farmer's whole crop, the work and product of a year, may be wiped out in a few minutes, and where the recurrence of such manifestations of nature is not infrequent, and no care can provide against their destructive character, it is of much public moment that agencies like insurance companies to distribute the loss over the entire community should be regulated so as to be effective for the purpose. * * * There is no discrimination and no denial of the equal protection of the laws. * * *
>
> "The Legislature was evidently convinced that it would help the public interest if farmers could be induced generally to take out hail insurance and 'temper the wind' so injurious to the agriculture of the state, and that they would be more likely to avail themselves of this protection if they could effect the insurance promptly and on the eve of the danger."

It is worthy of note that in the case just cited the Supreme Court forces a contract upon an insurance company against its will, justifying the legislation on the ground that the protection of the farmer's crop is a matter of public interest.

[12] The judgment, in so far as the appealing defendant is concerned, is affirmed. With respect to the judgment of the trial court in awarding the plaintiff the sum of $500 damages, we see no escape from the conclusion that in rendering this judgment the trial court was in error. If our conclusion with respect to liquidated damages under this character of contract is correct, it is determinative of this appeal. We know of no law that would justify the trial court in fixing an arbitrary amount as damages in contravention of the terms of the agreement made by the parties. This conclusion is confirmed by the cases hereinbefore cited, Poultry Producers v. Murphy, supra, and Consolidated Lumber Co. v. City of Los Angeles, 33 Cal. App. 698, 166 P. 385. With respect to this phase of the case the judgment is erroneous. The judgment is modified by changing the $500 allowed plaintiff to $1,000, and, as so modified, the judgment is affirmed, plaintiff to recover costs on appeal.

We concur: KOFORD, P. J.; STURTEVANT, J.

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91 Cal. App. 375

BOOMER et al. v. SOUTHERN CALIFORNIA EDISON CO. (Civ. 5330.)

District Court of Appeal, Second District, Division 1, California. April 27, 1928.

1. Electricity ⚷19(5)—In action for damage to household furnishings from fire alleged to have resulted from defective electric wiring, evidence did not sustain verdict for plaintiffs.

In action for damages to household furnishing, resulting from alleged defective electric wiring, evidence *held* not to support verdict for plaintiffs, when considered as whole, giving weight to testimony of experts to which it is entitled, namely, that whenever subject under consideration is one within knowledge of experts only, and is not within knowledge of laymen, expert evidence is conclusive on question in issue.

2. Evidence ⚷5(2)—It is common knowledge that, when mystery surrounds origin of fire, defective electric wires are invariably charged as cause.

It is matter of common knowledge that, whenever mystery surrounds origin of fire, defective electric wires are invariably charged as cause.

3. Abatement and revival 🔑9—Action for damage to household furnishings may not be abated because of prior suit by plaintiffs and son for damage to house.

In action for damages to household furnishings caused by fire, plea in abatement, based on previous action to recover damage by reason of burning of house which plaintiffs and son owned jointly, *held* that, because of additional plaintiff in previous case, that plea was defeated, since, in order to successfully maintain plea in abatement by reason of prior action pending, it must appear that such action is based on same cause and contested by same parties.

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

Action by J. A. Boomer and others against the Southern California Edison Company for damages suffered by reason of fire. Judgment for the plaintiffs, and the defendant appeals. Reversed.

See, also, 267 P. 181.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, for appellant.

James L. Allen and James L. Davis, both of Santa Ana, for respondents.

HAHN, Justice pro tem. This is an appeal by the defendant from a judgment entered upon a jury's verdict for the plaintiffs for damages suffered by reason of the destruction by fire of certain household furnishings belonging to the plaintiffs and located in a dwelling occupied by them as their home.

The complaint alleges that the defendant, without right or permission so to do attached its "high-powered electric service wires" to plaintiffs' house for the purpose of serving electric energy to a house located upon an adjacent lot; that the said wires were so defectively, negligently, and carelessly attached to plaintiffs' house, and were so defectively and negligently maintained thereon, that the said house and the furnishings therein contained were destroyed by fire on March 9, 1924; that the fire "was caused by the said energized electric wires"; and that, at the time of the fire plaintiffs were occupying said house, and had certain furnishings and personal property therein, all of which were destroyed by said fire through the careless and negligent acts of said defendant.

The answer admits that defendant attached its wires to plaintiffs' house, but denies that said wires were high-powered or other than the usual service wires used in connection with furnishing electric energy to dwelling houses for lighting purposes. The answer further denied all of the other material allegations of the complaint, and, in addition, sets up an affirmative defense in the nature of a plea in abatement, alleging that the plaintiffs herein with one L. A. Boomer did on the 4th day of September, 1924, file an action in the superior court in and for the county of Orange, for the purpose of collecting a claim of $3,500 as damages alleged to have been suffered by the said named plaintiffs by reason of destruction of their house by fire; that the house therein described and referred to is the same house described as destroyed by fire in the instant case, and its destruction was caused by the same fire which resulted through the same circumstances as alleged in the instant case causing the destruction of plaintiffs' furniture. The defendant further alleges that a judgment was rendered in the aforesaid referred to action in favor of the plaintiffs herein and their son, L. A. Boomer, for the sum of $2,500, and that an appeal has been perfected from the said judgment to the Supreme Court of the state of California.

Upon the submission of the case to the jury, a verdict was returned in favor of the plaintiffs for the sum of $1,000. From the judgment entered upon this verdict the defendant appeals.

From the evidence in the record the following undisputed facts may be gleaned:

In the early morning of March 9, 1924, as day was breaking, the dwelling house occupied by the plaintiffs, and which was jointly owned by plaintiffs and their son, L. A. Boomer, was destroyed by fire, together with a large portion of the furnishings located therein owned by the plaintiffs. The house had recently been constructed, and had been occupied but a few months prior to the conflagration. On January 1, 1924, J. A. Boomer, one of the plaintiffs, signed a written request to the defendant company, which is a public utility distributing electric energy in that locality, to connect their house with electric wires for lighting purposes. About the same time a similar request was made of the defendant by a neighbor whose house was about 20 feet distant from plaintiffs' house. Defendant had a power line some 250 feet from plaintiffs' house, and on January 25th, for the purpose of supplying plaintiffs and the neighboring house with electric current for lighting purposes, ran two service wires from its power line, and connected the service lines by porcelain spools to the ends of the rafters on the northeast corner of plaintiffs' house. From this point the service wires ran up toward the gable and under the overhanging eaves to a point where they were fastened again to porcelain spools, which in turn were attached to a false beam nailed onto the rafters. From this point the wires were strung to the neighbor's house.

At the time of the fire, plaintiffs' house had not yet been connected with the service wires; the reason appearing for the delay being that the plaintiffs had failed to furnish or construct a meter box in which the defendant was to install its meter. The neighboring house, however, was connected with the service wires, and used electric energy carried

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over them for four or six weeks prior to the fire.

Attached to one of the poles on the defendant's power line, and at a point not far from where the service lines attached to the feed line, was a 5-kilowatt transformer such as is usually used for reducing the electric current from 2,200 volts, as carried on their feed lines, to 110 volts carried on the service lines. This transformer was equipped with 5–M spring fuses, which served the purpose of breaking electric connections in the event that an excessive voltage passed from the feed lines into the service lines. The service lines were insulated and of the size and character usually used for such purposes. It further appears that the service wires, as they approached plaintiffs' house, and were carried along from the ends of the rafters to a point under the eaves from which they left respondents' house for the neighboring house, at no point were nearer to each other than twelve inches. There is some testimony in the record that one of the insulated service wires touched the false rafter near the porcelain spool to which this wire was attached.

There is no direct evidence as to how the fire was started. Early in the morning, just about daybreak, plaintiffs were aroused by some one calling "fire." On reaching the outside of the house, they found that the roof was on fire; the fire burning under the eaves and running up toward the ridge of the gable. Apparently the fire was first observed by one Emma J. Williams, who stated that she lived "straight east two long blocks from plaintiffs' house, and that there was nothing to obstruct her view of plaintiffs' house." She further testified that on the morning in question she got out of bed and pulled up the shade of her bedroom window to see if it was daylight, and then for the first time observed a light located apparently on plaintiffs' house, which "looked unusually large to me for an ordinary electric light." She stated that she then remarked to her husband that the light did not look like an arc light, and that she believed it was a fire, and that upon further observation she thought that the light she saw was a blaze coming out of the roof of plaintiffs' house. She stated that she did not remember seeing any smoke at first, but that later she saw some smoke; that the light as she first saw it was quite pale, and not red, and fixed the location of the light as on the northeast corner of plaintiffs' house "right up on top of the eaves." The only other testimony in the record describing the fire is that of the plaintiffs and their son, who first observed the fire when it was well under way, burning up the end gable and through the roof. The witnesses all place the fire at its outset as burning in the vicinity of the northeast corner of the roof where the two service wires were attached.

Among the witnesses for the defendant were those who had charge of the stringing of the service wires and the general oversight of the maintenance of the line. Their testimony to the effect that the wires used were new insulated wires of the character, size, and quality usually used for such purposes, and that the same were strung and attached to the house in the manner provided by the best usage and by the National Board of Fire Underwriters, was not disputed. Testimony was also offered to show that, after the fire, the service wires and the transformer were carefully examined; that the wires showed that there had been no short circuit, and the transformer was neither burned out nor were any of the fuses exploded; that there was nothing from an examination made of the wires and the transformers after the fire that indicated that there had been any excess voltage pass over the service line. The defendant's evidence further showed that prior to the fire no trouble had been reported to the defendant company affecting the service wires in question, and that they had served without trouble the neighboring house with electric energy for lighting purposes. In addition to this evidence, as to the conditions of the wiring and transformer, defendant offered the testimony of three expert witnesses, who gave it as their unqualified opinion that, under the conditions existing, as testified to by the witnesses in relation to the character and condition of the service wires before and after the fire, the manner in which they were connected to the house, the condition of the transformer before and after the fire, and all other matters presented in evidence relating to the service wires and their attachment to the house, it was impossible for the fire to have been started from the service wires. No expert testimony was offered by the plaintiffs to refute the opinions given by defendant's experts. To discuss in detail the reasons given by these expert witnesses for their conclusion would extend this opinion to unwarranted length without serving any useful purpose.

[1, 2] The jury undoubtedly inferred from the fact that the fire was first seen burning near where the wires were attached to the house, there being no other explanation offered for the fire, that it must have started from the electric wires. It is a matter of common knowledge that, when mystery surrounds the origin of a fire, "defective electric wires" are invariably charged as the cause. The inquiring lay mind, seeking an explanation, will often, in the absence of specific information, dignify a guess with the assurance of a conclusion. Possibly the evidence presented in the instant case might have gained judicial sanction for this custom were it not for the undisputed evidence given by the electrical experts that the fire could not have been started from the service wires under the conditions existing as appeared in the evidence. Assuming, for the sake of argument,

that the evidence in the case justified more than a guess as to the cause of the fire, and that the evidentiary facts supported an inference that the fire was caused by the wires, we are met with the rule as emphasized in the case of William Simpson Const. Co. et al. v. Industrial Accident Commission et al., 74 Cal. App. 239, 240 P. 58, "that whenever the subject under consideration is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue." This rule would seem to be particularly applicable in the instant case. As already pointed out, the meager facts bearing upon the origin of the fire hardly justify more than a guess that the fire was caused by the service wires. Respondents lay emphasis on the testimony of the witness Emma J. Williams to the effect that the light she first observed gave forth no smoke, but was quite pale in color. This respondents urge, would justify the inference that the first light she observed was created by a short circuit induced by the two service wires coming together. This inference would seem to entirely lose its weight in the light of the undisputed evidence that the wires in question were insulated and fastened apart not less than twelve inches. Furthermore, it is significant that the witness in question testified that but a few minutes after she first observed the light she and her husband were both satisfied that what they observed was the plaintiffs' house burning. Then, too, considering the distance of the witness from the plaintiffs' house and the early morning hour, at which time, according to her own testimony, there was a haze, all this would lead to but one reasonable conclusion, and that is that what the witness Emma J. Williams saw was the blaze in its incipient stage.

Considering all of the evidence, and particularly the evidence of the experts, giving to it the weight which it has been held in this state it is entitled to, we are led to the conclusion that the evidence does not support the charge that the fire was caused by defendant's service wires. From this it would follow that the verdict is not supported by the evidence.

In view of our conclusions on this vital point, the question as to whether or not the plaintiffs have borne the burden of proving the charge that the defendant was negligent in constructing and maintaining the service wires, becomes unimportant.

As the case will be remanded for further proceedings, it is proper that we should consider the point urged by appellant that the court committed error in refusing to give a requested instruction to the jury that the evidence offered in support of defendant's special defense of "plea in abatement" entitled appellant to a verdict in its favor.

[3] The plea in abatement is based upon the fact that, in a previous action filed to recover damages suffered by reason of the burning of the house in question, plaintiffs and their son, L. A. Boomer, were plaintiffs with the defendant here as defendant. It appears that the plaintiffs, with their son, jointly owned the house in question, while the plaintiffs here were the sole owners of the furnishings therein contained. Appellant contends that under these circumstances respondents should have included in the prior action their claim for damages for the furniture which was destroyed by the fire. Even if it be admitted that this point would be well taken, if in the prior action the plaintiffs were the same as in the instant case, yet the fact that there was an additional plaintiff in the prior case would seem to defeat appellant's contention.

In order to successfully maintain the plea in abatement by reason of a prior action pending, it must appear that such action is based upon the same cause and contested by the same parties. 1 Cal. Jur. 31; Cobe v. Crane, 173 Cal. 116, 118, 159 P. 587; Schoonover v. Birnbaum, 150 Cal. 734, 89 P. 1108.

In view of the conclusions we have heretofore indicated, the judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

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91 Cal. App. 382

BOOMER et al. v. SOUTHERN CALIFORNIA EDISON CO. (Civ. 5794.)

District Court of Appeal, Second District, Division 1, California. April 27, 1928.

1. **Trespass ⚿40(4)—Complaint charging that defendant, "without right, license or permission," attached electric wires to plaintiff's house, which resulted in its destruction, stated cause of action for trespass.**

Complaint charging that defendant, "without any right, license, or permission," went on plaintiff's property and attached its wires to plaintiff's house, and, as result of this trespass, plaintiff's house was destroyed by fire caused by such electric wires, stated cause of action for trespass.

2. **Negligence ⚿108(2)—It is unnecessary to aver that facts complained of were negligently performed, where facts necessarily exclude any other hypothesis.**

It is not necessary to aver that facts complained of were negligently performed, where facts alleged necessarily exclude any hypothesis other than that of negligence.

3. **Negligence ⚿111(1, 3)—To allege cause of action based on negligence, it should appear in what respect defendant was negligent, and that negligence caused injury.**

In order that complaint shall sufficiently allege cause of action based on negligence, it should appear in what respect defendant was negligent, and that such negligence had causal connection with plaintiff's injury.

4. Trespass ⚷43(1)—That evidence material to issue of trespass supported issue of negligence did not justify court in declaring case was tried on theory of negligence.

In action for damages alleged to have resulted from burning of house, where complaint stated cause of action for trespass and plaintiff asserted that complaint presented issue of negligence, the fact that evidence material to establish trespass tended to support issue of negligence *held* not to justify court in declaring that case was tried on theory of negligence.

5. Electricity ⚷19(5)—Assuming issue of negligence was involved, evidence did not sustain verdict that fire damaging house was caused by electric wiring.

In action for damage to house from fire alleged to have been caused by electric wiring, assuming that issue of negligence was involved, evidence *held* not to sustain verdict for plaintiffs.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by J. A. Boomer and others against the Southern California Edison Company for damages suffered by reason of a fire. Judgment for the plaintiffs, and defendant appeals. Reversed.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, for appellant.

James L. Allen and James L. Davis, both of Santa Ana, for respondents.

HAHN, Justice pro tem. The case before us for review is one wherein plaintiffs were awarded a judgment for $2,500 as damages suffered through the loss by fire of their house.

The complaint briefly alleges that plaintiffs were owners jointly of a dwelling house to which the defendant, without any right, license, or permission so to do, attached its high-powered electric wires, and that by reason thereof plaintiffs' house was totally destroyed by fire on March 9, 1921; that said fire was caused by the electric wires so attached to plaintiffs' house, and by reason thereof plaintiffs suffered damages, etc.

The answer in brief and concise form denies each and all of the allegations of the complaint.

Defendant and appellant, in urging a reversal of the judgment, makes two contentions: First, that the complaint is based on trespass and not on negligence, while the findings fail to find on the issue of trespass, but do find on an issue of negligence, which is nowhere raised in the pleadings; second, even if the pleadings could be interpreted as raising an issue of negligence, the evidence in the record is insufficient to support the finding of negligence.

We have this day filed an opinion in the case of J. A. Boomer et ux. v. Southern California Edison Co., 267 P. 178, being Civil No. 5330, which case arose out of the same fire that caused the loss which is the subject of controversy in this action. The evidence presented in that case relating to matters bearing on defendant's responsibility for the fire, and the question as to its right to attach its wires to plaintiffs' house, was substantially the same as that present in the instant case. For the sake of brevity, we refer to that opinion for a detailed statement of facts and cirsumstances bearing upon the origin of the fire, and make only such reference to the evidence as may seem necessary in considering the points here involved.

It appears that on January 25, 1924, defendant, a public utility corporation engaged in the business of distributing electric energy for lighting purposes, ran two service wires from its feed line along the alley bordering on plaintiffs' property to the northeast corner of plaintiffs' house, where the wires were attached to the ends of the rafters by porcelain spools. From this point the wires were continued up under the eaves and attached to porcelain spools fastened to a false beam, from which point they were carried to a neighboring house, distant about 20 feet from plaintiffs' home. The wires were intended to serve both houses with electric energy. It was and is plaintiffs' contention that defendant had attached these wires to their house without any permission being granted therefor, and that, as a result, plaintiffs' house was set on fire by these wires and destroyed. Two of the plaintiffs testified that they had not given such permission, but it appears uncontradicted that J. A. Boomer, the third plaintiff, signed a written order or request dated January 21, 1924, to the defendant to connect their house with its electric system. By reason of the failure of the plaintiff to furnish the necessary meter box, defendant, although ready so to do, was not furnishing electric current to plaintiffs' house at the time of the fire, but the neighbor's house was connected up and being served with electricity for some time prior thereto.

There was no direct evidence presented in the case as to how the fire started. Respondents urge that there were sufficient facts presented in the testimony to justify the inference evidently drawn by the court that the fire was started by the two service wires attached to the northeast corner of plaintiffs' house.

[1-3] The complaint clearly is one for damages based on trespass. The essential allegations to support such an action are therein alleged, and nothing more. Defendant is charged with having, "without any right. license or permission," gone upon plaintiffs' property and attached its wires to plaintiffs' house, and it is claimed as a result of this

trespass plaintiffs' house was destroyed by fire which was caused by the electric wires.

There is no direct allegation in the complaint charging the defendant with negligence, either in making the connection of its wires with plaintiffs' house or in maintaining its wires. It is true that it has been held that it is not necessary to aver that the acts complained of were negligently performed where the facts alleged "themselves necessarily exclude any hypothesis other than that of negligence." Silveira v. Iverson, 125 Cal. 266, 57 P. 996. It has also been held, in order that a complaint shall sufficiently allege a cause of action based upon negligence, that "it should appear in what respects the defendant was negligent and that such negligence had a causal connection with plaintiff's injury." Simons v. Pacific Gas & Electric Co., 64 Cal. App. 74, 220 P. 425. The acts of the defendant complained of and described in the complaint do not "exclude any hypothesis other than that of negligence." In fact, it is only by a stretch of the imagination that plaintiffs' complaint can be interpreted to mean that the pleader intended to rest his case upon proof of negligence. The only reasonable interpretation that can be put on the complaint is that the plaintiffs haled the defendant into court to answer to the charge that it had wrongfully trespassed upon their property with its wires, and this resulted in the burning of the house. The complaint clearly and concisely states a cause of action for trespass, and, moreover, the evidence in the record clearly shows that the plaintiff offered evidence only for the purpose of supporting the charge of trespass that the fire was started from the electric wires and the amount of damage suffered. No attempt was made in plaintiffs' case in chief to prove either that the wires in question were negligently strung or attached to plaintiffs' house, or that thereafter they were negligently maintained. In meeting these issues, it is true that the evidence of the defendant in some respects would support a contention that the defendant had strung and had maintained the wires in a good, workmanlike manner, and that there was no negligence on its part in either the material that was furnished or the manner in which the work was done, or the wires maintained, but the evidence none the less went directly to the issue as to whether or not the fire was started from the wires.

We have examined the cases cited by respondents in their brief as supporting their contention that the complaint sufficiently raises the issue of negligence, but we do not read these cases as supporting appellant's view. They deal with pleadings that were defective, but none the less susceptible to the conclusion that the pleader was attempting to allege but one cause of action, and that was one based on negligence. The complaint in the instant case is not to be measured by the rule applied in those cited.

[4] Respondents contend further that, even if their complaint does not sufficiently raise the issue of negligence, the case was in fact tried on the theory that the negligence of the defendant in attaching its wires to plaintiffs' house, and thereafter maintaining them there, was involved, and that appellant will not be heard at this time to raise the question that the issue of negligence was not before the court. Appellant asserts that neither the plaintiffs nor the defendant presented evidence to meet the issue of negligence, but that all of the evidence offered went directly to the issues raised in the complaint, namely, that defendant was a trespasser, and that the fire which destroyed the house was caused by defendant's wires.

While it is true that some of the evidence would have been pertinent to an issue of negligence, it is equally true that all of the evidence related directly to the question of trespass and the cause of the fire. The fact that evidence material to an issue may tend to support some matter not involved does not justify the court in declaring upon such foreign matter is clearly decided in the following language used in the case of Riverside Water Co. v. Gage, 108 Cal. 240, 41 P. 299:

> "It is frequently the case that evidence which is admissible to establish one issue may tend to establish another issue than that for which it is offered, and it is a rule that evidence so introduced is available to establish any of the issues in the case. This rule is, however, limited to the issues which are to be tried. If the other issue that the evidence may tend to establish is not before the court the evidence must be limited to the actual issue. The fact of its introduction cannot be used to establish an issue that the parties have not made in their pleadings. The court would not be authorized to consider it as establishing an issue that was not before it for trial. Even a finding upon such evidence would be disregarded in determining the correctness of the judgment."

The court, in the case of Crescent Lumber Co. v. Larson, 166 Cal. 168, 135 P. 502, considering the same question, declares the rule in the following language:

> "All of the evidence on this point was relevant to the issue of payment, which was in the case, and its introduction cannot, therefore, be regarded as authorizing the determination of some other issue not presented by the pleadings."

[5] But, even if we were to assume that there is merit in respondents' contention that the case was tried on the theory that the issue of negligence was involved, it would be unavailing to respondents here, for the reason that in our opinion the evidence that would be material to the issue of negligence is insufficient to support the court's finding, "that said fire was caused by reason of said wires being defectively and carelessly attached to, and defectively and negligently maintained on, plaintiffs' said house by defendant, which defect and negligence was unknown to plaintiffs prior to said fire." As

stated in our opinion in the appeal of Boomer v. Southern California Edison Co. (Civil No. 5330) hereinabove referred to, there was no direct evidence that the wires in question did start the fire. At most, it was only an inference which might be drawn from certain facts observed. The effect of this inference, however, was overcome by the expert testimony in the case that under the conditions existing just prior to and at the time of the fire, as testified to by witnesses at the trial of the case, the fire could not have been started from the electric wires. This question is so fully discussed in case Civil No. 5330 that, for brevity's sake, we refer to that opinion for our extended views on the subject.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

204 Cal. 220

GLENDORA BANK v. DAVIS et al.

(L. A. 9133.)

Supreme Court of California. May 21, 1928.

1. Bills and notes 🔑152—Note containing clause making it payable out of sales of merchandise for which it was given held nonnegotiable (Civ. Code, §§ 3082, 3084, 3085).

Under Civ. Code, §§ 3082, 3084, 3085, relative to requirements of negotiable instrument, a note containing a clause that payment thereof was to be made out of sale of merchandise in consideration for which note was executed *held* nonnegotiable as containing a contingency for payment dependent on sale of merchandise.

2. Appeal and error 🔑173(4)—Obligation of maker of note, payable from proceeds of merchandise, to sell merchandise, within reasonable time, cannot be raised for first time on appeal.

Question relative to liability of maker of note, payable on sale of merchandise for which it was given, on theory that he was obliged to sell merchandise within a reasonable time, cannot be raised for the first time on appeal, in that reasonableness of conduct of litigant should be measured by circumstances appearing in particular case.

Department 2.

Appeal from Superior Court, Los Angeles County; James W. Bartlett, Judge.

Action by Glendora Bank against E. A. Davis and the Foothill Finance Corporation. From the portion of the judgment against defendant first named in an amount less than asked, plaintiff appeals. Affirmed.

Leland S. Bower, of Los Angeles, and Warren D. Isenberg, of Glendora, for appellant.

Marks, Launer & Collins, of Fullerton, for respondents.

SHENK, J. The plaintiff sued the defendants on a promissory note for $1,935.48. Judgment by default was rendered against the defendant Foothill Finance Corporation, as indorser and guarantor, for the full amount of the note, and from this portion of the judgment no appeal has been taken. After trial, the court also rendered judgment in favor of the plaintiff and against the defendant Davis for the sum of $192.80. From this portion of the judgment only the plaintiff appeals.

The only question here involved is whether the promissory note is nonnegotiable in form. If it is, the judgment must stand. The note is dated October 19, 1923, is made payable to the defendant Foothill Finance Corporation or order "one day after date," is signed by the defendant Davis, and appears to be negotiable in form, except that immediately preceding the signature of the maker is the following provision:

> "This note is given in payment of merchandise and is to be liquidated by payments received on account of sale of such merchandise."

It appeared in evidence that the defendant Davis had purchased certain automobile accessories from his codefendant, and executed said promissory note in payment for the same, with the understanding that the note should be paid out of the receipts by Davis from the sale of such merchandise. This understanding was expressed on the face of the note, as above quoted. The trial court found and concluded:

> "That said promissory note is nonnegotiable, for the reason that its payment is to be made out of moneys to be realized from a sale of the personal property for which the note was given, and for the further reason that the clause as to payments out of sales of said merchandise makes it payable on a contingency which may not occur."

[1, 2] We think the conclusion of the trial court was correct. Section 3082 of the Civil Code requires, among other things, that an instrument, to be negotiable, must contain an unconditional promise to pay a certain sum in money. Section 3084 provides that a promise to pay out of a particular fund is not unconditional, and section 3085 provides that "an instrument payable on a contingency is not negotiable, and the happening of the contingency does not cure the defect." It is clear that the last clause of the note, above quoted, is susceptible of no other reasonable interpretation than that payment of the note or any part thereof was to be made out of receipts from the sale of the merchandise for which the note was given, and that this provision is "a promise to pay out of a particular fund," the existence of which depended on the contingency of the sale of the merchandise which might not take place at all or might take place to some, but to an uncertain, extent. These factors were fatal to the negotiability of the note under the Code sections referred to. See Tomlin v. Neale, 76 Cal.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

App. 726, 245 P. 800. The amount of the judgment against the defendant Davis was the amount of his receipts from sales of the merchandise prior to the commencement of the action, and which the court directed to be applied as a partial payment on the note. It is insisted by counsel for appellant that, if the note was not payable until Davis sold the merchandise, he was obliged to sell it within a reasonable time, and that his delay was unreasonable. Assuming that this question might be considered if properly and timely presented, it is enough to say that it was not raised in the trial court, and it is now too late to raise it for the first time. The reasonableness of the conduct of a litigant should be measured by the circumstances appearing in the particular case. We are unable to determine from the record whether the defendant Davis was or was not at fault in not selling more of the merchandise before the action was commenced.

The judgment is affirmed.

We concur: LANGDON, J.; RICHARDS, J.

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204 Cal. 223

TANNER v. HOBART ESTATE CO. et al.

(Sac. 4071.)

Supreme Court of California. May 21, 1928.

1. Venue ⚷50—Allegations of antagonism in county and that there was litigation between communities and persons engaged in business similar to defendants held insufficient for change of venue (Code Civ. Proc. §§ 392–400).

Allegations, in motion for change of venue from county where case would be tried, pursuant to Code Civ. Proc. §§ 392–400, because of land involved being situated therein, in action against companies supplying water for private, public, and domestic consumption, that there existed in county where trial would be held a general spirit of antagonism toward any person or association furnishing water for private, public, and domestic consumption, and that certain communities in county were engaged in litigation with other persons engaged in similar business, and that by reason thereof an unfriendly, biased, and prejudicial attitude of a large part of the residents of the county toward defendants existed, wherefor defendants believed they could not secure an impartial trial in said county, *held* insufficient showing for change of venue, since it was not alleged trial judge or any of court officers were biased or prejudiced, nor that any member of jury or person eligible for jury service was biased or prejudiced.

2. Venue ⚷37—Prior to issue joined, court should not be compelled to decide finally that cause cannot be fairly tried.

Prior to issue joined, the court should not be compelled to decide finally that at the time of trial the cause cannot be fairly and impartially tried in county.

Department 2.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action by Ammon Tanner against the Hobart Estate Company, a corporation, and others. From an order denying defendants' motion for change of venue, defendants appeal. Affirmed.

Jos. B. Huberty, of San Andreas, for appellants.

George F. McNoble and Stanley M. Arndt, both of Stockton, and Virgil M. Airola, of San Andreas, for respondent.

SHENK, J. This is an appeal by the defendants from an order denying their motion for a change of the place of trial without prejudice to a renewal of the motion at the time of trial. The motion was made on numerous grounds, two of which need now be considered, to wit: (1) That there is reason to believe that an impartial trial cannot be had in the county of Calaveras wherein said action was commenced; and (2) that all of the defendants, except the defendant Wilson, are nonresidents of the county of Calaveras, and as to the other defendant Wilson that no sufficient cause of action has been alleged against him. The notice of motion was filed concurrently with a notice of motion to strike certain portions of the complaint and a demurrer to the complaint, and the motion was heard and denied before any decision on the notice to strike or the demurrer and therefore before answer filed.

The action is one for trespass on real property, diversion of waters therefrom, and the destruction of a dam thereon. The action is triable in Calaveras county, where the real property is situated, unless the place of trial be changed as provided in the Code. Sections 392–400, Code Civ. Proc. The defendant Emma Rose is a nonresident of the state and may be sued in any county of the state. The defendant Hobart Estate Company is a California corporation and is suable in Calaveras county as the county wherein the liability is alleged to have arisen. Const., § 16, art. 12. The defendant Utica Mining Company is the alter ego of the defendant Emma Rose. The defendant Wilson is a resident of Calaveras county and is the resident manager of the defendants Hobart Estate Company and Emma Rose in said county. He is properly joined with his principal, and a cause of action is stated against him.

It is urged by the defendants that the trial court abused its discretion in denying the motion on the ground set forth in the affidavits supporting the motion that the defendants have reason to believe that they cannot have a fair and impartial trial. The Hobart

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Estate Company and Emma Rose are engaged in the business of supplying water to inhabitants and landowners in said county for private, public, and domestic consumption. It is alleged in the supporting affidavits "that there is a general spirit of antagonism existing on behalf of the residents in the county of Calaveras toward any person or persons or associations engaged in and furnishing water for private, public and domestic consumption"; that certain communities in said county are engaged in litigation with other persons and corporations engaged in a similar business; and that by reason of the business operations of the defendants and the controversies at present existing between said defendants and its many consumers, the unfriendly, partial, biased, and prejudicial attitude of a large portion of the residents of said county toward defendants, and the antagonistic feeling and spirit in general existing throughout the county toward such other persons and corporations engaged in a similar business, all cause the defendants to believe that they will be unable to have a fair and impartial trial in said county. These allegations were not denied, and it is for that reason that an abuse of discretion is charged against the trial judge.

[1, 2] We think the showing was entirely insufficient. It was not alleged that the trial judge or any of the officers of the court are biased or prejudiced. Nor was it alleged that any member of the jury panel or any person eligible for jury service is biased or prejudiced, nor that any of the persons claimed to be prejudiced or partial are eligible for jury service in said court. Indeed, it is not alleged that the cause will be tried before a jury. The cause is not at issue. Prior to issue joined the court should not be compelled to decide finally that at the time of trial the cause cannot be fairly and impartially tried. Cook v. Pendergast, 61 Cal. 72, 79.

We find no error in the order. It is therefore affirmed.

We concur: LANGDON, J.; RICHARDS, J.

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204 Cal. 172

Anna Grazide ALVARADO and William P. Alvarado (Her Husband), Plaintiffs, Cross-Defendants and Appellants, v. Fannie STANTON, Executrix of the Estate of A. A. Stanton, Deceased, and Fannie Stanton, Defendants, Cross-Complainants, and Respondents. (L. A. 9787.)

Supreme Court of California. May 14, 1928.

In Bank.

Appeals from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

See, also, 267 P. 313.

Montgomery, Stick, Moerdyke & Gibson, George W. Seith, and Louis P. Pink, all of Los Angeles, for appellants.

A. W. Sorenson and Kemper Campbell, both of Los Angeles, for respondents.

WASTE, C. J. Respondents have made two motions to dismiss appeals. The appellants, as plaintiffs in the court below, instituted two actions against respondents, as defendants, one in ejectment (No. 182980), the other to quiet title (No. 191794). Judgment in each case was entered for the defendants. Motions for new trial were denied, but on motion of the plaintiffs the trial court vacated and set aside the judgments and entered new judgments in their stead. Plaintiffs appealed from each of the new judgments, but subsequently the orders vacating the original judgments, and the substituted judgments entered thereon, were annulled by this court on certiorari. Stanton v. Superior Court (Cal. Sup.) 261 P. 1001. The remittitur was filed in the court below January 28, 1928.

Any question raised by the appeals having become moot, the appeals are, and each is, dismissed.

We concur: RICHARDS, J.; SHENK, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

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204 Cal. 173

ALVARADO et al. v. STANTON et al. * (L. A. 10406.)

Supreme Court of California. May 14, 1928.

Rehearing Denied June 13, 1928.

1. Appeal and error 🔑346(1)—Time to appeal from original judgment held not extended by pendency of matters arising from motion to vacate and substitute other judgments (Code Civ. Proc. §§ 663, 663a).

Where court set aside original judgment for defendant and entered substituted judgment on motion by plaintiff, under Code Civ. Proc. §§ 663, 663a, which judgment was subsequently annulled on certiorari, pendency of matters arising from motions to vacate original judgment did not extend time to appeal from original judgments, and hence appeal from original judgment not made in time after notice of denial of new trial must be dismissed.

2. Appeal and error 🔑345(1)—Motion to vacate judgment and substitute another held not motion for new trial and does not affect appeal from judgment (Code Civ. Proc. §§ 663, 663a).

Motion to set aside and vacate judgment and to substitute another judgment, authorized by Code Civ. Proc. §§ 663, 663a, is not a proceeding on motion for new trial, and has no connection with an appeal from judgment.

In Bank.

Appeals from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action in ejectment by Anna Grazide Alvarado and husband against Fannie Stanton,

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★Rehearing denied.

executrix of the estate of A. A. Stanton, deceased, and another, in which defendants filed a cross-complaint. Judgment for defendants, and plaintiffs appeal. On motion to dismiss appeals. Appeals dismissed.

John C. Stick and Stick, Moerdyke, Gibson, & Untereiner, all of Los Angeles, for appellants.

A. W. Sorenson and Kemper Campbell, both of Los Angeles, for respondents.

WASTE, C. J. Respondents move to dismiss appeals from two original judgments. The actions and the parties are the same as those referred to in the decision, this day handed down, dismissing two appeals from the substituted judgments. Alvarado v. Stanton (L. A. No. 9787) 267 P. 313.

Judgment was originally given in each action in favor of the defendants, now the respondents here, and notices of entry of judgment were served on the plaintiffs on the 6th day of July, 1926. Orders denying motions for a new trial made by the plaintiffs in each of the actions were regularly entered on the 21st day of July, and notices of the giving of such orders were served upon the plaintiffs on the 21st day of September, 1926. Sixteen months later, on January 28, 1928, the plaintiffs filed their notice of appeal from the judgments.

[1, 2] In explanation of their failure to give timely notice of appeal, the appellants rely upon the fact that, after the court denied their motions for new trial, it granted another motion made by them under sections 663 and 663a of the Code of Civil Procedure, and vacated and set aside the original judgments and entered other and different judgments in their stead. The substituted judgments were annulled by this court on certiorari (Stanton v. Superior Court [Cal. Sup.] 261 P. 1001), and plaintiffs' appeals therefrom have been this day dismissed (Alvarado v. Stanton [L. A. No. 9787] 267 P. 313). But, because of the pendency of the matters arising from the motions to vacate and set aside the original judgments and to substitute others, the appellants contend that their time to appeal from the original judgments was thereby extended until the final determination of the proceedings in this court. That is not the law. The proceeding authorized by sections 663 and 633a, supra, has no connection with an appeal from a judgment. It in no manner or degree affects or controls the latter proceeding. Modoc Co-operative Ass'n v. Porter, 11 Cal. App. 270, 274, 104 P. 710. Such a motion is not a proceeding on motion for a new trial, and does not extend the time within which an appeal must be taken from the original judgment. Spotton v. Superior Court, 177 Cal. 719, 171 P. 801. See, also, California Delta Farms v. Chinese American Farms (Cal. Sup.) 255 P. 1097.

The appeals from the original judgments are, and each is, dismissed.

We concur: RICHARDS, J.; SHENK, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

204 Cal. 159

FRANTZ v. MALLEN. (L. A. 8693.)

Supreme Court of California. May 9, 1928.

1. Limitation of actions 🔑180(2)—Demurrer raising defense of statute of limitations held properly sustained, where complaint showed on its face that limitations had run.

In action to enforce agreement to purchase stock, where complaint showed on its face that statutory period of four years had run and contained no allegation of absence from state, etc., to stop running of statute, demurrer raising defense of statute of limitations was properly sustained.

2. Pleading 🔑238(4)—Court had jurisdiction to change interlocutory order refusing amendment, where final judgment had not been entered.

Where court sustained demurrer without leave to amend and subsequently refused to allow amendment on theory court had lost jurisdiction to do so by its previous order, *held* that, since court had jurisdiction to change its judgment during that period, it had jurisdiction to change interlocutory order refusing amendment on which final judgment had not been entered.

3. Limitation of actions 🔑191—Amendment to avoid defense of limitations, alleging defendant had not been resident of state for four years, sufficiently alleged defendant had been physically within state.

Proposed amendment to complaint intended to show that action was not barred by four-year statute of limitations which contained allegation that defendant had not at time of commencement of action been resident of state for continuous period of four years or lived in said state for period *held* sufficient allegation to avoid defense of limitations that defendant was not physically within state during period involved when construed liberally, at least in absence of demurrer directed to that point.

4. Limitation of actions 🔑191—Amendment to show absence from state tolling limitations should allege physical absence.

Amendment to complaint intended to toll statute of limitations by showing that defendant was absent from state should allege that defendant was not physically within state during period involved.

5. Limitation of actions 🔑189—Trial court should have permitted amendment to avoid defense of limitations, where delay did not appear to have prejudiced defendant.

In action to compel purchase of stock, where complaint showed on its face that action was barred by statute of limitations and demurrer was sustained without leave to amend, *held* that, cause being meritorious one, trial court should have sustained demurrer and afterwards on application of plaintiff allowed him to amend his complaint showing absence from state tolling statute of limitations, especially where delay in moving to amend did not appear to have prejudiced defendant.

In Bank.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by J. H. Frantz against H. J. Mallen to enforce an agreement for purchase of stock. From a judgment of dismissal on sustaining of demurrer to the complaint without leave to amend, plaintiff appeals. Reversed, with directions.

Superseding opinion of District Court of Appeal, 261 P. 510.

C. A. Ballreich, of Los Angeles, for appellant.

J. Marion Wright, of Los Angeles, for respondent.

LANGDON, J. This is an appeal from a judgment of dismissal upon sustaining defendant's demurrer to the complaint without leave to amend.

The complaint, filed December 17, 1924, alleges that:

> "Defendant is a resident of Los Angeles county, Cal., and that during all the time herein mentioned said defendant was a resident of the state of Colorado, and during said time the plaintiff was and still is a resident of said state of Colorado."

It is then alleged that plaintiff and defendant entered into a written agreement in Colorado, set out in full in the complaint, by which, in consideration for the purchase of certain shares of stock by plaintiff from defendant for $2,000, defendant agreed to purchase said stock from plaintiff "and pay him $2,500 in cash therefor on or before August 4, 1920." If, on or before August 4, 1920, defendant offered to pay plaintiff $2,500, and plaintiff refused, defendant not to be under any obligation to buy it. Plaintiff bought and paid for the stock.

The complaint then alleges that a week or two prior to August 4, 1920, desiring to turn the stock back and receive the $2,500, plaintiff inquired as to defendant's whereabouts and learned he was in Europe; that defendant never offered to buy back the stock; that in the fall of 1920, upon defendant's return from Europe, plaintiff demanded the buying back of the stock by defendant, who refused and still refuses; soon after this demand defendant left Colorado and plaintiff "knew not of his residence until some few months since when he learned that he was in Los Angeles county, Cal." Judgment is prayed for $2,500 and interest.

[1, 2] The claim sued upon had accrued in August, 1920, and, as stated, the action was begun in December, 1924. The complaint showed upon its face, therefore, that the statutory period of four years had run. The complaint contained no allegation, such as absence from the state, etc., to stop the running of the statute. The demurrer, raising the defense of the statute of limitations, was therefore properly sustained. However, on January 23, 1925, when the order was made sustaining the demurrer, it was done without leave to amend, and plaintiff claims the order was made in the absence of his counsel, so that no request for leave to amend could have been made. On February 16, 1925, plaintiff filed a motion to amend the above order and grant him leave to amend and offered a proposed amendment setting up, upon information and belief, the absence of defendant from the state during the statutory period and the fact that the action was not barred in Colorado, where it had accrued. The court refused to allow the amendment upon the theory that it had lost jurisdiction to do so by its previous order. Since it had jurisdiction to change its judgments during that period, it certainly had jurisdiction to change this interlocutory order upon which final judgment had not been entered at that time.

[3, 4] The proposed amendment contained an allegation:

> "That the defendant had not at the time of commencement of this action been a resident of the state of California for a continuous period of four years or lived in said state for said period in that the plaintiff is informed and believes and upon such information and belief alleges that he did not take up his residence or abode in the state of California until long after the first of the year, 1921, and that prior to said time he was not a resident of the state of California, nor was he living therein, but was at said time a resident of the state of Colorado."

It is contended by respondent that this language does not allege that defendant was not physically within the state during the period involved and that such an allegation is necessary. While, technically, he is correct, nevertheless, a liberal construction of the proposed amendment, in the interests of justice, would hold it to allege, sufficiently, physical absence from the state at least in the absence of demurrer directed to this point.

Respondent contends that plaintiff waited too long before making his motion to amend his complaint. While, perhaps, the plaintiff should have made his motion in less than three weeks after the order was entered, it does not appear that this delay in any way prejudiced the defendant.

[5] It would seem that in the interests of justice—the cause of action appearing to be a meritorious one—the trial court should have sustained the demurrer, and afterwards, upon application of plaintiff, should have allowed him to amend his complaint as proposed. The judgment is reversed, with directions to the trial court to permit the plaintiff to amend his complaint.

We concur: WASTE, C. J.; PRESTON, J.; SHENK J.; RICHARDS, J.; CURTIS, J.

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204 Cal. 175

In re ARNOLD et al. (Cr. 3132.)

Supreme Court of California. May 14, 1928.

Contempt 🔑6—Action of officers of committee of political party and another in sending communications to Supreme Court relative to pending case held contempt.

The action of officers of the county central committee of a political party and of the chairman of a reapportionment executive committee in sending communications to the Supreme Court relative to, and giving their views on, a case pending in the Supreme Court, *held* contempt.

Langdon, J., dissenting in part.

In Bank.

Original proceeding for contempt of court against Ralph Arnold, Alfred F. Andrews, and Frank C. Tracy. Respondents committed.

R. M. J. Armstrong, of Los Angeles, for respondents Tracy and Andrews.

Marshall B. Woodworth, of San Francisco, for respondent Arnold.

PER CURIAM. In an action entitled "Frank S. Boggs, Petitioner, v. Frank C. Jordan, as Secretary of State of the State of California, Respondent (S. F. No. 12911)," there was filed in this court on March 16, 1928, a petition for a writ of mandate to compel the respondent secretary of state to disregard certain referendum certificates then on file in his office relative to an act of the Legislature, entitled "An act to amend section seventy-eight and to repeal section ninety of the Political Code, relating to the division of the state into legislative districts and defining and establishing such districts and to repeal all acts in conflict with this act" (Stats. 1927, p. 1757), and to take no further action with respect to said referendum certificates or proceedings thereunder. An alternative writ of mandate and an order to show cause were thereupon issued by this court and were served upon the respondent secretary of state. Said respondent thereupon made answer and return, and the matter came on regularly for hearing before the court in bank on the 3d day of April, 1928, petitioner and respondent each being represented by respective counsel. At that time certain counsel, among them Henry E. Carter, Esq., sought and obtained permission to file briefs amici curiæ for respondent. By agreement of all parties the cause was then ordered by the court to be submitted on briefs. No decision has yet been handed down in said cause, and the matter is now pending for consideration and determination by this court.

On April 12, 1928, there was handed to the clerk of this court a communication written by Ralph Arnold, reading in full as follows:

"Clift Hotel, San Francisco, April 12, 1928.

"The Clerk, Supreme Court of California, San Francisco, Calif.—Dear Sir: Mr. Henry Carter of Los Angeles will file a brief with your court to-morrow in reference to the validity of the petitions for the referendum on the reapportionment measure now before the court.

"This is to advise you that Mr. Carter in this proceeding represents the all parties reapportionment committee of Los Angeles county, said committee in turn representing the Republican county central committee, the Democratic county central committee, the Prohibition, Socialist & Progressive organizations, the Los Angeles, Hollywood, and other Chambers of Commerce, and numerous other organizations and individuals in Los Angeles county, in all representing a majority of the votes cast at the last election on the reapportionment question.

"Please convey to the court the information that the weight of the above citizens goes behind this brief.

"Yours very truly,

"[Signed] Ralph Arnold,

"Chairman, All Parties Reapportionment Executive Com. and Rep. Co. Central Com.

"My address is 639 So. Spring St., Los Angeles, Calif."

The clerk placed the communication in the hands of the justices of this court. On the same date there was handed to the clerk of the court, with directions to hand the same to the members of the court, a communication purporting to be "on behalf of the Republican county central committee of San Francisco," signed by Alfred F. Andrews and Frank C. Tracy, chairman and secretary, respectively, of said Republican county central committee, in which said Alfred F. Andrews and Frank C. Tracy, on behalf of said county central committee, protested "against the action Boggs v. Jordan, Secretary of State"; said communication reading in full as follows:

"Republican County Central Committee, City and County of San Francisco.

"April 12, 1928.

"To the Members of the Supreme Court, State of California, State Building, San Francisco, Calif. Re Boggs v. Jordan.

"Honorable Sirs: On behalf of the Republican county central committee of San Francisco we file herewith protest against the action Boggs v. Jordan, Secretary of State, to prevent from becoming effective the duly executed referendum of the electorate of the state against the so-called Farm Bloc Reapportionment Act.

"We feel that this question involves fundamental principles of initiative government and that the clear will of the people will be defeated should the action of the proponents in this case prevail. Not only will the express desires of the qualified number of electors who signed the referendum petition be defeated, but the whole principle of legislation by initiation from the people will be given a serious blow.

"This question involves all petitions by electors. It involves the referendum, the initiative and the recall. It also involves the practice of obtaining signatures to place candidates upon the ballot. Who can say if there is a public official in the state whose nominating petition signatures were of a sufficiency as regards technical requirements as justify his holding present office; and shall we go behind the record of their various elections if we now find that some of their petitions may have vulnerable technical validity?

"The referendum against the Reapportionment Act represents a true exercise of the right of review by the electorate of an action of the Legislature, within the constitutional guaranties to citizenship. We feel that because this is so fundamental, and that it does constitute the people's right of initiative review, interpretations of the act and all of its provisions should be constructively liberal.

"We feel that the signatures obtained for the referendum against the Reapportionment Act are not only valid but authentic. As we understand it, the authenticity of the signatures is not questioned as much as their validity; i. e., having to do with whether the date was written in by the elector or by the solicitor, and other technicalities. However, though we feel that all of the signatures are both authentic and valid, nevertheless, if there were a few in which the validity might be questioned because of a technicality, we believe that the intention of the elector in signing the referendum is the principal, the most important, and a most conclusive feature to consider. Clearly, the electors signing this petition intended to referendum the act, though in making this statement we by no means acknowledge that there were any quantity of such signatures with these technical omissions, or that their number, if they existed, substantially affected the validity of the petitions.

"We take the view that any objection to technical circumstances surrounding the signatures should have been made to the county clerks, or registrar of voters, who accepted for filing, the petitions. Clearly that is the place, and the only place, for the lodging of protest, as to the sufficiency of the signatures. We feel that it is an imposition upon the electorate of the state, the administrative office of the state, and upon the Supreme Court to inject this protest at this tardy time. Furthermore, we consider that the proponents of this action have not acted in good faith in permitting this lapse of time and opportunity in making their protest, and that they are striking at the whole question of initiative action, which is a much bigger and far more fundamental governmental question than the one involved herein.

"We trust that the members of your honorable body will see the justice of the claims we make above, and that you will recognize the legal soundness of the defense which will have already been filed with you by the Attorney General, and that you will deny the mandate which is being sought by the proponents.

"Yours very truly,
"Republican County Central Committee,
"City and County of San Francisco,
"Chairman [Signed] Alfred F. Andrews.
"Secretary [Signed] Frank C. Tracy."

The manifest purpose of preparing the foregoing communications, and each of them and sending the same, at the particular time mentioned, to the court in which this cause is pending, was and is to prejudice the minds of the members of the court, and to influence the consideration of the court against the cause of the petitioner in the action Boggs v. Jordan, Secretary of State, supra, and to influence the views of the members of the court, and to procure, if possible, a decision of the matter contrary to the contentions of the petitioner.

The said Ralph Arnold, Alfred F. Andrews, and Frank C. Tracy are not, nor is either of them, an attorney at law, and are not, nor is either of them, a party to the action Boggs v. Jordan, supra.

The sending of such communications, under the circumstances, to the court which still has before it the duty of exercising judicial functions in the case is an unlawful interference with the proceedings of the court and an attempt to obstruct the course of justice, and, therefore, a contempt of court.

Citation having issued, due return and appearance having been made, and no good cause being shown why they and each of them should not be found in contempt and punished therefor, it is adjudged by the court that the said Ralph Arnold, Alfred F. Andrews, and Frank C. Tracy are, and each of them is, guilty of contempt of this court, as specified in the citation, and that as punishment therefor the said Ralph Arnold, Alfred F. Andrews and Frank C. Tracy each pay a fine of $500, and that in default thereof they, and each of them, stand committed to the sheriff of the city and county of San Francisco, and, until such fine is paid, be imprisoned in the county jail of such city and county at the rate of one day's imprisonment for every $2 of such fine.

Let a commitment issue.

LANGDON, J. I dissent. I find myself unable to concur in the order fixing the punishment just made by the court majority. I am of the opinion that in this matter the penalty should be either the maximum provided by law—$500 fine and five days' imprisonment in the county jail—or, it should consist of an admonition or, at most, a reprimand. If this unwarranted interference with the due administration of justice were prompted by selfish or corrupt motives, or was knowingly and designedly intended, by secret communications, to exert an undue and unfair influence on the court, nothing less than the maximum penalty would be adequate. On the other hand, if, with no improper motives, but through ignorance of court procedure, with no realization of the improprieties of the act complained of, these defendants openly blundered into this embarrassing situation, neither the dignity nor the integrity of this court, nor the ends of justice, require more than an admonition, or, at most, a reprimand, to these defendants.

Because I am satisfied that the defendants, none of whom is a lawyer, did not realize the impropriety of their acts and were actuated by no improper motive, I think the punishment is excessive and unwarranted under the circumstances of this case; that an admonition, or, at most, a reprimand, would be amply sufficient.

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204 Cal. 162

BARNES v. CITY COUNCIL OF CITY OF LONG BEACH et al. (L. A. 10453.)

Supreme Court of California. May 11, 1928.

1. **Municipal corporations 🔑30—Alleged invalidity of annexation held not to justify city council's refusal to render effective vote of city and inhabitants of annexed area for its exclusion (St. 1913, p. 587; St. 1889, p. 433, § 1, as amended by St. 1927, p. 421).**

Alleged invalidity of annexation of territory to city under St. 1913, p. 587, on account of the annexed area's having been uninhabited and noncontiguous *held* not to justify city council's refusal to direct clerk to transmit to secretary of state certified abstract of vote taken on election to exclude such territory from the municipality under St. 1889, p. 433, § 1, as amended by St. 1927, p. 421, where election was regularly called, and both the city and the district to be excluded voted in favor of exclusion.

2. **Municipal corporations 🔑30—Statute providing for exclusion of territory from municipality is applicable to uninhabited and noncontiguous areas (St. 1889, p. 433, § 1, as amended by St. 1927, p. 421; St. 1913, p. 587).**

St. 1889, p. 433, § 1, as amended by St. 1927, p. 421, relative to exclusion of territory from municipalities, applies to exclusion of territory whether inhabited or uninhabited, contiguous or not contiguous, within meaning of St. 1913, p. 587; suit not being necessarily the converse of proceedings to annex territory.

3. **Municipal corporations 🔑30—Act for exclusion of territory from municipality held not repealed by subsequent act permitting annexation (St. 1889, p. 433, § 1, as amended by St. 1927, p. 421; St. 1913, p. 587).**

St. 1889, p. 433, relating to exclusion of territory from municipality was not repealed by St. 1913, p. 587, providing for annexation of areas to city, since there was no express repeal and St. 1889, § 1, was amended by St. 1927, p. 421.

4. **Municipal corporations 🔑30—Refusal of city council to take steps for exclusion of annexed territory pursuant to vote of city and territory held not warranted by pendency of action challenging annexation proceedings (St. 1913, p. 587; St. 1889, p. 433, § 1, as amended by St. 1927, p. 421).**

Pendency of suit challenging validity of proceeding for annexation of territory to municipality under St. 1913, p. 587, *held* not to warrant city council in refusing to take steps for exclusion of such territory in accordance with vote of the city and the excluded district in favor of exclusion under St. 1889, p. 433, § 1, as amended by St. 1927, p. 421.

In Bank.

Application by Martha L. Barnes for mandamus to be directed to the City Council of the City of Long Beach and others to require the certification of a vote at an election for the exclusion of certain territory from the city. Writ granted.

Bauer, Wright & Macdonald and Alexander Macdonald, all of Los Angeles, for petitioner.

Nowland M. Reid and Edmund J. Callaway, both of Long Beach, for respondents.

PRESTON, J. The issue of law here before us is presented by a petition for writ of mandate, with general demurrer thereto, Petitioner is a property owner in a disputed area which is either in or near the city of Long Beach, county of Los Angeles, state of California. Respondents are the city council of the said city and the individual members constituting said council.

The petition recites proceedings in due and regular form under the Act of March 20, 1889 (Stats. 1889, p. 433), as amended by the Act of April 22, 1927, in effect July 29, 1927 (Stats. 1927, p. 421), to exclude from the municipality of Long Beach certain territory therein described, known as the West Shoestring Strip exclusion district. Elections were regularly called, and voting occurred both in the exclusion district and in the remaining area of the city and decisive majorities resulted in both areas in favor of exclusion. As required by statute, the city council met following said elections, canvassed said returns, and declared said results. But the statute imposes upon said council a further duty, to wit, that said body "shall, by an order entered upon their minutes, cause their clerk, or other officer performing the duties of clerk, to make and transmit to the secretary of state a certified abstract of such vote, which abstract shall show" certain things set forth in said statute and "from and after the date of filing such abstract, such exclusion of territory from such municipal corporation shall be deemed complete, and thereafter such territory shall cease to be a part of such municipal corporation."

The city council refused to issue the order directing the city clerk to transmit to the secretary of state a certified abstract of the vote taken at said elections and the other data required by said provision of the statute; this step being necessary to make effec-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tive the result of such elections, and this suit for writ of mandate followed.

[1] The chief reason assigned by respondents for refusal to comply with this provision of the statute is that such territory proposed to be excluded was never a part of said city of Long Beach. This contention arises out of the following facts: In 1923, pursuant to the act of 1913 (Stats. 1913, p. 587), a territory known as Greater Long Beach was supposed to have been annexed to the city of Long Beach. This proceeding for annexation became effective in January, 1924. The West Shoestring Strip exclusion district is a part of that area, and the contention is that such part of said area was uninhabited and noncontiguous territory within the meaning of said act, and thus the whole proceeding failed and became a nullity. Justification of the position of respondents is further sought in the fact that one A. C. Brown and others, among whom is petitioner, have an action pending which has for its purpose the securing of a judgment declaring the whole of said annexation scheme a nullity.

There is, in our opinion, no merit in this position so taken by the said city council. In the first place, conceding the invalidity of the annexation proceedings, the action of the city in excluding it is but to render assurance doubly sure and thus end any controversy respecting the city's territorial jurisdiction over this shoestring area. If the invalidity of this proceeding be conceded, it does not render ineffective the elections. The most that could be said is that it might have been superfluous.

[2] Moreover, we are of the opinion that the statute of 1889, as amended in 1927, applies to the exclusion of territory whether it be inhabited or uninhabited, contiguous or noncontiguous, within the meaning of the Annexation Act of 1913, supra. The statute before us is not necessarily the converse of proceedings to annex territory. Uninhabited territory might have been made a part of the original area forming the municipal territory.

The matter of exclusion is determined by a vote of the qualified electors within the municipality, provided also a majority of the qualified voters in the area to be excluded have voted for exclusion. But if no voters are in said area, or if an opportunity to vote is given and no votes are cast in said territory, and this fact is made to affirmatively appear, we see no reason why exclusion would not be effective based upon the majority vote of the municipality alone. Otherwise from 1889 to 1913 there was in existence no method whereby a city could exclude uninhabited territory by an alteration of its boundaries. The method provided in 1913 (Stats. 1913, p. 703, c. 346) makes necessary a resolution of the board of supervisors of the county wherein the municipality is situated approving the exclusion, followed by a special election in the municipality for the purpose, wherein a majority vote for exclusion must be had. The favorable resolution cannot be made if a majority of property owners to be excluded protest. The two systems, though widely different in some respects, have the same essence, to wit, a majority consent in both the area to be excluded and in the remainder of the territory of the municipality.

[3] The act of 1913 does not purport to repeal the former act, and in fact only applies specifically to uninhabited territory. It seems to be but a special procedure as to that kind of territory without attempting to supplant the former act. Then again the earlier act has recently, as above noted, been amended, and this without disclosing any attempt to repeal the act of 1913. We feel that both statutes are intact, and that it must be so held. But the fact is that persons were residing in said area who voted at said election at voting places regularly established therein, and a majority so voting favored exclusion.

[4] The fact that Brown and others, including petitioner, have still pending and undetermined a suit challenging the validity of said annexation proceeding does not warrant respondents here in persisting in their policy of inaction. There is no analogy between the position of persons attacking said proceeding and the position of the city here. The annexation proceeding is in the nature of a proceeding adverse to the rights of the property owners, but, so far as the city council is concerned, the proceeding was a voluntary one on its part.

Let the writ of mandate issue as prayed for.

We concur; WASTE, C. J.; SHENK, J.; RICHARDS, J.; LANGDON, J.; CURTIS, J.

204 Cal. 195

HIETT et al. v. INLAND FINANCE CORPORATION et al. (Sac. 4045.)

Supreme Court of California. May 15, 1928.

1. Corporations 🔑503(1)—Action against corporation for cancellation of note and mortgage held properly brought in county where instruments were executed and land lay (Const. art. 12, § 16).

Action against corporation for cancellation of note and mortgage given it on ground of duress *held* properly brought in county where note and mortgage were executed and where land lay, under Const. art. 12, § 16, and corporation was not entitled to change of venue to county in which it had its principal office and place of business.

2. Appeal and error 🔑151(2)—Defendant against whom no case was stated and no relief sought held not aggrieved by order denying change of venue.

Where complaint, in action against corporation and its managing agent for cancellation of note and mortgage, stated no right of action against the agent and sought no relief against him, agent was not aggrieved by order of trial court refusing change of venue, and was therefore not entitled to maintain appeal from such order.

Department 2.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by H. C. Hiett and another against the Inland Finance Corporation and another. From an order denying defendants' motion for change of place of trial, defendants appeal. Affirmed.

Louttit & Stewart and Louttit & Marceau, all of Stockton, for appellants.

Roy A. Bronson, E. D. Bronson, Jr., and Bronson, Bronson & Slaven, all of San Francisco, for respondents.

RICHARDS, J. This appeal is prosecuted by the defendants from an order of the superior court of the county of Stanislaus denying their motion for change of place of trial to San Joaquin county, where at the time of the institution of the action the defendant corporation had its principal office and place of business, and where also the defendant Ross resided.

The plaintiffs commenced this action in the county of Stanislaus against the Inland Finance Corporation, joining with said corporation the defendant Ross, who was alleged in the plaintiffs' complaint to be the president and managing agent of said corporation. By the action the plaintiffs sought the cancellation of a certain note and of the mortgage securing the same upon the ground of duress and menace exercised upon the plaintiffs by said corporation through its president and manager, Ross, said note and mortgage having been executed in the county of Stanislaus, the property described in said mortgage being in the county of Stanislaus. The defendants separately moved for a change of place of trial which motions were by the trial court denied; whereupon the defendants appealed to this court from the order made in the foregoing regard.

[1] As to the appeal of the Inland Finance Corporation, it is clearly without merit, for the reason that the action was properly commenced against it in the county in which the contract which constitutes the gravamen of the plaintiffs' cause of action was made and was to be performed, under the provisions of section 16 of article 12 of the state Constitution.

[2] As to the appeal of the defendant Neil I. Ross, we are of the opinion that it is also without merit, for the reason that it clearly appears upon the face of the plaintiffs' complaint that, as to the defendant Ross, no right of action exists in favor of the plaintiffs, and it also appears that no relief or remedy of any sort against said defendant Ross is sought or prayed for by the plaintiffs, or would be proper in any aspect of the plaintiffs' alleged cause of action. The mere fact that the plaintiffs, out of abundance of caution or for other undisclosed reason, may have united the defendant Ross with his codefendant in said action, would not justify the defendant Ross in seeking a change of place of trial to the county of his residence, or in appealing from the order of the trial court of the county of Stanislaus denying such change, since it is apparent that he has been in nowise aggrieved by said order.

The order is affirmed.

We concur: SHENK, J.; LANGDON, J.

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91 Cal. App. 652

UNION OIL CO. OF CALIFORNIA v. CONEJO OIL CO. (Civ. 4734.)

District Court of Appeal, Second District, Division 2, California. May 8, 1928.

1. Judgment 🔑106(2)—Defendant who had not answered within time specified in summons nor within extension period was in "default," requiring clerk to enter judgment (Code Civ. Proc. § 585).

Where defendant, in an action to recover money for goods sold and delivered, did not file an answer either within the time specified in the summons or within the further time of ten days granted by the court, he was plainly in default within the meaning of Code Civ. Proc. § 585, making it necessary for the clerk to enter judgment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Default.]

2. Costs 🔑260(1)—Costs of appeal were entered against appellant, where appeal from default judgment on ground of clerk's unauthorized entry thereof was frivolous (Code Civ. Proc. § 585).

Costs of appeal were entered against appellant, where appeal from default judgment on ground of clerk's unauthorized entry thereof was, under Code Civ. Proc. § 585, *held* frivolous.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by the Union Oil Company of California against the Conejo Oil Company. From the judgment, defendant appeals. Affirmed.

Ben S. Hunter, of Los Angeles, for appellant.

Cooney & Kelley, of Los Angeles, for respondent.

THOMPSON, J. This was an action to recover money alleged to be due for certain goods, wares, and merchandise alleged to have been sold and delivered to defendant.

Defendant filed a general demurrer to the complaint. The demurrer was overruled, and defendant given ten days to answer. Upon defendant's failure to answer, its default was entered, and subsequently judgment was entered by the clerk pursuant to the prayer of the complaint.

Appellant's sole contention on this appeal is that the judgment is void, in that the county clerk is without authority to enter a judgment against a defendant who has appeared in the action.

Appellant cites authorities to sustain the proposition that the clerk in entering a judgment acts, not in a judicial, but in a purely ministerial, capacity, and can only enter a judgment when expressly authorized to do so by statute. Section 585 of the Code of Civil Procedure prescribes when judgment may be had if defendant fails to answer the complaint. Subdivision 1 is as follows:

> "In an action arising upon contract for the recovery of money or damages only, if the defendant has been personally served and no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount demanded in the complaint, including the costs, against the defendant, or against one or more of several defendants, in the cases provided for in section four hundred and fourteen."

In the instant case, no answer was filed within the time specified in the summons. Upon the overruling of the demurrer, a further time of ten days was granted, and no answer was filed within such further time so granted, and the statute provides that in such case, upon the application of the plaintiff, the clerk must enter the default of the defendant, and immediately thereafter enter the judgment for the amount demanded in the complaint and for costs.

The clerk is not only "expressly authorized" to enter the judgment, but he "must" enter it.

Appellant states that the precise question here involved has not, so far as appellant has been able to ascertain, been directly passed upon. That may be, but the fact remains that the point was decided in 1884, and a bit of diligence would have uncovered the authorities of Bailey v. Sloan, 65 Cal. 387, 4 P. 349, and Wall v. Heald, 95 Cal. 364, 30 P. 551.

[1] No answer having been filed by defendant, either within the time specified in the summons or the further time of ten days granted by the court, the defendant was plainly in default within the meaning of section 585 of the Code of Civil Procedure.

The appeal is so obviously without merit that we are compelled to the conclusion that it is purely frivolous, and intended solely for the purpose of delay.

[2] Judgment affirmed, with instructions to the trial court to enter judgment in favor of respondent and against appellant for the sum of $100 and costs of this appeal.

We concur: WORKS, P. J.; VALENTINE, Justice pro tem.

91 Cal. App. 574

MARYLAND CASUALTY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 5964.)★

District Court of Appeal, Second District, Division 1, California. May 3, 1928.

Hearing Denied by Supreme Court July 2, 1928.

1. Master and servant 🔑417(7)—Findings of Industrial Accident Commission are conclusive on certiorari, unless facts testified to are inherently improbable or inferences drawn therefrom unreasonable.

Determination of Industrial Commission as to facts on basis of evidence is binding on certiorari, unless facts testified to are inherently improbable, or inferences drawn from them are manifestly unreasonable.

2. Master and servant 🔑417(9)—Finding as to injury to employee's left eye held not to require annulment of compensation award on ground testimony showed direct injury was to right eye.

Finding of Industrial Accident Commission that employee was burned in left eye by flame from gas stove, causing injury to left eye, and affecting vision of both eyes, *held* not to require annulment of award, though application for compensation was based on blinding of right eye and partial blindness of left eye, and evidence showed that direct injury was to the right eye only; there being no issue raised as to which eye was directly injured.

★Hearing denied by Supreme Court.

3. Master and servant 🔑417(3)—Court's authority over Industrial Accident Commission on certiorari is less extensive than that given on appeal from decisions of courts.

Powers of appellate court over award of Industrial Accident Commission on certiorari are less extensive than those given on appeal from decisions of the courts.

4. Master and servant 🔑405(6)—Evidence held to sustain award of Industrial Accident Commission allowing cook compensation for injury to eyes from flame of gas stove.

Evidence *held* to sustain award of Industrial Accident Commission for compensation for cook's loss of sight of eyes resulting from burning of left eye by flame from gas stove, notwithstanding conflicting testimony as to existence of pre-existing disease causing blindness, where it was admitted that the accident may have hastened the final result.

5. Master and servant 🔑376(2)—Acceleration or aggravation of pre-existing disease in employment constitutes "industrial injury" (Workmen's Compensation Act).

Acceleration or aggravation of a pre-existing disease is of itself an injury in the occupation causing such acceleration, for which recovery may be had under Workmen's Compensation Act (St. 1913, p. 279, as amended).

Proceedings under the Workmen's Compensation Act by Calvert Briley, opposed by the Maryland Casualty Company, insurer, and the California Lutheran Hospital, a corporation, employer. From an order of the Industrial Accident Commission awarding compensation, employer and insurer apply for certiorari. Award affirmed, and writ discharged.

Kidd, Schell & Delamer, of Los Angeles, for petitioners.

G. C. Faulkner, of San Francisco, for respondents.

SHAW, Justice pro tem. The petitioners seek to annul an order of the Industrial Accident Commission awarding compensation to Calvert Briley, an employee of petitioner California Lutheran Hospital, for an injury to his eyes. Briley was employed by the California Lutheran Hospital as a cook, and testified that while he was engaged in his work as such cook he stooped over to look into the oven of a gas range, and that as he did so there was a gas explosion in the range, and a blast of flame suddenly came out of the oven door and struck him in the right eye, burning the eye and some of the hair on his face around it, and causing a sharp pain in the eye; that the eye immediately swelled shut; and that he has not been able to see out of it since. He further testified that the flame did not strike his left eye, and he then felt no pain in it, but that since the accident the sight of his left eye has gradually failed, and that before the accident occurred his sight was good in both eyes. The Industrial Accident Commission found that Briley was "burned in left eye by flame from gas stove, causing injury to left eye, affecting the vision of both eyes."

[1-3] The petitioners contend, first, that the evidence does not show that Briley suffered any injury at all to either eye, and hence does not support the finding on that point. The only direct testimony as to the accident is that of Briley, and petitioners' argument is based upon an analysis of his testimony in an attempt to show that it is vague, uncertain, and contradictory. But, conceding it to be so, it was evidently believed by the Industrial Accident Commission, and their action in that respect is binding upon us, unless the facts testified to are inherently improbable or the inferences drawn from them are manifestly unreasonable, which we do not think can be said in this case. We notice that, while Briley testified that the direct injury was to his right eye only, and that there were apparent subsequent effects upon his left eye, the commission found that the direct injury was to the left eye. The petitioners do not stress this discrepancy, and we are satisfied that it affords no ground for annulling the award. Briley's application for compensation, filed with the Industrial Accident Commission, merely states that "right was totally blinded, left eye was partly blinded," thus raising no issue as to which eye received the direct injury; and the answer filed thereto, while denying that either eye was injured, does not specifically attempt to put that question in issue. It is manifest that there was a clerical error in drawing this finding, but it does not affect the substance of the issue litigated before the Industrial Accident Commission, which was whether Briley received an injury which affected the sight of both eyes. Since the commission found on sufficient evidence that there was such an injury, the question whether the direct injury was to the right eye or to the left eye may be considered as immaterial. To annul this award for such an error on an immaterial issue would be to prefer form to substance. Such a ruling would not be made even on a direct appeal from the judgment of a court (2 Cal. Jur. 1028, 1029); and it is well settled that our powers over an award of the Industrial Accident Commission are less extensive than those given us on appeal from the decisions of the courts. (Dearborn v. Industrial Acc. Com., 187 Cal. 591, 203 P. 112; 27 Cal. Jur. 582.)

[4, 5] Petitioners contend further that there is no evidence showing that the accident to which Briley testified caused the disability for which the award was made or affected the vision of either eye. We have carefully read the evidence on this point, but can see no sufficient reason for reproducing it here. Undoubtedly the petitioners made a strong showing by the testimony of their expert witnesses

that Briley's loss of vision was due to a pre-existing disease, and that the burn caused by the gas explosion was not severe enough to affect his vision at all; but there was some evidence from which a contrary inference could be and was drawn by the commission, and we cannot substitute our judgment for theirs or annul the award, even should we entertain different views as to the weight of the evidence. One of the petitioners' expert witnesses conceded that the accident may have "touched off" the disease, and thus hastened the final result. There was other evidence, but this alone would be sufficient to uphold an award. "Acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration." Eastman v. Industrial Acc. Com., 186 Cal. 587, 594, 200 P. 17, 20.

The award is affirmed, and the writ is discharged.

We concur: HOUSER, Acting P. J.; YORK, J.

91 Cal. App. 542

WATKINS v. PENSION BOARD OF CITY OF SACRAMENTO et al. (Civ. 3470.)

District Court of Appeal, Third District, California. May 2, 1928.

1. Evidence 🔑12—Court must take judicial knowledge of growth of city of Sacramento.

Court must take judicial knowledge of growth of the city of Sacramento.

2. Municipal corporations 🔑200—Present office of city electrician of Sacramento held not same, except in name, as former office of superintendent of fire alarm system entitling one pensioned as superintendent to one-half salary paid city electrician.

Office of superintendent of fire alarm system created by city charter of Sacramento approved by St. 1893, p. 595, § 152, is not the same office, except in name, as the present office of city electrician created by section 16 of the present charter, but by reason of growth of city, rapid increase in use of electrical appliances, and more extensive use of electrical power, an entirely new and distinct office has been created, and hence one pensioned while superintendent of fire alarm system was not entitled to pension in sum of one-half of annual salary paid to city electrician.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Petition for mandamus by Richard Watkins prayed to be directed against the Pension Board of the City of Sacramento and others. From judgment denying writ, petitioner appeals. Affirmed.

Busick & Leeper, of Sacramento, for appellant.

Robert L. Shinn, City Atty., of Sacramento, for respondents.

PLUMMER, J. This cause is before us upon an appeal from a judgment of the trial court denying the petitioner a writ of mandate to compel the defendants to grant to plaintiff a pension in the sum of $1,650 per annum, payable in monthly installments.

The record before us shows: That for a period exceeding 21 years prior to the 1st day of April, 1912, the petitioner had been continuously employed by the city of Sacramento as a member of the fire department thereof, and for more than one year prior to the 1st day of April, 1912, had been employed in the fire department of said city under the title and in the capacity of "Superintendent of the Fire Alarm System." That for more than one year preceding the said 1st day of April, 1912, the petitioner had received a salary in the sum of $1,800 per year, payable at the rate of $150 per month. That on the 1st day of April, 1912, the petitioner was retired on account of disability and granted a pension in the sum of $900 per year, payable monthly at the rate of $75 per month, and the petitioner was then and there placed on the pension roll of the fire department of the city of Sacramento, and has since said date been receiving a pension in the sum of $75 per month.

In the year 1911 the city of Sacramento adopted a new charter, which became effective shortly after the retirement of the petitioner herein, as just stated, in the year 1912. By this charter the position of superintendent of the fire alarm system was discontinued, and all the duties theretofore performed by the superintendent of the fire alarm system were provided to be performed by a person occupying the position of city electrician. That thereafter, and by a charter adopted by said city in November, 1920, and which became effective June 30, 1921, the office of city electrician was discontinued, and the duties theretofore performed by the person occupying the position as city electrician were consolidated with, and provided to be performed by, a person designated as the city engineer, or under his supervision and direction. That thereafter, in accordance with section 16 of the charter of the city of Sacramento, an ordinance was duly passed by the city council of the city of Sacramento establishing the office of city electrician, to be paid a salary in the sum of $3,300 per annum, payable in equal monthly installments. Upon this state of facts the petitioner alleges that he is entitled to a pension in the annual sum of $1,650, payable in equal monthly installments. The facts which we have just set forth all appear by the petition filed herein, to which the defendants interposed a demurrer, which was sustained, and judgment thereafter entered for the respondents.

The contention is here made that the city

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

electrician of the city of Sacramento is now an officer of the same rank formerly held by the petitioner as superintendent of the city fire alarm system; that the city electrician is performing the same duties, and therefore, under the decisions of this court in the cases of Klench v. Board of Pension Fund Commissioners of the City of Stockton, 79 Cal. App. 171, 249 P. 46, Douglas v. Pension Board of the City of Sacramento, 75 Cal. App. 335, 242 P. 756, and Aitken v. Roche et al., 48 Cal. App. 753, 192 P. 464, is entitled to an annual pension equal to one-half of the salary now paid to the city electrician of the city of Sacramento. On the part of the respondents it is contended that there is now no office corresponding to that of superintendent of the fire alarm system; that the duties performed by such officer prior to the adoption of the city charter of the city of Sacramento which became effective in 1912 were consolidated with other duties to be performed by an officer named in the charter; and that there is no similarity between the rank and duties performed by the petitioner as superintendent of the fire alarm system and that provided to be performed by the city electrician, and later placed under the charge of the city engineer's department of the city of Sacramento, and hence no standard by which the court could fix the amount of increased pension, if any, to which the petitioner herein would be entitled. It is admitted by counsel for both petitioner and respondents that the petitioner has a vested right to a pension in the sum of $75 per month, and became possessed of such right upon his retirement in such a manner that subsequent charters could not take away that right.

The only question which we are really called upon to decide in this case is whether, under the varying changes of the city charter, the consolidation of offices and the attaching of the duties performed by the petitioner to other offices effected a change of salary belonging to an officer of the rank of superintendent of the fire alarm system of the city of Sacramento as it existed at the time of the petitioner's retirement. If there has been simply a change in name the petitioner is entitled to an increase in his annual pension; but if, on the other hand, there has been a consolidation of offices, or rather, if the duties and responsibilities connected with the office of superintendent of fire alarm system have been attached to and made a part of the duties and responsibilities of some other office, then and in that case the petitioner is not entitled to any increased pension. Or, to state the matter in another form: If other qualifications have been required of the person designated to perform the duties theretofore performed by the petitioner and additional services required to be performed by such officer, then and in that case there has been more than a mere change of name, namely, the creation of a distinct and separate office with which the duties formerly performed by the superintendent of the fire alarm system are required to be performed by the officer having charge of the newly created office. With this in view, we will consider the charter provisions of the various charters to which we have referred. By the city charter approved by the Legislature in 1893 (Statutes 1893, p. 595, § 152) it is specified that:

> "There shall also be attached to the fire department a fire alarm system, which shall be under the immediate charge of a superintendent, who shall devote his entire time to the duties of his office."

After setting forth how often the superintendent shall report to the chief engineer, the section further specifies:

> "All electric light or power, telegraph or telephone wires, erected or maintained in this city, shall be subject to the supervision and inspection of said superintendent, and shall be located, laid, erected and maintained only in such manner as may be approved by him, and so as not to endanger or interfere with the wires or apparatus of the fire alarm system."

Nothing is said in this section relative to the qualifications of the superintendent of the fire alarm system, whether he shall have had any practical knowledge of electrical engineering, or whether he shall be charged with the duty of enforcing any ordinances relative to the installation of electrical appliances, or whether he shall perform any duties in supervising the installing of electrical fixtures or wires conveying electrical energy to buildings or plants using the same in the city of Sacramento, or whether he shall exercise any duties in relation thereto, save and except to make sure that the stringing or laying of such wires shall be so done as not to interfere with the wires or apparatus of the fire alarm system. A reading of the section makes it clear that the duties of the superintendent of the fire alarm system were restricted to and circulated about the wires and apparatus constituting the fire alarm system.

By section 99 of the charter of the city of Sacramento ratified by the electors of said city in November, 1911, and which became effective in the year 1912 (Statutes 1911 [Extra Session] p. 332), in defining the duties pertaining to the commissioner of public works, it is specified:

> "The commissioner presiding over the department shall appoint a city electrician, who shall be a practical, qualified electrician or electrical engineer, and such other assistants and subordinates as may be authorized by the city commission."

Section 99 then sets forth that:

> "The city electrician shall have general charge and supervision over all municipal electrical matters, and, in particular, shall have charge of the construction and maintenance of the fire and police alarm systems. He shall have charge of the inspection of all the electrical wires and appliances for furnishing light, heat or power in,

under, over or upon the streets and buildings of the city, and shall be charged with the duty of enforcing all ordinances, rules, regulations and requirements governing the installation and use of such wires and appliances."

Other and additional duties are also particularly set forth and specified in the section, to be performed by the city electrician.

By sections 60 and 61 of the city charter of Sacramento, which became effective in 1921 (Statutes 1921, p. 1940), the duties theretofore performed by the officer designated as city electrician were attached to the office of city engineer and placed under the supervision of the city engineer. Those sections required that the city engineer shall be a civil engineer of not less than five years' practical experience; that he shall have charge of a number of duties, and perform certain functions therein set forth, among which is listed the construction and maintenance of fire and police alarm systems, enforcement of rules and regulations relative to installation of electric wires for furnishing heat, light, or power, wiring of all buildings erected in the city of Sacramento, inspection of buildings, issuing permits for building operations in accordance with the rules and regulations as may be prescribed by ordinance, etc. Thereafter, and as we have stated, under the provisions of section 16 of the present city charter, the office of city electrician was created, and all the duties which we have set forth herein as required to be performed by the city electrician under the charter of 1911, and as required by the charter of 1921, and the ordinances passed in pursuance thereof, were attached to and made the duties of the city electrician.

[1, 2] If the same office, or if an office identical, save and except in name, as that of superintendent of the fire alarm system, had been maintained all through the various transmutations of the charters of the city of Sacramento, it may be admitted that the petitioner would be entitled to a pension in the sum of one-half of the annual salary paid for the performance of such duties, even though there had been a change in the name or designation of the officer performing the same. The résumé of the different charter provisions which we have herein set forth establishes that there has been much more than a change in name of an official designation. In the first place, qualifications have been required which were not attached to, or required to be possessed by, the superintendent of the fire alarm system under the city charter of 1893. The growth of the city, of which we must take judicial knowledge, and also the rapid increase in the use of electrical appliances, and the more extensive use of electrical power necessitated not merely a change in name, but the creation of an entirely new and distinct office, to which should be attached experience, learning, and qualifications entirely different and additional to those which were necessary in 1893. Not only was the city electrician provided for in the charter adopted in 1911 required to possess the additional experience, qualifications, and learning, but he was also required to perform additional and different duties, and there is no standard or measuring stick by which it is possible to determine just how much of the salary earned or paid to the city electrician was for what we may appropriately call the simpler duties attached to the office of superintendent of the fire alarm system and required to be performed by such officer. Again, by the charter adopted in 1921, it is reasonable for us to assume that the growth of the city, and the still greater extended use of electrical power, induced the placing of the supervision of all appliances relating thereto under the general direction of the city engineer, with a subordinate officer named a city electrician, with still greater and more extensive administrative powers as well as duties. Here, again, we are confronted with the impossibility of ascertaining what portion of the compensation now paid to the officer or person who may be occupying the position or rank of city electrician is paid to him by reason of his supervision of the fire alarm system of the city of Sacramento.

In view of what we have stated relative to the changes of the city charter of the city of Sacramento, and the changes and additions relative to the duties to be performed by the different officers named therein, we cannot very well perceive how any of the cases relied upon by petitioner are applicable to the issues here presented. The office or rank of superintendent of the fire alarm system of the city of Sacramento does not exist. The duties once performed by the person so designated are now discharged by an officer having other duties to perform. This is more than a mere change in names, and therefore the record does not show that the petitioner is entitled to any increased pension. It being conceded by the respondent that the petitioner has a vested right in the pension now paid him, that subject is not inquired into.

The judgment of the trial court is affirmed.

We concur: HART, Acting P. J.; TUTTLE, Justice pro tem.

CITY AND COUNTY OF SAN FRANCISCO v. TILLMAN ESTATE CO. (Civ. 5940.)★

District Court of Appeal, First District, Division 2, California. May 5, 1928.

Hearing Granted by Supreme Court July 3, 1928.

1. Eminent domain ⟹200—Requiring plaintiff in eminent domain proceedings to assume burden of proving value held error warranting new trial (Code Civ. Proc. §§ 657, 1244).

Under Code Civ. Proc. § 1244, providing what complaint shall contain, court's requiring plaintiff in eminent domain proceedings to condemn real property for public school purposes to assume burden of making proof of value *held* error entitling plaintiff to new trial, under section 657, relating to grounds for new trial, since plaintiff having established its prima facie case and jury having viewed premises, plaintiff was entitled to rest and ask jury to fix value of property it had viewed.

2. Evidence ⟹547—Permitting evidence regarding sales of real estate in vicinity of defendant's property in eminent domain proceedings held error warranting new trial (Code Civ. Proc. § 657).

In eminent domain proceedings to condemn real property for public school purposes, permitting examination of defendant's witness to show activity in sales of real estate in vicinity of defendant's property and to show possibility of increased value if property were subdivided *held* error entitling plaintiff to new trial, under Code Civ. Proc. § 657.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Eminent domain proceeding by the City and County of San Francisco against the Tillman Estate Company. Verdict for plaintiff fixing value of defendant's property, and, from an order granting a new trial, defendant appeals. Affirmed.

Henry C. McPike, of Oakland, for appellant.

John J. O'Toole, City Atty., and Charles J. McDonnell, Deputy City Atty., both of San Francisco, for respondent.

NOURSE, J. Plaintiff sued in eminent domain to condemn real property for public school purposes. The cause was tried before a jury, which returned a verdict for plaintiff, fixing the value of the defendant's property at $50,000. The trial court granted plaintiff's motion for a new trial, and from this order the defendant has appealed upon a typewritten record.

The complaint was in the usual form. It contained all the allegations necessary to a proceeding in eminent domain, properly omitting any allegation as to the value of the property which the city desired to take. The answer, as amended, admitted the material allegations of the complaint, except the necessity for the use of the property sought, and affirmatively alleged the value of the property to be not less than $75,000. Proofs were submitted to the court establishing a "prima facie" case on all issues, save that of the value of the property, and these were determined by the court without contest. In accordance with the stipulation of the parties the jury was taken to view the premises and the plaintiff rested its case. The defendant thereupon rested without offering any evidence on the issue of value, and insisted that the burden of proving value was on the plaintiff. The trial judge ruled with the defendant, requiring the plaintiff, over its objection, to reopen its case for the purpose of proving value, and thereafter permitted defendant, over objection of plaintiff, to tender evidence in rebuttal. During the course of the direct examination of one of its witnesses the defendant was permitted to question her in detail as to the various transactions and particular sales of other lands in the immediate neighborhood in which she had participated, and this is assigned as one of the errors justifying the order for a new trial.

[1] That the trial court improperly reversed the order of proof of value admits of no doubt. Counsel for the city went into court relying upon a method of procedure accepted and followed by all the trial courts of the state and affirmed by all decisions. The rule is stated in Monterey County v. Cushing 83 Cal. 509, 510, 23 P. 701, where it is said:

> "In California the burden as to value is on the defendant. Section 1244 of the Code of Civil Procedure provides what the complaint shall contain, and it does not mention value or damage. And if the plaintiff is not required to allege value or damage, he is not required to prove it. This was the view taken in Cal. S. R. R. Co. v. S. P. R. R. Co., 67 Cal. 63, 64 [7 P. 123]."

The plaintiff having established its "prima facie" case, and the jury having viewed the premises, the plaintiff was entitled to rest and ask the jury to fix the value of the property it had viewed. The defendant, having declined to offer any proof of value, could not complain at any verdict which the jury might have returned. When, therefore, the trial judge required plaintiff to assume the burden of making proof of value, he committed an "error in law," within the provision of section 657, Code of Civil Procedure, specifying the grounds for which a new trial may be granted. By thus reversing the well-established order of proof, the plaintiff was taken unprepared and the ruling was unquestionably to its prejudice.

[2] But upon another ground the order must be sustained. The defendant was permitted, over objection, to ask his witness on her examination in chief details of all the transactions, in real estate in which she had participated during a period of two years or

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★Superseded by opinion of Supreme Court, 272 P. 585.

more. This course of examination is defended as tending to show the qualifications of the witness to testify as an expert. It seems to have been offered for the purpose of showing the activity in sales of real estate in the vicinity of the defendant's property and to show the possibility of increased value if the property were subdivided. The impropriety of this method of examination is settled by a long course of procedure in our trial courts and the unanimous decisions of the courts on appeal. See Central Pac. R. Co. v. Pearson, 35 Cal. 247, 262; Reclamation Dist. No. 730 v. Inglin, 31 Cal. App. 495, 500, 160 P. 1098, and cases cited.

If there is any virtue in the doctrine of "stare decisis," it is particularly appropriate to a proceeding of this kind, which involves the constitutional rights of the state as well as those of the individual. Rights of property which have grown up under an established method of procedure are better secured by an adherence to such method, leaving to the lawmaking body the duty of providing a different method if a change is deemed necessary.

The order is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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91 Cal. App. 483

DINGWELL et al. v. SEYMOUR et al. (Civ. 6140.)

District Court of Appeal, First District, Division 2, California. May 2, 1928.

1. Perpetuities 🔑8(1)—Charitable trusts are not void merely because they are in perpetuity (Const. art. 20, § 9).

Under Const. art. 20, § 9, charitable trusts are not void merely because they are in perpetuity.

2. Charities 🔑10—"Charity" is gift for benefit of indefinite number of persons for purposes of education or religion, or to relieve their bodies from disease, suffering, or constraint.

A "charity," in a legal sense, is a gift to be applied consistent with existing laws for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Charity.]

3. Charities 🔑11—Trust for hospital for care of free and pay patients held charitable trust.

Deeds of trust reciting that after grantor's death trustees should establish and maintain a hospital for the care and treatment of the sick and wounded of both sexes and for patients suffering from cancer and tubercular diseases, and providing that indigent patients admitted to hospital should at all times receive same care, treatment, and attention as that bestowed on pay patients, *held* to evidence intention to create a charitable trust, and validly created such trust.

4. Charities 🔑11—Provision for as many free beds in hospital as financial condition permits held not to destroy charitable character of trust (Civ. Code, § 2269).

Provision of deed of trust reciting that trustor desired to modify previous deed of trust provisions for 25 free beds in proposed charitable hospital because of fear that number arbitrarily fixed might injure operation of hospital, and that instead as many free beds should be provided as financial condition of hospital permits, *held* not to destroy the free bed charity provided in prior deed, and thereby destroy charitable character of trust, in view of provision that any surplus from pay patients should go to augment number of free patients, which under Civ. Code, § 2269, state will see carried out if trustees fail in duties.

5. Charities 🔑11—Gift to establish public institution to deal with misery and unhappiness of any person, rich or poor, is "public charity."

A trust may be charitable in its nature, uses, and purposes without giving alms to the poor, and a gift to establish and maintain a public institution where the misery and unhappiness of any person of high or low degree, rich or poor, may be considered and sanely dealt with comes within the definition of a "public charity."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Charity.]

6. Charities 🔑11—Provision of trust authorizing pay patients in hospital to assist in maintaining it for charitable purposes held not to make trust noncharitable.

Provision of trust for creation of hospital, allowing charges to be made for admission to or treatment in hospital of pay patients in order to assist in maintaining hospital for charitable purposes, *held* not to make trust noncharitable and therefore void.

7. Charities 🔑10—Provision setting aside property for annuities to trustor's nephews and nieces held not to destroy charitable features of trust.

Charitable features of trust creating hospital *held* not destroyed by grant in first trust deed setting aside certain property and funds for payment of annuities to trustor's nephews and nieces, where such use of property to pay annuities, though noncharitable, did not go beyond lives of persons in being.

8. Charities 🔑4—Reservation of life estate in deeds conveying property in trust for charitable purposes held not to destroy trust by creating passive and active trusts (Civ. Code, §§ 693, 694).

Life estate reserved to trustor in deed creating charitable trust for hospital *held* not to destroy trust by creating a passive or primary trust operating in trustor's lifetime for benefit of heirs, and an active or secondary trust for charitable purposes to take effect on her death, where life estate was not a part of trust scheme, but was expressly reserved from trust res conveyed to trustees, and trust was not to be put into operation during trustor's lifetime and deeds conveyed to trustees a vested future interest in properties conveyed under Civ. Code, §§ 693, 694.

9. Charities 🔑4—Deed of trust provision authorizing trustor to sell property during her lifetime with trustees' consent under certain circumstances held not objectionable as creating passive and active trusts.

Provision of deed of trust, creating charitable trust and reserving life estate in trustor, that if during trustor's life it should be deemed for best interests of all concerned and for accomplishment of purposes of trust to sell properties therein described, trustor by and with consent of trustees might sell and convert property into good interest-bearing securities, revenues from which should belong to trustor and principal to take place of property so converted, and providing that suitable grounds for proposed charitable hospital might be purchased and paid for out of said funds if deemed advisable, *held* not objectionable as creating passive and active trusts.

10. Charities 🔑4—Provision authorizing establishment of hospital during trustor's life, on her waiver of life estate, instead of waiting until her death held not objectionable as creating passive trust.

In deed of trust conveying property to trustees for charitable hospital, provision authorizing trustor to surrender her life estate in property conveyed, and with trustees' consent to sell property, and with their aid and co-operation establish proposed charitable hospital during her lifetime instead of waiting until her death, *held* not objectionable as creating passive trust in addition to the active trust provided for therein.

11. Charities 🔑4—Trust deed provision, that if trustor sold trust property without trustees' consent proceeds should go for trust purposes held merely limitation on power to sell for private gain.

In deed of trust conveying property to trustees for charitable hospital, provision that if trustor should sell and convey any of property involved, with or without trustees' consent, proceeds thereof should go to trustees in same manner as property so sold or conveyed would have gone if conveyance had not been made, *held* not a reservation of power by trustor to sell trust property which destroyed charity created in deeds, but was a limitation on her power to sell for private gain.

12. Charities 🔑4—Certainty of express trust must be determined by rules of construction and code essentials for valid trust.

The certainty or uncertainty of an express trust, whether contained in deeds or in trust agreement, must be determined, like any other contract, by laws or rules of construction and the code essentials for a valid trust, and if instrument shows trustor's intent to create charitable trust and interpretation of language creating trust discloses essential elements of contracts and of a valid trust, instrument is not void for want of certainty.

13. Charities 🔑4—Deeds of trust for charitable hospital held sufficiently certain to create valid charitable trust (Civ. Code, §§ 2221, 2222).

Deeds conveying property to trustees for charitable hospital for benefit of sick and wounded of both sexes, where poor should have free beds and considerate and efficient treatment, and accurately describing and identifying property conveyed, *held* to create valid trust under Civ. Code, §§ 2221, 2222, requiring voluntary trusts, to be valid, to disclose intent to create trust, subject-matter, purpose, beneficiary, and acceptance of trust by trustee.

14. Charities 🔑4—Recital that trustor did not wish to bind trustees' discretion respecting disposition or holding of property held not tantamount to direction to hold property indefinitely.

In deed conveying property to trustees for charitable hospital, recital that trustor did not wish to bind trustees' discretion with respect to disposing of or holding certain property for rising market, except that it was her desire that hospital be erected and put into working operation as soon as possible, *held* not objectionable as tantamount to a direction to indefinitely hold property in violation of law charitable trusts, or as suggestion that property should be held in perpetuity.

15. Trusts 🔑377—Trustor's administrator suing to quiet title as against trustees held not entitled to attorneys' fees out of trust estate.

Deceased trustor's special administrator substituted as plaintiff for trustor in her unsuccessful action to quiet title to properties previously conveyed to trustees for charitable purposes *held* not entitled to attorneys' fees out of trust estate, action not being for benefit of trust estate but for benefit of trustor's heirs; and such fees being allowed only where litigation is a benefit and service to trust.

16. Trusts 🔑377—Where two conflicting trusts involving same property necessitated litigation, trustees of unsuccessful trust held entitled to attorneys' fees out of estate.

In action involving determination of validity of two conflicting trusts respecting same property, it was the duty of trustees of both trusts to defend their respective trusts when attacked, and trustee of trust declared invalid was therefore entitled to attorneys' fees out of trust estate.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by Millicent H. Olmsted, for whom on her death were substituted Earl C. Dingwell and another as executors of her estate, against J. H. Seymour, Hugh K. Walker, and others. From the judgment, defendant last named and certain other defendants appeal. Reversed, with directions.

Stephens & Stephens, of Los Angeles, for appellants.

Newlin & Ashburn and Ray E. Nimmo, all of Los Angeles, for respondent Security Trust & Savings Bank.

Lissner, Roth & Gunter, of Los Angeles, for amicus curiæ.

WELCH, Justice pro tem. This action was commenced by Millicent H. Olmsted in her lifetime to quiet her title against appellants and a number of other codefendants who have disclaimed any interest herein. The Attorney General of the state was made a defendant, who, although served with summons, did not appear. The complaint is in the usual form of actions to quiet title to real estate. The complaint simply alleged that plaintiff is the owner and entitled to the property described in the complaint, and that the claim of defendants is without any right whatever, and that they have no right, title or interest in either the real or personal property described in the complaint. The properties described in the complaint are situate in Los Angeles county.

The complaint was filed August 3, 1923. Plaintiff died on October 15, 1923, and Robert M. Clarke, special administrator, was substituted as plaintiff for deceased. There is a statement in the brief of respondent that since the taking of the appeal Earl C. Dingwell and Henry K. Elder have superseded the special administrator as executors.

Appellants, who are trustees named in certain deeds hereinafter described, answered the complaint and deny that plaintiff is the owner and entitled to the possession of said properties. By way of cross-complaint they set forth four deeds in full, which deeds were made and executed to appellants by the original plaintiff in the action. The properties described in the complaint are properties described in some one or more of said deeds, which properties were conveyed to appellants in trust to establish and maintain in or near the city of Los Angeles a hospital for sick, wounded, and poor persons. Appellants made the Security Trust & Savings Bank a party defendant; but later the defendant bank came into the action as a fictitiously designated defendant and filed an answer to the complaint; it also cross-complained against all the parties to the action in which it set up six deeds to the real estate described in the complaint, which deeds were made and executed by the original plaintiff in the action; also it alleged an assignment by said original plaintiff to respondent of all the personal property described in the complaint, and finally it set forth a document denominated "Trust Agreement" in which the respondent bank is named as trustee, in which trust agreement many uses and trusts concerning the property conveyed are named and among them is one to establish and maintain a "public charitable hospital" in Los Angeles county.

The cross-complaints of appellants and of respondent were duly answered by the respective cross-defendants. The special administrator in his answers to the cross-complaints of appellants and of respondent alleges that the deeds of conveyance to appellants and to respondent and the trusts therein alleged to be created were and are null and void. He sought to secure all the property for the heirs and devisees of the grantor, Millicent H. Olmsted, deceased.

The result of the trial was a judgment and adjudication that plaintiff has no right, title, or interest in and to the property involved; that the deeds relied upon by appellants are null and void; and that the respondent bank is the owner of all property involved in the action, subject to and upon and with the uses and trust prescribed and contained in the trust agreement above mentioned. The special administrator did not appeal from the judgment against him and therefore the judgment is final as to him.

The appeal is upon the judgment roll and involves questions of law alone, for there is no evidence in the case except the documents set forth in full in the pleadings. In the subsequent documents to the bank there is not even a suggestion or word to indicate the trustor's reason for making these subsequent deeds and trust instrument, nor is there any reference to the former deeds. There is not an expression anywhere in the record to suggest the grounds of the trial court's judgment holding the prior deeds null and void. No word has escaped the lips of the trustor so far as this court knows from the record of otherwise giving or explaining her act or motive for commencing the suit to quiet her titles against her trustees named in the prior deeds. And counsel for appellants are discreetly circumspect in refraining from assigning any motive or alleged motive for Mrs. Olmsted's later act in bringing the suit and in making the documents to the respondent bank; while counsel for the respondent throughout their briefs persist in asserting that Mrs. Olmsted made the subsequent trust documents because she knew of the defects and weaknesses of her prior deeds and because of her desire to carry out her original hospital trust scheme in a businesslike manner.

We know nothing of the intentions and motives which induced Mrs. Olmsted to make the deeds and trust agreement to respondent except such as may be implied by the acts themselves. We are not permitted to draw the inference insisted upon by respondent. Subsequent change of mind and motives are of no consequence, unless the grantor had the legal right to make the subsequent documents to respondent. It is to be determined herein if she had such right.

This is not a contest between trustees and heirs. Mrs. Olmsted provided for certain heirs in both trust schemes, and since these relatives disclaimed in this action they apparently are satisfied. The contest was initiated by the grantor and maker of the prior deeds above mentioned when she sued the trustees named therein to quiet her title to the properties described in said deeds. After the death of Mrs. Olmsted, the original plaintiff in the action, the contest settled down to a question as to the validity or invalidity of three of the four of said prior deeds and, incidentally, to the validity of the trust agreement with the bank. In its ultimate analysis it is a contest between the individual trustees of the prior deeds and the respondent bank, trustee named in the subsequent trust agreement to it.

A brief history of the documents involved is essential to the treatment of the appeal.

Millicent H. Olmsted, a widow of El Monte, Los Angeles county, Cal., was the owner on November 5, 1905, of many parcels of real estate and considerable personal property, valued at the time of the judgment at more than $500,000. On said November 5th Mrs. Olmsted made a deed of conveyance of the bulk of her estate to five trustees, with which to build and maintain in Los Angeles county a hospital to be known as the Millicent H. Olmsted Hospital. Two years later on October 12, 1907, Mrs. Olmsted, discovering that three of the grantees and trustees named in the 1905 deed were not members of the Presbyterian Church, of which church she was a member and to which church she desired her trustees to belong, filed in the superior court of Los Angeles county an ex parte petition in which she stated that it was her desire "to provide for the establishment of a hospital in or near the city of Los Angeles, California, wherein indigent and worthy poor persons of both sexes might be cared for and treated without charge, as well as others" for pay; that in order to carry out and execute said trust according to her original desires, purposes and intentions it was necessary that the 1905 deed be annulled, canceled and set at naught, and that another trust deed, made in 1907, be substituted therefor. This deed, which is dated October 12, 1907, the date of filing the ex parte petition, was made an exhibit to the petition and is known in the record as the 1907 deed. It contains the principal but not all of the trust provisions herein involved. All five trustees accommodatingly tendered their resignations to the court.

The court heard the petition and granted it. In its order and judgment the court recited that the 1907 deed "affords and furnishes a more certain, definite and efficacious means of executing and carrying out said trust, and the wishes of the trustor in relation thereto, and the court being fully advised and sufficiently informed is of the opinion that the prayer of said petition ought to be granted * * * and that the instrument of date October 12th, 1907, executed by petitioner as aforesaid, a copy of which is attached to the petition filed herein, marked Exhibit F and made a part of the record in this cause, be and the same is hereby substituted for and in lieu of said original instrument." Appellants claim that this is an adjudication of the validity of the 1907 deed, binding alike on trustor and trustees. We will not have occasion to pass upon this claim and will not further refer to it.

In May, 1916, Mrs. Olmsted made another deed to her seven trustees named in the 1907 deed, of additional property, and impressed these properties with the same uses and trusts as those expressed in the 1907 deed.

Again, in April, 1920, Mrs. Olmsted made still another deed herein known as the 1920 deed in which she conveyed to her seven trustees other and all of her real estate owned by her in trust, excepting such property as may be disposed of by her by will. In this deed certain nephews and nieces are provided for and additional uses and trusts to those in the 1907 deed are created. In this 1920 deed the grantor modifies some of the trust provisions of the 1907 deed. The 1920 deed declares that all three deeds of 1907, 1916, and 1920 "shall be construed as one instrument, and that the later trust conveyances (1916 and 1920 deeds) are created by her to feed the first trust, save and except to build as part of it, the memorial to her said brother," for which she makes a special grant of property, and, finally, she ratifies and confirms both the 1907 and the 1916 deeds.

Later in the year in October Mrs. Olmsted and her trustees named in the three deeds above mentioned made and recorded a document wherein the three deeds are mentioned with approval and the name of the hospital by mutual agreement is changed to "Olmsted Memorial Hospital."

In the discussion herein the three deeds will be construed together, and the matters therein contained will be designated herein the Walker trust.

In July, 1923, Mrs. Olmsted entered into a trust agreement with the respondent, the Security Trust & Savings Bank, herein called the bank, and on or about the same time conveyed and assigned all the property described in the Walker trust to the bank; nevertheless, for certain uses and trusts designated in the trust agreement.

Both the appellants and respondent regard these instruments to respondent as hostile to the Walker trust and that the two sets of instruments cannot stand together. This court will so treat the Walker trust and the matters described and contained in the instruments to the bank, designated herein the bank trust.

Each of these three deeds of 1907, 1916, and 1920 was in form a grant, bargain, and sale deed conveying to the grantees the lands and properties therein described to have and to hold the same forever; nevertheless, in trust for certain uses and trusts hereinafter mentioned and quoted when necessary. Each of these three deeds reserved a life estate to the grantor. Appellants accepted the trusts therein set forth by signing and acknowledging each of the three deeds.

No reserve of power to revoke any of said deeds by the trustor is found or expressed in the deeds, but on the contrary the deed of 1907 provides that "the trust herein created and the conveyance hereby made shall in no sense be revoked or impaired." On this point counsel for respondent admit in their briefs: "No power of revocation was reserved and none is implied." To foreclose the question of the power of the trustor to revoke the Walker trust, we cited section 2280, Civil Code.

All of the three deeds were duly recorded before the making of the deeds and the agreement to the bank.

Appellants do not attack the bank trust, but content themselves by endeavoring to maintain and defend the Walker trust; while respondent attacks the Walker trust and severely arraigns it. It maintains that the equitable principle that charitable trusts are favorites of the law and should be carried into effect when possible, has no special application here for the reason that if the Walker trust is held to be void the bank trust will carry out the charitable ideas of the trustor.

This court will confine its consideration to the validity or invalidity of the Walker trust, but in doing so it will have occasion to contrast and compare certain provisions of the two sets of documents containing the two trust schemes. In treating the subject of this appeal we cannot specifically notice all of the many points made by counsel in their briefs, but will cover all the essential contentions either specifically or on broad principles.

[1] We begin with the premise that the trusts sought to be created by the deeds of 1907, 1916 and 1920, are in perpetuity and for this reason are void unless they are of a charitable nature; but we take it that the converse must be true, that if these trusts create a charity they are not void merely because they are in perpetuity (section 9, art. 20, state Constitution; Estate of Hinckley, 58 Cal. 457); and in order that we may not drift too far afield in the discussion of the subject of trusts let us establish another legal monument by defining a charitable trust so that we may be guided in our course and from which monument we may take bearings.

[2] We do not find it necessary to define a charity in our own language. In the Matter of the Estate of Merchant, 143 Cal. 537, 77 P. 475, the Supreme Court has approved a definition of charity which we adopt as follows:

> "A charity in a legal sense may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons—either by bringing their hearts under the influence of education, or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."

The quotation is from Mr. Justice Gray, in Jackson v. Phillips, 14 Allen (Mass.) 556, which, definition Mr. Perry says leaves nothing to be desired.

The deed of 1907 reads in part as follows:

> "The parties of the second part, herein called trustees, or their successors as hereinafter provided for, shall, upon the demise of the party of the first part, take immediate possession of all of said property, and shall, as soon thereafter as practicable, having due regard to the objects hereby sought to be accomplished, convert the same, in whole or in part, as to them may seem best, into cash, or good and solvent interest bearing securities, and out of the proceeds thereof said parties of the second part shall purchase suitable grounds * * * and as soon as practicable establish and maintain thereon a hospital for the care and treatment of the sick and wounded of both sexes, said hospital to be known as the 'Olmstead Memorial Presbyterian Hospital.'"

This deed also provides that the trustee shall "set apart and provide an endowment of $5,000 each for the maintenance of at least 25 free beds for the care, accommodation, and treatment in said hospital of poor and worthy persons of both sexes who may be pecuniarily unable to pay the expenses of their maintenance therein; the trustees of said institution to be the judges of the indigency and worthiness of those applying for admittance to said hospital as free patients under the provisions hereof. And it is hereby expressly agreed and understood by and between the parties hereto that indigent patients admitted into said institution as herein provided shall at all times receive the same care, treatment, and attention as that given and bestowed upon other patients who pay for admittance therein as herein provided. Said trustees shall also receive into said hospital other patients for care, treatment, and attention, for which reasonable charges shall be made and paid, and the revenue derived therefrom shall be applied to the maintenance and operation of said institution; and the surplus thereof, if any, shall go to augment the number of free patients that may be kept and treated in said hospital, to the end that there shall at all times be kept, treated and cared for in said institution the largest number of poor and worthy patients that the finances of said institution will admit of or justify."

In her 1920 deed Mrs. Olmsted provided for the erection and maintenance of the memorial building to perpetuate the memory of her brother, Seth H. Hickcox, deceased, which building was to be a part of the main hospital, but as a special building to be known as the Seth H. Hickcox Memorial building and the trustees "shall maintain the same for the purpose of nursing and caring for therein patients who are suffering from cancer and tubercular diseases and for such other purposes, incident and kindred, in aid of the general hospital mentioned." The deed further provides that the Hickcox Memorial building should be supplied "with the best equipment that medical and surgical science can reasonably provide * * * it being the intent and purpose of the party of the first part, in the creation of this trust, to provide for this memorial building sufficient funds to erect the same and equip and maintain the same after its construction for the benefit of persons afflicted as aforesaid."

[3] In referring to her 1907 deed, Mrs. Olmsted declares in her 1920 deed "that the purpose of said trust as expressed therein, is that, after the death of the party of the first part, the said trustees should establish and maintain a hospital for the care and treatment of the sick and wounded of both sexes."

In executing said deeds of 1907, 1916 and 1920 the intention of Mrs. Olmsted as plainly shown on their face was to provide ample means with which her trustees after her death could and they were empowered and directed to erect and maintain a hospital for the use and benefit of persons of both sexes who may be poor, sick, wounded, or suffering from disease.

By consensus of opinion the poor, from the Mosaic law down the ages to the present, have been considered objects of charity. Those features of the Walker trust which provide for free beds for the care, accommodation and treatment of the poor and worthy, are highly charitable in their character and the charitable mind that conceived this hospital and generously endowed it with "all her worldly goods" to be in part used to make the worthy poor well, comfortable, and happy, further enjoined upon her trustees and exacted from them written promises that indigent patients admitted to her hospital "shall at all times receive the same care, treatment and attention as that given and bestowed upon" pay patients. Her charity for the worthy poor is not only manifested in providing a place where they might be treated, but her charitable purpose goes beyond and provides for kind and the best care without neglect or favoritism, and her broad charity was not exhausted by her thought for the poor alone, but she recognized that all humanity is heir to disease and subject to accidents and thus provided that the hospital should receive, care for and treat the sick and wounded of both sexes without any qualification or limitation other than the capacity of the hospital. On the face of the Walker trust during 15 years of the trustor's life it is apparent that Mrs. Olmsted gave deep and solicitous thought to the establishment and maintenance of her hospital. In her 1920 deed she provided for the Seth H. Hickcox Memorial building and directed that it be equipped with the best and most modern hospital appliances. For what use and purpose did her charitable mind provide this building with its superb, modern equipment? "For the purpose of nursing and caring for therein patients who are suffering from cancer and tubercular diseases." Thus her charity went out to persons of whatever degree or station in life who are suffering from the two fell diseases which annually carry to the grave prematurely more of her fellow men and women than any other two diseases.

The mere statement of the purposes of the trusts refutes conclusively the contention of respondent that the 1907, 1916 and 1920 deeds are devoid of charitable features and are not charitable on their face. Measured by the legal rule or interpreted by the approved usage of language or the applied teachings of the Master, the intention and purpose of the maker of the Walker trust were to create a charitable trust. And these deeds did create a charitable trust and are valid unless for some reason hereinafter discussed the trustor destroyed the charitable features of her said deeds.

[4] Counsel for respondent half concede that the provision in the 1907 deed for free beds is a charity, but maintain that the 1920 deed totally destroys this charity and that without free beds the trust or any trust which shuts its doors to the poor and needy as distinguished from the rich, well-to-do, or those in moderate circumstances, is not a charitable trust.

In the 1920 deed Mrs. Olmsted expressed the wish to modify the provisions concerning the 25 free beds because she feared that the number arbitrarily fixed might work an injury to the operation of the hospital and proceeded to say:

> "* * * It is the desire of the party of the first part that as many free beds be provided by the trustees as the financial condition of the hospital shall permit without reference to the number and that instead of the twenty-five beds, the number may be decreased or increased by the trustees as the hospital funds shall be sufficient to provide for the same."

Interpreted in a broad sense which the rules of construction in cases of charitable trusts permit and require, the provision of the 1920 deed did not destroy the free bed charity provided in the 1907 deed. Reading the two deeds together, Mrs. Olmsted said in effect to her trustees: For fear that it might work an injury in the operation of the hospital I do not fix any arbitrary number of free beds which you shall establish and maintain for the care, accommodation and treatment in said hospital of the poor and other persons of both sexes who may be pecuniarily unable to pay the expenses of their maintenance therein, yet it is my desire that you provide as many such free beds as my endowment and the financial condition of the hospital shall permit. Evidently it was not the intention of the trustor to eliminate free beds from her trust scheme. Estate of Upham, 127 Cal. 97, 59 P. 315. This interpretation is further strengthened by other references in the Walker trust concerning the poor and their admissions to and treatment in the hospital. For example: Any surplus revenues derived from pay patients "shall go to augment the number of free patients that may be kept and treated in said hospital to the end that there shall at all times be kept, treated and cared for in said institution the largest number of poor and worthy patients that the finances of said institution will admit of or justify." In our seeking the intention of Mrs. Olmsted to provide for free beds for the poor we are not particularly concerned with the possibility that the trustees may so manage or mismanage the hospital as to preclude the maintenance of any free beds whatever as contended by respondent. The state through its officers and courts will see that the intention and purposes of the trustor are carried into effect. Section 2269, Civ. Code. But the free bed feature of the Walker trust could be entirely eliminated, and yet poor and worthy persons are thought of and provided for in other portions of the deed above quoted.

[5] Also the insistence of respondent that a trust without providing for the poor is not and cannot be a charity must go unrewarded, for both the law and reason are against the contention. People v. Cogswell, 113 Cal. 129, 45 P. 270, 35 L. R. A. 269. Any person, the rich as well as the poor, may fall sick or be injured or wounded and become a fit subject for charity. St. Luke, chapter 10, verses 30–37. A trust may be and often is charitable in its nature, uses and purposes without giving alms to the poor. It is true that poverty is a condition which, even when brought about by indolence and waste of life's opportunities, arrests the attention and commands the consideration of charity. Yet perhaps more worthy and deserving members of society than the ne'er-do-well poor may under certain conditions be proper objects of charity. A gift to establish and maintain a public institution where the misery and unhappiness of any person of high or low degree, rich or poor, may be considered and sanely dealt with would come within the purview of the definition of a public charity. And yet the dollar may not and would not be the sesame to open the door of such an institution.

[6] This discussion brings us to a kindred subject—that of pay patients. It is claimed by respondent that this feature of the Walker trust makes it possible for the trustees to so operate the hospital as to exclude every poor person or any free treatment in the hospital. Such a possibility is remote and can and will be prevented by courts. Estate of Merchant, 143 Cal. 541, 77 P. 475; Estate of Willey, 128 Cal. 1, 60 P. 471; People v. Cogswell, 113 Cal. 129, 45 P. 270, 35 L. R. A. 269. The provision of the Walker trust allowing charges to be made for admission to or treatment in the hospital of pay patients does not make the trust noncharitable and therefore void under the law laid down in the Estate of Sutro, 155 Cal. 727, 102 Cal. 920. Without taking coveted time and space to point out the difference between the Sutro trust and the Walker trust, suffice it to say that they are so dissimilar in structure and purpose as to make the Estate of Sutro, supra, of little or no aid in construing this provision of the Walker trust. This provision to admit and treat pay patients in the hospital is a provident provision for supplementing the gift of the donor with additional means to support the hospital. The provision is not only wise, but it is also legal if the hospital is not operated for private gain. Burdell v. St. Luke's Hospital, 37 Cal. App. 310, 173 P. 1008; In re McDowell's Will, 217 N. Y. 454, 112 N. E. 177, L. R. A. 1916E, 1246, Ann. Cas. 1917E, 853; Butterworth v. Keeler, 219 N. Y. 446, 114 N. E. 803; Daly's Estate, 208 Pa. 58, 57 A. 180; Parks v. Northwestern University, 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N. S.) 556, 4 Ann. Cas. 103.

In her 1920 deed Mrs. Olmsted removed all question of the hospital ever being run for private gain and thereby becoming noncharitable by providing:

> "Lastly, it is the wish of the party of the first part and she desires and she charges the trustees that, in the general plan, conduct and operation of said hospital they shall be controlled by the following:
>
> "1st. The said hospital shall not be run for profit;
>
> "2nd. That the charges for treatment for patients who pay for same shall be placed at the lowest sum or sums possible taken in connection with good service."

What language could be plainer?

[7] We grant that the provision in the 1920 deed providing for certain named nephews and nieces is a noncharitable use; but certain property and funds were designated to take care of certain annuities to these kinsmen during their lives, and upon the death of the last of such annuitants the remainder of such property is to be devoted to hospital purposes under the general trust scheme.

This use of property to pay certain annuitants did not go beyond the lives of persons in being. Such a provision is authorized by law and did not destroy the charitable features of the Walker trust.

[8] Respondent, perhaps anticipating that the court would hold that Mrs. Olmsted's trust scheme was charitable in character, makes its severest assault on the Walker trust on the grounds that the trust intruments contain two trusts, a passive and an active trust, the passive or primary trust to operate in her lifetime for the benefit of herself, and the active, or secondary trust, eleemosynary in its character, to take effect after her death. The respondent bank strenuously maintains that these two trusts exist in the Walker trust, and that the trust is null and void under the principles laid down in the case of Carpenter v. Cook, 132 Cal. 621, 64 P. 997, 84 Am. St. Rep. 118, because it is asserted that the two trusts are inextricably interwoven and are mutually interdependent, resulting in the invalidity of the whole scheme. In support of its claim here made respondent specially cites three features of the 1907 deed as examples of passive or primary trusts, namely, the life estate reserved to the trustor, a conditional provision made for the sale of any or all the property devoted to the trust, and a conditional or optional provision to initiate the establishment and operation of the hospital during the trustor's life instead of waiting until after her death as provided in the deeds. We will take up the consideration of these provisions of the deeds in the order named.

The deeds of 1907, 1916 and 1920 each expressly reserve a life estate to the trustor. The life estate is in the following language:

> "It is expressly agreed and understood by and between the parties hereto that the party of the first part reserves to herself a life estate in and to all the property herein conveyed, and shall be entitled to the management thereof, and to the revenues arising therefrom, for the period of her natural life, and shall in like manner during said time be responsible for the care, maintenance and preservation of the same."

We think that the argument of respondent is based on a false conception of the meaning and purpose of the life estate. In the first place, the life estate was never a part of the trust scheme. It is an estate authorized by the Civil Code and was by express terms in the instruments themselves carved out of and reserved from the properties—the trust res—conveyed to the trustees. By general provisions the trust was not to be put into operation during the lifetime of the trustor. By her deeds she vested a present title in the trustees subject to the life estate and subject to the trust to be put into operation after her death. By her deeds Mrs. Olmsted conveyed to her trustees, to the appellants, a vested future interest in her properties described in said three deeds. Sections 693 and 694, Civ. Code. In imposing upon herself the responsibility for the care, maintenance, and preservation of her properties, out of which she carved her life estate, she did nothing more than to express in words what the law implies as to the duties and responsibility of a life tenant. While it is no argument in favor of the validity of the Walker trust on this point, nevertheless it is not amiss to mention that the bank trust also reserves a life estate to the maker of the trust agreement. The only difference discernible between the two is that in the Walker trust the life tenant undertakes all responsibility concerning the property during her life, whereas in the bank trust the bank in excess of caution declined any and all responsibility or liability for any waste or for any act or debt of the trustor in the management or care of said property during the life of the trustor.

[9] The deed of 1907 provides and the trustees expressly agree that if during the life of the trustor it should be deemed to the best interests of all concerned and for the accomplishment of the purposes of the trust therein, to sell any of the properties therein described, Mrs. Olmsted "by and with the consent and approval of said trustees, or a majority thereof, may sell and convert said property into good and solvent interest-bearing securities, the revenues arising therefrom to be and belong to the party of the first part absolutely, and the principal thereof to take the place of the property so converted and to pass under this instrument; provided suitable grounds for said hospital may be purchased and paid for out of said funds, if deemed advisable."

Mrs. Olmstead lived for more than 15 years after she executed her 1907 deed. It may be presumed from the natural desire of humanity generally that she expected to live to a ripe old age and enjoy her ample income. Therefore to have neglected to provide a mutual power of change of form of this trust res would have been shortsighted. Many things may happen even in a short 15 years that would make it advisable to sell real property, and especially so in a locality where real estate values are fluctuating. Barring the quoted portion concerning the purchase of a building site the provision of the deed goes no further than to change the form of the trust res. The title or holding of either the life estate or remainder was not changed. The trustor, by the provision, was to enjoy the revenues which were to belong to her while the title to the principal remained in the trustees "to take the place of the property so converted." There was no primary or secondary estate created or attempted to be created. The trustor was to get nothing more than she was entitled to have and to enjoy under the original terms of the trust, namely, the rents and profit of the property. No trust was created for her benefit in her lifetime, for her life estate was not a part of the trust res.

And the provision to the effect that out of the principal fund suitable grounds may be purchased for the hospital was another wise and thoughtful provision. During the lifetime of the trustor an opportunity might present itself to acquire a suitable site for the hospital, while without the provision under consideration such opportunity may be lost. It cannot be said that the purchase of a site for the hospital during the lifetime of the giver was a trust, passive or active, created in her favor and for her personal benefit. But the fact is the site was not selected, nor was any property sold except one piece. The proceeds of this sale were delivered to the trustees to hold for the establishment and operation of the hospital, while Mrs. Olmsted took and reserved the revenues arising out of the proceeds of such sale, in consonance with the trust scheme. At the time of the death of Mrs. Olmsted the trustees held these proceeds intact as a part of the trust estate and for the uses and purposes thereof.

[10] The 1907 deed also has in it an agreement between the parties thereto, the trustor and trustees, that the trustor "shall have the right at any time she may elect so to do to waive and surrender her life estate in and to any or all of the property herein conveyed, and by and with the consent and approval of said trustees, or a majority thereof, sell and convert said property in whole or in part, into cash or into interest-bearing securities and with the aid and assistance of said trustees, and with their consent, approval and co-operation during the lifetime of said party of the first part, establish and put into operation said hospital in accordance with the provisions hereof."

We can see in the quoted provision none of the elements essential to make the trust a passive trust. The purport of the provision is to the effect that at any time Mrs. Olmsted should choose to waive her life estate the property so released from the life estate may be sold by mutual consent of trustor and trustees and the date when the hospital should be built and put into operation be advanced and the trust scheme initiated during the life of the trustor instead of waiting until after her death. No part of the trust article indicates that Mrs. Olmsted was to establish and manage the hospital alone during her life. It was not only with the consent and approval of the trustees that the hospital could be established and operated during the life of the trustor, but the trustees agreed to aid, assist and co-operate with the trustor to "establish and put into operation said hospital in accordance with the provisions hereof as hereinbefore set forth." This last-quoted clause negatives the claim of respondent that Mrs. Olmsted reserved the power to establish and operate the hospital during her life "for the benefit of herself and the hospital." The wish and desire to see in her lifetime the establishment and operation of her hospital of 15 years of solicitous thought and meditation was a natural longing, which calls for neither apology nor criticism.

One or two further observations on this branch of the case: A reservation in a trust to revoke does not make void the trust. Then on what principle does the provision to sell by mutual consent of the trustor and trustees to better accomplish the purposes of the charity, and in harmony with it, destroy the trust? Certain it is that the law of passive trusts is not applicable to the provisions of the 1907 deed to sell under certain conditions therein named, but always with the consent of the trustees. The trustor was so guardful of her trust plan to build and operate a hospital for the sick, wounded, and afflicted that she provided that neither she nor her trustees, nor both together, could change, annul, alter, or modify any provision of her trust which would revoke or impair the trust. In other words, after providing the power for necessary and desirable changes with the consent of the trustees, or perchance without their consent, she added this clause: "Provided, the trust herein created and the conveyance herein made shall in no sense be revoked or impaired."

In support of this claim that the Walker trust contains a passive as well as an active trust which makes void the whole trust scheme, counsel for respondent cites and relies upon Carpenter v. Cook, 132 Cal. 621, 64 P. 997, 84 Am. St. Rep. 118, as above stated. That case involved what is known as the Willey trust. Willey made a deed in which he disposed of all his property to two grantees in trust for certain uses and purposes; that during his life the trustees were to hold the property and the rents and income "to the sole use and behoof of the trustor; and that whenever directed by him the trustees were to sell such property to such person or persons designated by the trustor and to hold the proceeds of such sale to the use and behoof of the trustor; that after the death of the trustor the trustees were "to have, hold and possess all and singular the residue and remainder of said property" in trust for certain enumerated uses and purposes. The provisions were made a part of the trustor's will. Manifestly there were two trusts created by the Willey deed, one to operate in his favor during his lifetime and the other in favor of other beneficiaries after his death. The trust scheme of the Walker trust is so dissimilar to that of the Willey trust it would seem a waste of time and space to contrast and point out the patent differences between the two trusts were it not for the insistence of counsel for respondent.

The Walker trust was not to be put into operation until after the death of the trustor, as provided in the general scheme; the Willey trust began at once and in the lifetime of the trustor. The Walker trust reserved from and carved out of the property conveyed in the life estate; the Willey trust made no such provision. The Walker trust assigned no duty to the trustees during the life of the trustor except to hold a vested estate with which to build and operate a hospital after the decease of the trustor; the Willey trust imposed on the trustees an immediate duty to devote all the property conveyed to them together with the income—not to charity, but to the personal use and behoof of the trustor both before and after sale. The Walker trust did not reserve the right to direct her trustees to sell at her will, but provided that a sale could be made in the interest of the trust by the mutual consent of trustor and trustees and that the proceeds of sale should go to the trustees to hold and to be applied for charitable purposes named, while the increase should belong to the trustor and not to the trustees; the Willey trust arbitrarily reserved the right to compel the trustees to sell any or all the property at any time during his life and to whomsoever he chose to name and to apply the proceeds—to charity? No; "to his own use and behoof." This court in its discussion of the life estate and the provisions to sell and to advance the date of beginning to build the hospital set forth in the Walker trust decided and again decides that there was but one trust created or attempted to be created in the Walker trust. If we are right in that conclusion, then the Carpenter v. Cook Case, supra, has no application to the facts of the Walker trust. That case and the principles there laid down must have at least a primary and a secondary trust with which to deal and to compare which are absent in the Walker trust. The foregoing also answers the brief of amicus curiæ.

[11] In connection with this subject of sale of the trust property, respondent makes another claim that Mrs. Olmsted reserved the power to sell the property without the consent of her trustees, and that the natural effect of such reservation is to overthrow the whole trust scheme, leaving in Mrs. Olmsted every muniment and prerogative of title. After a general provision conveying to her trustees all of her property owned by her, or in which she may have an interest, including after-acquired property, Mrs. Olmsted, in her 1920 deed, says:

> "And she further provides that in case she should sell and convey any of the property herein described or described in any of the other deeds of trust, with or without the consent of said trustees, that the money or property received therefrom shall go to the said trustees in the same manner as the property so sold or conveyed would have gone, if said conveyance had not been made, it being the intent and purpose of party of the first part that all the property she now has, or which she may acquire hereafter, real, personal or mixed, except such property as may be devised by the will of the party of the first part, shall go to the said trustees for the construction and maintenance of said hospital and of said memorial to Seth H. Hickcox."

Money and securities in bank are excepted from this conveyance in general terms.

In all of the provisions to sell found in the Walker trust, Mrs. Olmsted made the consent of the trustees a prerequisite to the sale. Indeed, without such provision the terms of the grant deeds of 1907, 1916 and 1920 required the consent of and signature to every conveyance of any piece or parcel of the trust corpus in order to pass legal title. Taking all the deeds together and taking into consideration the context of the provision itself, it cannot be said that the provision to sell "without the consent of said trustees" is a reserve power to sell the trust property, which would thereby destroy the charity created in the deeds. She plainly said that if perchance she should sell any part of the trust property conveyed to her trustees without their consent, then the proceeds arising from such sale should go to said trustees for the same purposes, uses, and trusts as if the property had not been sold, namely, to the construction and maintenance of a charitable hospital as described in the Walker trust. The provision is clearly a limitation on her power to sell for private gain, or for any purpose except to establish and operate a hospital so described, but in any event such sale should not "revoke or impair" the Walker trust. Mrs. Olmsted never sold, or attempted to sell, any property described in the Walker trust without the consent of her trustees.

Respondent cannot successfully maintain that the six deeds and the trust agreement to it were made under an exercise of a reserve power to revoke the Walker trust, or a reserve power to sell the trust property without the consent of the grantees named in the Walker trust. The deed and instruments to the bank were made without consideration and were not a sale of property. The trust agreement recites "no consideration was given by the trustee for such conveyances and transfers," and that the trustor paid the trustee $500 "for the acceptance and undertaking of the trust." It will hereinafter appear that the property conveyed to the respondent was not necessarily for the purpose of establishing and maintaining the same kind of a hospital as that described in the Walker trust. The bank trust, if valid, wholly destroys the Walker trust.

The Walker trust scheme is most critically analyzed by counsel for respondent. They charge that it is void for uncertainty. One-third of their elaborate briefs is devoted to maintaining this point. There is scarcely a paragraph in the three deeds, except as to description of property, that is not either quoted or commented upon, criticized, and condemned. On the other hand, throughout their briefs they hold up before the court the bank trust as a model of a public charitable trust in which a complete business plan is devised for the management of the trust property and for the establishment and operation of a "public charitable hospital." They suggest that this court need not be particularly concerned about invoking the cy pres doctrine in favor of the Walker trust, for the reason that in any event the original charitable object of Mrs. Olmsted will be carried into effect through the bank trust, which it is asserted "expresses the real wish of the donor." We cannot agree with the suggestion. It is not only our duty to give due consideration to the objections of respondent to the legality of the Walker trust, but it is equally our duty to carefully consider the argument of appellants, to examine the trust scheme of the Walker trust and uphold it if it violates no principle of law and is sufficiently certain to be carried into effect. The appellants—the trustees of the Walker trust serving without compensation—are here doing their duty as such trustees by defending the Walker trust and maintaining that it is valid. They are entitled to a fair consideration of the question as to whether or not the deeds containing the Walker trust are null and void as found by the trial court, whatever may be the perfection or imperfection of the bank trust.

In this case the court does not find it necessary to resort to the doctrine of cy pres in order to sustain the Walker trust. Nevertheless a few quotations from leading cases and authorities on the attitude of courts toward charitable trusts are pertinent, since they have a direct bearing on the laws of construction:

> "Charitable trusts are the favorites of equity; they are construed as valid whenever possible, by applying the most liberal rules of which the nature of the case admits, and are often upheld where private trusts would fail." 11 C. J. 307.

We quote a sentence from the Estate of Hinckley, 58 Cal. 457:

> "* * * Courts look with favor upon all attempted charitable donations, and will endeavor to carry them into effect if it can be done consistently with the rules of law. A bequest intended as a charity is not void, and there is no authority to construe it to be legally void, if it can possibly be made good."

Again, from the Estate of Dwyer, 159 Cal. 680, 115 P. 242:

> "It is well settled here that dispositions to charity are looked upon with favor and the courts will uphold all such gifts whether made by a donor in his lifetime or by a testator, when it can be done consistently with the rules of law."

And from the Estate of Upham, 127 Cal. 90, 59 P. 315:

> "It must be remembered that charities—both as to the trustees and the beneficiaries—are more liberally construed than are gifts to individuals." "An interpretation which gives effect is preferred to one which makes void." (Sec. 3541, Civ. Code.)

California, perhaps, is more advanced than any other state in the Union in establishing and maintaining public charities; also in encouraging individuals to dedicate their private fortunes to public charitable uses. Such privately established charities are beneficial to the welfare of society and tend to lessen the cost of government.

In the light of the principles laid down in the cases and law above quoted and in consonance with such policy of the state we proceed to consider the question of the alleged uncertainties of the Walker trust.

[12] The certainty or uncertainty of an express trust, whether contained in deeds or a trust agreement, must be determined, like any other contract, by the rules or laws of construction and the code essentials for a valid trust. If the deed or trust instrument shows the intention of the trustor to create a charitable trust and the interpretation of the language creating the trust discloses the principal or essential elements of contracts and of a valid trust, such deed or instrument is not void for want of certainty.

[13] The five essential elements of every valid, voluntary trust are: (1) The intention to create the trust; (2) the subject-matter of the trust; (3) the purpose of the trust; (4) the beneficiary of the trust; and (5) the acceptance of the trust by the trustee. The deed or instrument containing the trust must indicate with reasonable certainty each and every one of these essential elements. Sections 2221 and 2222, Civ. Code.

In the deeds of 1907, 1916, and 1920, Mrs. Olmsted indicates her intention to create a trust—to establish and maintain a public charitable hospital for the benefit of the sick and wounded of both sexes where the poor could have free beds and considerate and efficient treatment; where persons afflicted with cancer and "consumption" could be treated and cared for in a modern well-equipped hospital. Her intention is not only reasonably certain, fulfilling the law's requirement, but it is so plain and explicit that even the wayfaring man may run and read and understand. Can so much be said of the bank trust? The trust agreement of the bank granted all the property described in the Walker trust to the bank in trust and for the uses and purposes to hold, maintain, sell, assign, convert, lease, mortgage, exchange with the bank's own securities, invest, loan, purchase, contract buildings; to equip, to furnish and operate and maintain a charitable hospital; to organize another corporation to carry out the purposes of the trust contained in the trust agreement, to the bank, and to convey any and all of the property described in the trust to such organization, "on such terms and subject to such conditions as it (the bank) may deem advisable"; to accept or exchange stock of such corporation for its own stock; to employ all agents and attorneys and to fix their compensation; to reimburse itself for outlays, fees and expenditures; to be compensated in the management of the properties and trust; to be released from nearly every conceivable liability in the management and operation of the trust and trust properties; "to sell and convert into cash sufficient of the principal of the trust estate to erect or cause to be erected a public charitable hospital in, or in the vicinity of, the city of Los Angeles * * * to be forever known as Olmsted Memorial Hospital"; to have "full and absolute discretion" in the erection and operation and maintenance of the hospital. The trust finally provides that for the purpose of indemnifying the trustee against all liability, and to secure the bank for any advances, losses and expenses made or suffered by it, the trustor "hereby creates and grants to the trustee and it shall have a first and prior charge and lien on the entire trust estate both income and capital."

We submit there is not a word in the bank trust that indicates that Mrs. Olmsted intended to create a charitable trust except the provisions to erect, furnish and operate a "public charitable hospital." The character of the charity is absolutely in the discretion of the trustee. Section 2269, Civ. Code. The trustees could make, establish, and maintain a hospital for the insane, or any other one or more of the different eleemosynary charities, and yet not violate any *expressed* intention of the donor. The intention to create a charitable trust is vague and uncertain in the bank trust; but to what legal degree of uncertainty we are not called upon to determine. Suffice it to be shown and held that the Walker trust expresses a clear intention to create a public charitable hospital of a particular character.

We return to the essential elements of a valid trust. The subject-matter of the Walker trust is more than reasonably certain. The properties conveyed, both real and personal, are accurately described and identified, being practically the same properties as those described in the trust agreement and deeds to the bank.

[14] The industry of counsel for respondent has found some fault with the mode of dealing with the trust res of the Walker trust. Some of these objections have already been dealt with and answered herein, and some are deemed of little or no consequence. We will specially notice one criticism and dispose of it here. The trustor stated in her 1920 deed that she left it to the discretion of her trustees whether or not they should sell a certain piece of property known as the San Pedro property, within a reasonable time after her death, or to hold it for a rising market; that she did not wish to arbitrarily bind their discretion, but wished them to act freely and use their own discretion in the matter, "except that it is her desire that said memorial building and that said general hospital be erected and put into working operation as soon as possible." The claim is that this provision is tantamount to a direction for the trustees to indefinitely hold this property which it is claimed would be a violation of the mandate of the law of charitable trusts; also that if the trustees withhold the San Pedro property from sale it would make the trust res uncertain; that such holding would be in perpetuity, thereby destroying the charitable feature of the trust. The provision in our judgment is not a direction or a suggestion that the trustees shall hold the San Pedro property in perpetuity in violation of the Constitution or any law of the state, as argued by respondent. It is only a business suggestion with an inference drawn from her language that the trustees must not hold it too long for a rising market if by so doing the erection and operation of the hospital be unduly delayed. It must be presumed that the trustees will do their duty and devote the property to charity, as positively directed in the trust scheme, and if they do not they can be compelled to do so. Section 2269, Civ. Code; People v. Cogswell, 113 Cal. 129, 45 P. 270, 35 L. R. A. 269. If the court should hold this provision of the 1920 deed illegal it would affect the San Pedro property only and not make void the whole instrument. Estate of Willey, 128 Cal. 1, 60 P. 471. In the event of the court holding the provision illegal, the Walker trust by explicit language rededicates the property to the uses and trusts described in the deeds.

The Walker trust is at least reasonably certain as to its purpose clearly complying with the Code requirement. This purpose is shown by the intention of the trustor to establish and maintain a charitable hospital for the wounded, sick, and needy. Again we ask, does the bank trust display the purpose of the donor in certain terms when it goes no further than to direct her trustees to erect or cause to be erected a public charitable hospital and to "pay all costs and expenses in furnishing, erecting, operating and managing the charitable hospital"?

Again, the Walker trust is more than reasonably certain as to beneficiaries: They are the "sick and wounded of both sexes;" "the poor and worthy persons of both sexes;" "patients who are suffering from cancer and tubercular diseases." The trust does not attempt to limit the number of beneficiaries and is therefore within the rule laid down in the definition of charitable trusts cited hereinabove. The bank trust is sufficiently indefinite as to the essential element of beneficiaries, inasmuch as it names none at all for any particular charity. It is true it says "that the hospital shall be nonsectarian and for the use and benefit of all persons alike," and, half apologizing for directing the power and discretion of her trustees, the trustor indicates her desire "without, however, in any way limiting or restricting the character of the hospital * * * persons in accord and harmony with the doctrine and teachings of the Presbyterian Church be admitted and cared for in such hospital so far as practical and consistent with the general character and purpose of this charity." "This charity" is nowhere in the bank trust described mentioned or defined except in the words "public charitable hospital." The bank trust scheme is businesslike for the management of the property by the trustees, but therein the quality of charity is strained. Between the bank trust and the Walker trust there is little in common except the name "Olmsted Memorial Hospital." Therefore Mrs. Olmsted's intention to carry out her original ideas in the later bank instrument is not manifested or even suggested.

There can be no doubt about the certainty of the acceptance of the trustees of the Walker trust, for they signed, acknowledged and agreed to the contents of each of the three deeds. The essential Code element of certainty in this respect is beyond cavil. As to the religious qualifications of the trustees, the courts are open to determine that question if necessary as well as to appoint trustees to carry into effect valid trusts. Sections 2269 and 2287, Civ. Code.

In our decision in this cause we have not gone far into the realms of common-law trusts. In our entrance into and way out of the half-explored realms of trusts we have found our Codes and laws sufficient light and guides. So, if counsel think we should have gone further with them into the labyrinths and mazes of trusts, pray do not charge us with being too timid to do so, but, rather, that we did not find it necessary to explore further.

The court holds that the deeds of 1907, 1916, and 1920 created a valid charitable trust; that these deeds were not revoked by Millicent H. Olmsted in her lifetime, and could not be revoked by her without the consent of the trustees, signatory parties to the deeds, which consent the trial court found was never given or obtained; that all three deeds of 1907, 1916, and 1920 were duly recorded; that the law of recordation was binding on all parties; that the bank took the trust agreement and the deeds to it, without paying any consideration therefor and with constructive notice as to the real estate and actual notice as to the personal property therein described; that said deeds of 1907, 1916 and 1920 vested the title to the whole of the property both real and personal in appellants, the grantees and trustees named in said deeds, subject only to the execution of the charitable trusts therein provided; that the deeds of conveyance and the trust agreement to the respondent set forth in the cross-complaint of the bank purporting to convey said properties to the bank are without force or effect to grant, transfer, or convey any right, title, or interest of whatever nature in and to the properties described in the Walker trust.

The trial court allowed $7,500 attorneys' fees each to the plaintiff, to the trustees of the Walker trust, and to the trustee of the bank trust.

[15] As special administrator, substituted plaintiff herein, plaintiff undertook to maintain this action for the avowed purpose of obtaining all of the property of the trust for the heirs and estate of Millicent H. Olmsted, deceased. In no proper sense can the action of the special administrator be for the benefit of the trust estate. It was exactly the opposite. It was for the benefit of the heirs of the decedent, and they or the estate of the decedent alone were to receive the property free from the trust, if the plaintiff should succeed in the action. Plaintiff's purpose was to destroy and not to benefit or sustain either the Walker or the bank trust. His claim, therefore, for attorneys' fees will be disallowed. Hobbs v. McLean, 117 U. S. 567, 582, 6 S. Ct. 870, 29 L. Ed. 940. This case has been frequently cited and followed. Rose's Notes U. S. Reports, vol. 13, p. 440.

The underlying principle which guides the court in allowing costs and attorneys' fees incidental to litigation out of a trust estate is that such litigation is a benefit and a service to the trust. So far as the allowance of attorneys' fees to the Walker trustees is concerned, there can be no doubt as to its propriety in view of our decision. Estate of Duffill, 188 Cal. 556, 206 P. 42, holds that it is the right and duty of a trustee to employ counsel in the prosecution or defense of an action where in the proper administration of the trust such action is necessary for the preservation of the trust, and that such trustee may be reimbursed for such expenditures out of the trust fund. State of O'Connor, 2 Cal. App. 470, 84 P. 317.

[16] In respect to the allowance of counsel fees to the bank trustee a somewhat different question is presented. In view of our conclusion upon the main issue of the case the bank trustee, in one respect, was an unsuccessful litigant claiming the trust property as against the true trustees. However, the purpose of the part of the litigation conducted by the bank trustee has also some analogy to the part conducted by the Walker trustee, in that it was for the benefit of the only trust fund involved in this case. The bank trustee did not begin this litigation. This action was commenced and prosecuted up to the time of her demise by the common trustor of the Walker trust and the bank trust. The object of the litigation by the trustor was presumably in favor of the bank trust and against the Walker trust. After the death of the original plaintiff in the action the bank

was drawn into the litigation by subsequent pleadings. It must be borne in mind that it was equally the duty of the bank trustee to defend its trust when attacked, as it was the duty of the Walker trustees to defend and maintain their trust when attacked. See Estate of Duffill, supra, 555 (206 P. 50). It must also be remembered that the trust res in the two trusts is the same and that the purpose of the two trusts was to establish and maintain a public charitable hospital. The fact that the beneficiaries in the two trusts may in a sense be different is immaterial. It was the duty of the trustees of each trust to defend and maintain their respective trusts for the benefit of the beneficiaries mentioned therein. That the part of the litigation conducted by the bank trustee was for the benefit of the trust fund is determined for us by the finding of the court, which reads:

> "Plaintiff, the Walker parties and the bank, all did, and each of them did, participate in this action to the extent that they have participated in good faith and in compliance with their duties; and that such participation was necessary for the determination of the validity or invalidity of the various instruments involved in this action and of the trust therein provided therefor, and this action has inured to the benefit of the trust property and the trust desired to be imposed thereon by the said Olmsted; and this action was necessary in order to clear and establish the true status and title to the trust property, in order that the uses and trusts to which it had been put should be finally determined and established."

This appeal being upon the judgment roll alone, we assume that there was ample evidence to support this finding so far as the Walker parties and the bank trustee are concerned. We think the action of the bank trustee in taking part in this litigation is to be governed by the rule which allows compensation out of the trust fund to a trustee who has conducted necessary litigation or court proceedings to obtain an interpretation of the trust provisions, and is not ruled by the decisions which deny such compensation to one who claims the trust fund as an adversary against the beneficiaries and those interested in the trust. The action of the plaintiff against the two groups of trustees was not for the benefit of the trust, and had the plaintiff never filed the suit the trust and the trust fund would be as secure as after the action was tried. But the administration of the trust could not proceed in view of the two conflicting groups of trust deeds and trust agreement until a determination by court had been made deciding which group of documents controlled the trust. Whatever differences there are between the Walker trust and the bank trust the fund and the trustor are the same. The litigation which cleared the way for the administration of the charity was a benefit to the trust. By virtue of the unusual act of the decedent in executing two sets of trust documents the court proceedings were made inevitable. By the execution of the bank deeds and trust agreement a duty was cast upon the trustee named therein to defend the trust from failure if possible. This was a duty which the trustee owed to the trust fund and those interested therein, and for this reason it is proper to allow the bank trustee compensation for attorneys' fees out of the trust fund for which the service was rendered.

We conclude, therefore, that the allowance of attorneys' fees to the Walker trustees and to the bank trustee should be affirmed, and the award to the plaintiff should be disallowed.

It is hereby ordered that the judgment be reversed, and the trial court is directed to enter judgment in favor of the appellants and in accordance with this decision.

We concur: KOFORD, P. J.; STURTEVANT, J.

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91 Cal. App. 549

SHOOK v. BAIRD et al. (Civ. 6179.)★

District Court of Appeal, First District, Division 1, California. May 3, 1928.

Hearing Denied by Supreme Court July 2, 1928.

Taxation ⟹679(5)—Tax collector's resale of city property after sale to city for delinquent taxes held unauthorized (Pol. Code, § 3897, and §§ 3764, 3771, 3785b, as amended and added by St. 1913, pp. 556–558; San Diego City Charter, art. 2, c. 2, § 1, subd. 50, art. 6, c. 1, § 3, §§ 15–27, and § 18, as amended by St. 1905, pp. 913–924).

Tax collector's resale to plaintiff of city property originally sold city for delinquent taxes pursuant to provisions of Pol. Code, §§ 3764, 3771, and 3785b, as amended by St. 1913, pp. 556–558, *held* unauthorized and void under San Diego City Charter adopted in 1889 (St. 1889, pp. 644–729, art. 6, c. 1, § 3, §§ 15–27, and section 18, as amended by St. 1905, pp. 913–924, repealing sections 19 to 27, which fails to provide for resale of property after execution to city of tax collector's deed, in view of Charter, art. 2, c. 2, § 1, subd. 50, and Pol. Code, § 3897.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by A. M. Shook against Marguerite Bradley Baird and others. Judgment for plaintiff, and defendants appeal. Reversed.

Haines & Haines, of San Diego, for appellants.

Herbert C. Kelly, of San Diego, for respondent.

CASHIN, J. An action by the plaintiff to quiet the title to the west half of lot 15 of

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★Hearing denied by Supreme Court.

Encanto, a subdivision situated in the city of San Diego.

The plaintiff claims title by virtue of a tax deed to the property executed by the tax collector of the city, and the defendants were the owners of the property subject to the proceedings leading to the execution of the tax deed. The trial court entered judgment for the plaintiff, from which an appeal was taken by the defendants.

The city by its charter—which was adopted in 1889 (Stats. 1889, pp. 644–729)—made express provision for taxation for municipal purposes of property situated therein; the state laws then in force with respect to the method of assessment, the collection of taxes, and the sale and redemption of property sold being closely followed.

Sections 15 to 27, inclusive, of section 3, chapter 1, of article 6 of the charter provided for the sale each year at public auction, after notice of all real property upon which the taxes assessed the preceding year were delinquent; and also that, in case there should be no purchaser for the same, the property be struck off to the city; that, in the latter event, the city, at any time after the expiration of the period for redemption, to wit, twelve months, would be entitled to a deed whenever called for by the common council. The charter also contained the following general provisions, which are still in force:

> "Except as in this charter otherwise provided the assessment of property taxable in the city for municipal purposes, the equalization of assessments and collection of taxes, and the sale of property for unpaid taxes, and the redemption of property sold for taxes, shall be made in the same manner and with like effect as now or as may be hereafter provided by law for the assessment of property, equalization of assessments, levy and collection of taxes, and sale of property, * * * for state and county purposes and redemption thereof; and all provisions of law applicable to such assessments, equalization, levy, collection, and sale for state and county purposes are hereby applied to and shall be the law governing such assessments, equalization, levy, collection, and sale for municipal purposes." Charter, § 3, c. 1, art. 6.

The last section also provides that "all powers and duties so by law conferred or imposed" upon the following county officers, the assessor, tax collector, treasurer, clerk, and auditor, "are hereby conferred and imposed" upon the corresponding city officers.

In 1905, sections 19 to 27, inclusive, of the above charter, were repealed, and section 18 thereof amended (Stats. 1905, pp. 913–924). The material portions of the section which as amended makes provision for the sale of property for delinquent municipal taxes, its redemption and the execution of deeds therefor to the city after the expiration of the period for redemption, are as follows:

> "On the day and hour fixed for the sale, all the property delinquent, upon which the taxes of all kinds, penalties, and costs have not been paid, shall, by operation of law and the declaration of the tax collector, be sold to the city of San Diego, and said tax collector shall make an entry 'Sold to the city' on the delinquent assessment list opposite the tax (and a duplicate certificate of sale shall be delivered to the city auditor and filed by him in his office, and a like certificate shall be filed in the office of the city clerk). * * * A redemption of the property sold may be made by the owner or any person in interest within five years from the date of the sale to the city, or at any time prior to the entry or sale of said land by the city, in the manner provided by law for the redemption of property sold to the state for state and county taxes, at the time such redemption is made. * * * If the property is not redeemed within five years from the date of the sale thereof to the city, the tax collector of said city, or his successor in office, must make to the city a deed to the property. * * *"

By the above amendments to the charter provisions respecting sales for unpaid municipal taxes were made to conform substantially to the sections of the Political Code relating to tax sales as the same were amended in 1895 (St. 1895, p. 18), and no amendments to the charter to conform with subsequent changes in the above Code provisions have been made.

The charter makes no express provision for a resale of property sold by operation of law and the declaration of the tax collector to the city, or for its resale after execution to the city of the tax collector's deed; and it is urged by appellant that the proceedings leading to the execution to respondent of a deed to the property here involved were unauthorized and the deed void.

The proceedings leading to the execution of the deed in question, as shown by the record, were as follows: Under date of February 17, 1919, the tax collector issued to the city of San Diego a certificate of sale of the property, reciting that the property had been assessed for the year 1918 to W. A. Shaules; that the same, by operation of law and the declaration of the tax collector, had, on January 25, 1919, been sold to the city for the nonpayment of taxes assessed for the previous year, with the percentage, costs, and charges thereon. The certificate also contained the following statement:

> "Unless said real estate so sold as aforesaid is redeemed within five years from the date of sale the purchaser thereof will be entitled to a deed therefor on 26 day of January, A. D. 1924."

Under date of January 28, 1924, the tax collector executed and acknowledged a deed to the city, reciting the previous sale, that no redemption had been made, and that the city was entitled to a deed on January 26, 1924. This deed was recorded on March 19, 1924. On January 26, 1924, the city tax collector also executed and acknowledged a deed to respondent for the same property, reciting that the property "was duly assessed for taxation in the year 1918 to W. A. Shaules, and was thereafter on the 28th day of January, 1924, duly sold to A. M. Shook for the nonpayment of delinquent taxes which had been legally levied in the year 1918 and were a lien on said real property," and further "that all taxes levied and assessed against said property prior to the year 1924 have been paid and discharged. * * *"

It appears that the execution of the deed to respondent followed proceedings by the tax collecter under the provisions of sections 3764, 3771, and 3785b of the Political Code as amended in 1913 (St. 1913, pp. 556–558), and respondent contends that the provisions of section 18 of chapter 1 of article 6 of the Charter were superseded by the amendments to the above sections of the Political Code, and that sales for delinquent municipal taxes assessed after the year 1913 were governed by the Code provisions.

The amendments to the charter adopted in 1905 provided a complete scheme for the levy and assessment of municipal taxes, for sales for their nonpayment, and for the redemption of property sold to the city. While these amendments conformed substantially to the general laws then in force, the changes in the latter made in 1913 were not followed by corresponding amendments to the charter, and to the extent that the plan or method expressly provided remained unchanged by amendment the charter had "otherwise provided." Its provisions in those respects were within the exception contained in section 3 (c. 1, art. 6), and were not affected by the Code amendments of 1913. As stated, the charter makes no express provision for a resale by the city of property acquired through tax proceedings; but it is further contended by respondent that the tax collector is authorized by section 3, chapter 1, article 6, of the charter to sell such property in the manner provided by sections 3897 and 3898 of the Political Code. Under the above Code sections county tax collectors are without power to sell property sold for taxes and which has been deeded to the state, unless directed to do so by the controller. Pol. Code, § 3897. No officer or body is clothed by the charter with authority to direct or make a sale of property, however acquired, which is owned by the city, except the common council (Charter, § 1, subd. 50, c. 2, art. 2), which may provide for such sale by ordinance; and it is not contended that the sale in question was authorized by that body.

Respondent further suggests that the city tax collector has for several years pursued the method provided by sections 3764, 3771, and 3785b of the Political Code, and that his practical construction of the charter provisions should not be disturbed, citing Marysville v. Smith, 178 Cal. 786, 790, 175 P. 13. As to this contention, however, it will be sufficient to say that no sales by the tax collector other than those involved in this action are shown by the record to have been made.

For the reasons stated, it is our conclusion that the sale by the tax collector was unauthorized, and that the deed to respondent was for that reason void; and it will therefore be unnecessary to consider the further claim by the appellants that the proceedings had were not conducted in accordance with the requirements of the above Code sections.

The judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

91 Cal. App. 529

GALE v. DIXON. (Civ. 4897.)★

District Court of Appeal, Second District, Division 2, California. May 2, 1928.

Hearing Denied by Supreme Court June 28, 1928.

1. Judgment 🔑338—Trial court may vacate judgment and enter different judgment on basis of amended conclusions of law without new trial (Code Civ. Proc. § 663).

Trial court, under Code Civ. Proc. § 663, may correct and amend its conclusions of law and vacate judgment and enter a different judgment to conform with the findings without necessity of motion for new trial.

2. Contracts 🔑305(2)—Contractor who willfully and without justification fails substantially to perform cannot recover any compensation, though owner takes possession of incomplete structure.

Where contractor willfully and without justification fails substantially to perform, he is not entitled to compensation for work done and materials furnished which are attached to freehold, even though owner may takes possession of the incomplete structure.

3. Contracts 🔑295(1)—Contractor may recover under construction contract without literal compliance as to all details thereof.

Literal compliance as to all details of construction contract is not requisite to contractor's recovery thereunder.

4. Contracts 🔑322(4)—Finding of contractor's failure to perform contract substantially, precluding recovery of any compensation, held not sustained, in view of unsatisfactory plans furnished and good-faith attempt to complete structure.

In contractor's action to recover last installment of contract for construction of houses and garage, finding that contractor had not substantially performed contract, or attempted in good faith to do so, precluding recovery of any compensation, *held* not sustained by evidence, in view of unsatisfactory character of plans and specifications, which required certain impossible measurements, and involved use of patented articles, and in view of contractor's completion of building with only minor defects.

★Hearing denied by Supreme Court.

5. Contracts 🔑322(4)—Trial court's deductions for contractor's noncompliance with certain details of plans and specifications held sustained, under conflicting evidence.

In contractor's action to recover last installment for construction work, finding as to plaintiff's noncompliance with certain of specifications and as to deductions allowable to defendant from amount of contract price *held* sustained, under conflicting evidence, where major portion of contract was verbal, notwithstanding confusing nature of plans.

6. Costs 🔑203—Cost bill filed by prevailing party before filing of court's findings and conclusions held properly stricken (Code Civ. Proc. § 1033).

Cost bill filed at time judgment was announced and findings directed to be prepared, but in advance of filing of the findings and conclusions, *held* premature and properly stricken, under Code Civ. Proc. § 1033, requiring that successful party serve memorandum of costs and disbursements within five days after notice of decision.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Charles H. Gale against J. W. Dixon. From a judgment in plaintiff's favor originally entered, thought to be insufficient, and from a subsequent adverse judgment entered on an amendment of the court's conclusions of law, and from an order striking out plaintiff's cost bill, plaintiff appeals. Findings amended, and judgment last entered reversed, with directions, and order striking out cost bill affirmed.

Maynard F. Stiles and Caesar A. Roberts, both of Los Angeles, for appellant.

Thomas T. Porteous, of Riverside, for respondent.

CRAIG, J. The parties to this action entered into a contract in writing whereby appellant agreed to construct for respondent at the city of Riverside two bungalows and a garage according to plans and specifications, and respondent agreed to pay therefor the sum of $6,900, as the work progressed, in three equal installments of $2,300 each. The buildings were completed, respondent paid the first two installments, and took possession, but declined to make the final payment on account of various alleged willful or negligent violations of the contract through failure to comply with the specifications. This action was instituted for the recovery of the sum last mentioned.

The case was tried before the superior court, without a jury, and the trial court made findings from the evidence, enumerating twenty-four technical specifications, designated by letter from "a" to "x," inclusive. Twelve of these it found had not been complied with, and also that the defendant had been damaged thereby in the sum of $1,213. It further found that $140.90 had been paid in addition to the $2,600 admitted by the complaint, and that the amount remaining unpaid was $946.10. Conclusions of law were signed and filed, reciting that the plaintiff was entitled to judgment for this latter amount, and judgment was rendered accordingly.

Finding numbered IV recites:

> "The said defects were caused by the want of proper care and attention of the plaintiff and the workmanship was not first class, and the materials used in the construction of said houses and garage is not first class, and defects, omissions, and changes from the plans and specifications pervade the whole of said structures, and the plaintiff has not performed his contract as agreed, and he did not substantially perform same, or attempt honestly and in good faith to perform the same. The defendant did not accept said houses as being constructed in compliance with said contract."

The plaintiff made a motion for new trial on August 7, 1923, and on August 11 the defendant moved that the judgment be vacated; that judgment for costs be entered in his favor; that the plaintiff be denied any relief; and that the conclusions of law be amended to conform thereto. The latter motion was argued and submitted, and the trial court granted the same, striking out its former conclusions of law, "and substituting in lieu thereof the following: As a conclusion of law from the foregoing facts the court finds that the defendant is entitled to judgment, that the plaintiff take nothing by his action, and that the defendant is entitled to recover of and from the plaintiff his costs of defense herein." Judgment was then entered in accordance with this latter ruling and conclusion.

The plaintiff appealed from the first judgment upon the ground, among others, that he should have been awarded the full amount demanded, less $140, and that the judgment was not supported by the evidence. He also appealed from the judgment last entered upon the ground that the trial court was without power to alter its conclusions of law and judgment, or to do more than grant a new trial, which the defendant did not request. It is insisted by appellant that the substituted judgment is void for the reason that conclusions of law may under such circumstances be modified or amended only to conform to the findings of fact, whereas, as amended, the conclusion above quoted is contrary to the findings.

It is the theory of respondent, and was stated by the trial court in granting the motion to vacate the original judgment, that a builder acting in good faith may recover the contract price, notwithstanding slight and trivial defects or deviations from the specifications, and is not held to a strict and literal compliance therewith, but that there is no legal basis for one acting in bad faith to recover either a reasonable value of the services or the contract price less the damages.

[1] The Code of Civil Procedure, in section 663 thereof, provides that a judgment of the superior court may be vacated and another and different judgment entered when the conclusions of law are incorrect or inconsistent with the findings of fact, and that in such event the conclusions of law shall be corrected and amended. It has been held that such a matter is properly reviewable in the trial court under said section, rather than by motion for new trial. Elizalde v. Murphy, 11 Cal. App. 32, 39, 103 P. 904.

Therefore we proceed to inquire, first, as to whether or not the plaintiff, under the finding that he failed to attempt honestly and in good faith to perform his contract substantially in accordance with agreed plans and specifications, but having received about two-thirds of the contract price, is entitled to judgment for the balance; and, second, as to whether or not under the facts presented such finding is warranted by the evidence.

[2] We think that, if the finding in question be sustained, the trial court properly vacated the original judgment, and that the one which was substituted therefor, and the amended conclusions of law, must be upheld. It seems to be the established rule in this and many other jurisdictions that where a builder willfully and without justification fails substantially to perform, though the owner cannot avoid availing himself of the benefit of partial performance because the labor and material are attached to his freehold, the contractor is not entitled to compensation, even though the owner may take possession of the incomplete structure. 9 C. J. 819, and cases there cited. Our Supreme Court, in Connell v. Higgins, 170 Cal. 541, 556, 150 P. 769, 775, quotes from 2 Elliott on Contracts, § 1607, as follows:

> "A substantial performance must be established, in order to entitle the party claiming the benefit of the contract to recover; but this does not mean a literal compliance as to the details that are unimportant. There must be no willful or intentional departure, and the defects of performance must not pervade the whole or be so essential as substantially to defeat the object which the parties intend to accomplish. Whether, in any case, such defects or omissions are substantial, or merely unimportant mistakes that have been or may be corrected, is generally a question of fact."

The court found in the instant case that through want of proper care and attention the plaintiff failed to furnish first-class materials or workmanship; that he did not substantially perform or attempt to perform his contract honestly or in good faith; and that the defects complained of pervaded the whole of said structures. The rule above stated was followed, and a judgment for an alleged balance, after partial payment, was likewise denied in each of the following cases: Laidlaw v. Marye, 133 Cal. 170, 65 P. 391; Merchant v. Hayes, 117 Cal. 669, 49 P. 840; Lynip v. Alturas School District, 24 Cal. App. 426, 141 P. 835.

It will be observed, however, that in those cases wherein all compensation was denied, the performance was not substantially complete or in compliance with the contract of the parties; there was a willful and intentional departure, causing defects which were so essential, and so pervaded the whole structure, as substantially to defeat the object which the parties intended to accomplish.

A technical and detailed statement of the evidence in this case as to alleged omissions or departures from the plans and specifications is unnecessary. The defendant, a resident of Chicago, was not familiar with building, nor with building contracts, plans, or specifications. While visiting in California he expressed a desire to build, and inquired as to the employment of a competent, experienced builder. The plaintiff was introduced as such by others for whom he had successfully and satisfactorily performed services of like character. The defendant attempted to draw his own plans, and thereafter, upon his return to Chicago, he forwarded to plaintiff additional plans, in the nature of blueprints, and certain specifications. It appears from the plaintiff's testimony that some of the items consisted of improvements which were patented, and which the plaintiff could not legally make or use, except by purchasing them from the manufacturers; two coolers, or air ventilators, clothes closets, and linen closets were of slightly different dimensions from those specified; the plans called for three gables, whereas but two were furnished; shelving in the basements was omitted, the plaintiff says, by agreement; brick chimneys about four inches off center, were not specified at all, but the defect could be remedied at small expense; a cracked baseboard, hammer marks, rough bread boards, a glass knob missing, and other small items, constitute the sole basis of the finding, as facts, that there was not a substantial performance of the contract, that the defects and omissions pervaded the whole of said structures, due to a want of honesty and good faith on the part of the plaintiff.

From the whole record before us, it is apparent that the evidence does not support such a finding. The contract merely provided that Gale should "furnish all labor and materials for the erection and completion of two bungalows and garage house at 163 So. Monroe St., Riverside, Cal., according to plans and specifications as agreed for the sum of sixty-nine hundred dollars ($6,900.00). Payments to be made in the following order: $2,300.00 when the buildings are roughed in, $2,300.00 when the plumbing and wiring is in and the buildings are plastered, $2,300.00 when completed." It appears that the plans and specifications were crude, requiring in some instances technical measurements which, owing to other considerations, were impossible. Patented articles which the contractor could not build were specified, and many of the items were trivial. From the meager nature of the written contract it was obvious, and the testimony tends to show, that much was left to verbal understandings between the parties, and to the judgment of the builder. The defendant took possession, and occupied the houses personally and by tenant for the period of about a year before complaint was made, at which time the defendant was prepared to make final payment if the plaintiff would make a few corrections. The plaintiff suggested that Dixon cause them to be made, and deduct the expense from the amount due, which the latter declined to do, and they have not been made, nor has the defendant, notwithstanding full use of the buildings, expended any amount for repairs thereon. It is not denied that Gale used every effort to perform his part of the contract to the satisfaction of Dixon, at an expenditure of about $800 more than the amount of the entire contract price. Certain of the omitted items were not specified as being required by the contract or plans, and in at least one instance an item charged against the plaintiff was, after much discussion and endeavor, constructed at the request and under the direction of defendant's wife.

[3, 4] As was said in Connell v. Higgins, supra, and other cases cited, a literal compliance as to all the details is not requisite to recovery. The object which the parties intended to accomplish was not defeated, or materially affected, by the deviations or omissions of which complaint is made. The trial court specifically detailed and found upon the evidence before it about twelve items upon which the parties seriously differed, and that an expenditure of $5 to $218 in various instances, aggregating $1,213, would compensate the defendant for his damage. We are not at this point concerned with the accuracy of the individual findings as to damages. It is sufficient to say that the plaintiff did not abandon the contract, nor did he display a lack of honesty or of good faith, such as is contemplated by the decisions, holding that in such cases the contractor is entitled to nothing. The buildings were fully completed, and the results of plaintiff's efforts, though not entirely satisfactory to the defendant, were accomplished by diligence, experience, and the exercise of plaintiff's best judgment under the circumstances. We think, therefore, that this finding was unwarranted, and, this being so, the substituted judgment and amended conclusions of law are without foundation.

Appellant next contends that the evidence was not sufficient to support the findings as to certain deductions for damages alleged by the defendant; that he should have been awarded the full amount prayed, less $140; and that the judgment first rendered should be reversed.

Upon final submission of the case, the trial court announced from the bench in the form of an opinion certain deductions for defects or omissions for which it decided that respondent should be allowed damages, stating that judgment would be given in favor of the plaintiff for $1,006.10, but directed that the defendant prepare findings and judgment. The findings submitted by respondent's counsel varied in some respects, as to certain items, from those announced by the court, and as finally signed and filed the findings, conclusions, and judgment awarded to the plaintiff the sum of $946.10. To these findings the plaintiff excepted, tendering other proposed findings, and thereafter moved for a new trial,, which motion was not formally acted upon, but was denied by operation of law. The defendant, as already observed, moved the court that said judgment be vacated, and that judgment in his favor, for costs, be entered, which motion was granted.

[5] It is but justice to the appellant to state that from the record before us it is obvious that he was confronted with a most complicated and difficult problem. There were various conferences between himself and respondent at which many of the details of the buildings were verbally agreed upon. No written specifications, other than mere typewritten notations of an admitted novice, were furnished. Blueprints, not drawn to scale, and drawings which simply approximated the measurements which he was required to follow, constituted all that he had before him as a guide, except a catalogue of ready-built houses containing pictures from which he was expected to gather ideas as to general design. Appellant testified that with these crude "specifications," rough drawings, the catalogue, and remembering to the best of his ability previous oral agreements, he constructed the bungalows and garage.

There is a sharp conflict in the testimony, however, as to what was actually agreed upon, as to what under ordinary circumstances is required by custom among builders, as well as concerning the amounts which should be allowed for negligent or inadvertent omissions in such cases. Appellant admits that items "n" and "o" may have escaped his attention, and as to ten other items the court found upon all of the evidence before it that, whereas first-class workmanship and materials were promised, the inside finish and certain other features were not so furnished, and that the aggregate expense of reconstruction and refinishing in these respects was $1,213. The deductions allowed for the respective defects which the trial court found to exist were in many instances considerably less than those contended for by respondent and his witnesses, whereas appellant insisted that there was no agreement to furnish them as alleged, and that no charge should be made therefor. We think, however, in view of the fact that the major portion of the contract was verbal, and was left to the memory and judgment of appellant, the trial court doubtless with all of the evidence at hand considered the frailty of human recollection, and the irreconcilable conflicts between the memories and opinions of various witnesses. Under the facts and circumstances before us we cannot say as a matter of law that the court erred in its computations and in the conclusions which it reached concerning this phase of the case.

[6] After the trial court announced judgment for the plaintiff and directed that findings be prepared accordingly, on the 5th day of July, 1923, plaintiff filed his memorandum of costs and disbursements. The findings and judgment were not signed and filed, however, until August 1, 1923. The defendant moved that the cost bill be stricken from the files, upon the ground that no judgment had been entered at the time the same was filed, which motion was granted. Section 1033 of the Code of Civil Procedure provides that the successful party must deliver to the clerk and serve upon the adverse party his memorandum of costs and disbursements within five days *after* notice of decision of the court. It has been held that the "decision" referred to by said section consists of the findings of fact and conclusions of law, signed by the court, and filed with the clerk (Porter v. Hopkins, 63 Cal. 53, 55; Mullally v. Irish-American B. Soc., 69 Cal. 559, 561, 11 P. 215), and that a cost bill filed before the filing of the findings and judgment is premature, and will be stricken out (Sellick v. De Carlow, 95 Cal. 644, 30 P. 795). The order striking out the plaintiff's cost bill in the instant case was therefore not error.

The findings are amended by striking out the language of finding IV herein quoted. The judgment entered October 10, 1923, is reversed. The superior court is directed to enter judgment in accordance with the views herein expressed, being in effect a re-entry of the judgment of August 1, 1923, and the order striking out plaintiff's cost bill is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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91 Cal. App. 470

VACA v. SOUTHERN PAC. CO. et al.★

(Civ. 6184.)

District Court of Appeal, First District, Division 1, California. May 2, 1928.

Hearing Denied by Supreme Court June 28, 1928.

1. Appeal and error ⇨995—Value of photograph as evidence is for jury, not appellate court.

The value of a photograph as evidence is not for the appellate court to determine, but must be determined by the jury from all the evidence.

2. Appeal and error ⇨1002—Jury's finding on conflicting evidence as to truck driver's ability to see approaching train before reaching track will not be disturbed.

The jury's finding on conflicting evidence as to truck driver's ability to see approaching train before he reached the track will not be disturbed on appeal.

3. Evidence ⇨597—Testimony that witnesses did not hear automatic railway crossing bell ring held sufficient to sustain verdict for plaintiff on such issue in death action.

In action for death of truck driver struck by train at street crossing, testimony of several witnesses that they did not hear automatic crossing bell ring, though they listened for it, *held* sufficient to sustain verdict for plaintiff on issue whether bell sounded and defendant failed to use ordinary care in keeping it in condition.

4. Trial ⇨139(1)—Testimony of witnesses in position to hear and observe that they heard and saw no signals of train's approach, opposed to positive testimony that signals were given, presents jury question.

Negative testimony of witnesses in position to hear and observe that they heard and saw no signals of train's approach, opposed to positive testimony that signals were given, presents a question for jury, in action for death at railway crossing.

5. Railroads ⇨330(3)—One approaching railroad track must seize every reasonable opportunity to look and listen, notwithstanding custom or legal duty to give signals.

One approaching a railroad track, which is itself a warning of danger, must take advantage of every reasonable opportunity to look and listen, and may not depend on custom, or even duty enjoined by law, to give appropriate signals of approach of trains.

6. Railroads ⇨328(3)—Automobilist must leave machine and go forward to look for approaching train, if prudence requires.

Automobilist approaching railroad track must get out of machine and go forward on foot to look for approaching train, if required in exercise of prudence to ascertain whether his life is in danger.

7. Negligence ⇨122(1)—Contributory negligence is affirmative defense, which defendant must establish.

Contributory negligence is an affirmative defense, the burden of establishing which is on defendant asserting it.

8. Railroads ⇨327(1)—Traveler's discharge of duty to stop and look before crossing railroad tracks must be measured in light of surrounding conditions and circumstances.

While traveler is generally charged with duty of stopping and looking before crossing railroad tracks, his discharge of such duty and his care or negligence is to be measured in light of surrounding conditions and circumstances.

★Hearing denied by Supreme Court.

9. Railroads 🔑330(1)—In measuring conduct of traveler at railroad crossing, jury may consider railroad's creation of condition causing him to relax vigilance.

While traveler, struck by train at railroad crossing, may not seek redress for injury caused solely through his own carelessness, jury in measuring his conduct may consider railroad company's creation of condition which caused him to relax his own vigilance with resulting injury.

10. Negligence 🔑136(8, 9) — Law forbids recovery only when evidence is not conflicting, and contributory negligence is only reasonable inference from facts.

Law forbids recovery only when evidence is such that court is impelled to say that it is not in conflict on the facts, and that reasonable men can draw from such facts, but one inference, pointing unerringly to plaintiff's negligence contributing to his own injury.

11. Railroads 🔑350(28)—Contributory negligence of truck driver held for jury on conflicting evidence as to whether railway crossing bell rang and was properly maintained.

Contributory negligence of truck driver, killed in collision with train at street crossing, *held* for jury on conflicting evidence as to whether automatic crossing bell rang as train approached and defendant exercised proper care in maintaining bell.

12. Railroads 🔑347(8, 11)—Testimony as to whether engine bell was rung held relevant on question of decedent's contributory negligence, though inadmissible on question of want of care in keeping crossing bell in good condition.

In action for death of truck driver struck by train at street crossing, testimony as to whether engine bell was rung *held* admissible, not on question of defendant's want of care in keeping automatic crossing bell in good working order and condition, but as relevant to question of decedent's contributory negligence.

13. Railroads 🔑307(3)—Crossing bell's failure to ring as truck driver approached was not of itself negligence.

The momentary failure of automatic railroad crossing bell to ring as truck driver, killed in collision with train, approached tracks, was not of itself negligence.

14. Railroads 🔑348(3)—Evidence held not to show that crossing bell's failure to ring was due to railroad's want of ordinary care in keeping it in working order.

In action for death of truck driver struck by train at street crossing, testimony of three witnesses that crossing bell did not ring as trains approached at undefined times in past *held* not to show that its failure to ring as decedent approached was due to defendant's want of ordinary care in keeping it in working order, nor to justify finding that defendant failed to use such care in inspection, renewal, or replacement.

15. Railroads 🔑346(1)—Burden was on plaintiff to prove defendant railroad's negligence in not properly inspecting, or taking steps to insure ringing of crossing bell on approach of trains.

In action for death of truck driver struck by train at street crossing, burden was on plaintiff to prove defendant's negligence in not properly inspecting signal bell or taking steps to assure its ringing on approach of trains.

16. Railroads 🔑346(3)—Res ipsa loquitur rule held inapplicable in action for death at railroad crossing, because of failure of automatic bell to ring.

Principle of res ipsa loquitur *held* inapplicable in action for death of truck driver in collision with train at street crossing because of alleged failure of automatic crossing bell to ring as train approached.

17. Trial 🔑251(8)—Instruction as to duty to place bell on locomotive held erroneous as not within issues raised by complaint alleging failure of crossing bell to ring (Civ. Code, § 486).

In action for death of truck driver struck by train at street crossing, because of alleged failure of automatic bell to ring as train approached, instruction in language of Civ. Code, § 486, as to duty to place bell weighing at least 20 pounds on locomotive, to be rung at certain distances, etc., *held* erroneous as not within issues raised by complaint, but mere abstract statement of law.

18. Appeal and error 🔑1066—Abstract instruction as to duty of placing bell on locomotive, in action for death at railroad crossing, held not reversible error (Civ. Code, § 486).

In action for death of truck driver struck by train at street crossing, giving of instruction, not within issues raised by complaint, as to duty of placing bell weighing at least 20 pounds on locomotive, to be rung at certain distances, in language of Civ. Code, § 486, *held* not reversible error.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by Pat F. Vaca, as administrator of the estate of Vidal Garcia, deceased, against the Southern Pacific Company and another. From a judgment against named defendant, it appeals. Reversed.

C. P. Kaetzel, of San Luis Obispo (Henly C. Booth, of San Francisco, of counsel), for appellant.

John R. Stowe, H. J. Dubin and A. H. Brazil, all of San Luis Obispo, for respondent.

CAMPBELL, Justice pro tem. On October 23, 1924, plaintiff's intestate, while crossing the track of appellant corporation where it crosses Palm street, a public street in the city of San Luis Obispo, in a Ford truck, was struck at a grade crossing by a south-bound passenger train of the Southern Pacific Company and received injuries from which he died. This action is prosecuted by the administrator of the estate of the deceased to recover damages on account of his death. The action was dismissed as to the defendant Southern Pacific Railroad Company, and the jury before which the action was tried returned a verdict in favor of plaintiff and against the defendant Southern Pacific Company in the sum of $20,000.

The case was tried on the theory that an automatic bell maintained at the Palm street crossing to give warning of the approach of trains failed to ring on the occasion of the approach of the train which collided with the Ford truck driven by Vidal Garcia, deceased, and that this failure was due to a lack of proper care on the part of the railroad company in the maintaining of the automatic bell. The answer denies the alleged negligence and as a further defense charges contributory negligence on the part of plaintiff's decedent.

Appellant urges the following points on appeal:

> "First, on the issue of ordinary care in keeping the bell in condition the jury, though properly instructed, found directly against the uncontradicted evidence on this issue; second, that the verdict of the jury was not supported by the evidence, in that the uncontradicted testimony demonstrates that, as a matter of law, the decedent was guilty of contributory negligence, even though there was a failure of the crossing bell; third, that the verdict of the jury was not supported by the evidence, in that there was no evidence that the crossing bell failed to ring; fourth, that the court erred in its instructions to the jury."

The facts are undisputed that the accident occurred in the afternoon of a clear day; that there was a sign, 6 or 7 feet high, with a circular disc 2 feet in diameter with "Crossing" on it, approximately 300 feet from where the accident occurred in the direction from which deceased approached, and two crossing signs directly at the crossing, and that the decedent was familiar with the crossing, he having crossed the railroad track at that point on numerous occasions. There is, however, a conflict in the evidence as to the distance up the track one approaching could see from a given point. Thomas J. Foley, trainmaster for defendant, testified that on the side of the track from which deceased approached he could, at a point 16 feet from the nearest rail look up the track for a distance of about 1,000 feet, and at 9 or 10 feet from the nearest rail could see the track for about half a mile, while the witness Maggetti testified that, "before the dirt was taken away (which was subsequent to the accident) you couldn't see up that track without being right on it," and, according to the witness William Mallagh, "it is a straight piece of track; you couldn't see up there until you got almost on the track."

[1, 2] A photograph of the scene of the accident, taken shortly thereafter, was introduced in evidence (Plaintiff's exhibit No. 2), which gives a view up the track in the direction from which the train approached. This photograph shows the track and the embankments on either side. From the photograph it appears that at the base or on a level with the rails on either side of the track there is a space of about 3 feet between the rails and the banks of the cut; that this space widens at an angle of approximately 45 degrees from the base to the top. Appellant argues—and with some merit—that the photograph shows that decedent's view of the track was not obstructed, but, on the contrary, that on approaching the crossing, if he had looked in the direction from which the train was approaching, he would have seen the on-coming train. The value, however, of a photograph as evidence is not for this court to determine, for, as was said in People v. Crandall, 125 Cal. 129, 133, 57 P. 785, 787:

> "We may assume that every one now understands the limitations upon the use of the photograph. It presents but one point of view, and may sometimes make an unfair representation of the points at issue. Like any other diagram, its value must be determined by the jury, from all the evidence."

The jury saw the photograph and examined it in view of the surroundings at the scene of the accident, which was also inspected by it. During the trial, by stipulation of counsel, the court and jury were conducted to the scene of the accident and there viewed the crossing and surroundings and such objects as respective counsel requested be inspected. It is true that subsequent to the accident and before the inspection by the jury a portion of the bank was removed; this, however, gave the jury even a clearer view of the track running through the cut than the deceased could have had. Furthermore, the jury saw and heard a train operated through the cut and over the crossing. This evidence presents a conflict on the question of the ability of the deceased to see the approaching train before he reached the track, and, therefore, under the well-established rule, the finding on this issue in favor of respondent will not be disturbed.

[3, 4] On the question as to whether or not the signal bell sounded and as to defendant's failure to use ordinary care in keeping the bell in condition, it may be said that several witnesses testified that they did not hear the bell ring, although they listened for it, and Kenneth Smith testified:

> "At the time I was looking out the window listening for a bell, which I always do, you know, habits of looking and listening for the train. At the time I heard no bell, about 2 o'clock looking for a train. I heard an engine coming, and I turned to go to my work when I heard a crash."

Ira Barlow testified:

> "Q. Now, prior to the time that the train struck the truck, while the train was approach-

ing the crossing, did you hear the automatic bell at the Palm street crossing ring? A. I did not. Q. Do you know whether or not that bell rang? A. That bell did not ring until after that train started back as I stood on the concrete block up at the foot of it. Q. And you are sure of that? A. I am positive."

This is sufficient to sustain the verdict as to this issue. "In this connection it may be said that negative testimony of witnesses who are in a position to hear and to observe, who declare they heard no signals and saw none, even as opposed to positive testimony that signals were given, presents a question to be submitted to the jury, and it has been held such negative evidence may be sufficient to sustain a verdict." Jones v. Southern Pacific Co., 74 Cal. App. 10, 239 P. 429; Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 P. 709.

[5, 6] We concede the law to be, as urged by appellant, that a person approaching a railroad track which is itself a warning of danger must take advantage of every reasonable opportunity to look and listen, and that a traveler may not depend upon a custom or even a duty enjoined by law to give appropriate signals of the approach of trains, and has no right, because he heard no such signals, not to look and listen (Griffin v. San Pedro, L. A. & S. L. R. R. Co., 170 Cal. 776, 151 P. 282, L. R. A. 1916A, 842), and that, where the exercise of prudence would require him, if necessary, to ascertain whether his life was in danger to get out of his machine and go forward a few steps on foot in order that the matter be placed beyond peradventure (Thompson v. Southern Pacific Co., 31 Cal. App. 567, 161 P. 21; Murray v. Southern Pacific Co., 177 Cal. 1, 169 P. 675). Nor are we at variance with the rule laid down by the United States Supreme Court in the recent case, Baltimore & Ohio Railroad Co. v. Goodman, 275 U. S. 66, 48 S. Ct. 24, 72 L. Ed. ——, as that case establishes the same rule announced in Thompson v. Southern Pacific Co., supra, but in none of those cases did the element of crossing signals enter into the consideration of the cases. Here the appellant had erected a crossing bell to warn persons about to cross the railroad track of the approach of trains, which crossing bell we must conclude, under the finding of the jury on the conflict in the evidence, did not ring on the occasion in question, and, that being so, was the deceased under the circumstances disclosed by the record guilty of contributory negligence as a matter of law in attempting to cross the track?

[7] Contributory negligence is an affirmative defense, and the burden of establishing such negligence was upon the defendant who asserted it. The record is entirely silent as to the actions of the deceased before he drove upon the track and was observed by the engineer. In Gay v. Winter, 34 Cal. 153, the court says:

> "In the absence of any direct proof we are of the opinion that the jury are at liberty to infer ordinary care and diligence on the part of the plaintiff from all the circumstances of the case—his character and habits and the natural instinct of self-preservation. To hold otherwise would be in effect to presume negligence on the part of one in excuse of negligence on the part of another."

Furthermore, the same degree of care is not required of a traveler approaching a railroad crossing at which a bell or signal is erected to warn him of danger. And in Gregg v. Western Pacific Co., 193 Cal. 212, 222, 223 P. 553, 557, the court uses this language:

> "It is true, as has often been stated, that a railroad crossing is itself a place of danger and is an effectual warning of danger which must always be heeded and the exercise of ordinary care in traveling over such place is not excused by the negligent omission of the railroad company itself to exercise reasonable care. But it is also true that a railway company will not be permitted to encourage the public to relax its vigil as to the dangers that lurk in railroad crossings by assurances that the danger has been removed or minimized by the adoption of safety devices and measures and at the same time hold a person to the same quantum of care as if no such safety measures had been provided."

[8-10] While a traveler about to cross a railroad track is generally charged with the duty of stopping and looking before crossing the tracks, in each particular case his discharge of that duty and his care or negligence is to be measured in the light of surrounding conditions and circumstances. It is true that he may not seek redress for an injury caused solely through his own carelessness, but in measuring his conduct a jury may take into consideration that the railroad company has created a condition which has caused the traveler to relax his own vigilance so that he is brought to his destruction or injury. Scott v. San Bernardino Valley Co., 152 Cal. 610, 93 P. 677; Runnels v. United Railroads, 175 Cal. 528, 166 P. 18. It is only when the evidence is such that the court is impelled to say that it is not in conflict on the facts and that from these facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, that the law steps in and forbids the plaintiff a recovery. Zibbell v. Southern Pacific Co., 160 Cal. 237, 240, 116 P. 513.

[11] In Smith v. Southern Pacific Co. (Cal. Sup.) 255 P. 500, the court uses this language:

> "The rights and obligations of all persons using a public street are, in this respect, reciprocal. Each may rightfully expect that the other will, at the proper time, discharge his proper duty towards others. He cannot rely wholly on the care of others, nor, on that account, neglect to use the precautions which the

> particular situation demands of him. But he frequently must, to some extent, depend on others in such situations, and his conduct must be considered in view of that fact in determining whether or not it is negligent. His care, or want of care, in such cases is generally a matter to be determined by the jury from all the circumstances surrounding him at the time."

See, also, Marini v. Southern Pacific Co. (Cal. Sup.) 257 P. 74, and Clark v. Bennett, 123 Cal. 275, 277, 55 P. 908, and we think in the present case the question of the contributory negligence of plaintiff under the circumstances disclosed was a question for the jury.

[12, 13] The most serious question is the one presented by appellant's assignment that "on the issue of ordinary care in keeping the bell in condition, the jury, though properly instructed, found directly against the uncontradicted evidence on this issue." The complaint counts solely on the failure of the automatic bell to give warning of the approaching train:

> "That said defendants, with reasonable care and diligence, could have kept said automatic bell in good working order and prevented the same from being out of order, on said 23d day of October, 1924, and at all times."

It is true the answer alleges:

> "The train of defendants mentioned in said complaint warned said Vidal Garcia of its approach to said railroad crossing by the rumble and roar of said train, the whistle of its engine, ringing of its bell, and the ringing of said automatic bell."

And testimony was introduced as to whether or not the engine bell was rung. This testimony was proper, not on the question as to defendants' want of care in keeping the crossing bell in good working order and condition, but was relevant on the question of the contributory negligence of plaintiff's decedent. The momentary failure of the crossing bell was not of itself negligence. The jury was so instructed, and the correctness of that instruction is not challenged, nor could it be. In Neale v. Atchison, etc., Ry., 178 Cal. 225, 229, 172 P. 1105, 1106, the court says:

> "This court has never said that evidence of the failure of machinery to do its allotted work may not be introduced, but the rule is that proof of the occurrence of the accident by reason of such failure, standing alone, is not proof of negligence."

If, therefore, plaintiff had proven that the accident occurred and that the crossing bell failed to ring and there rested, his case must have failed. But, says respondent, we have, as evidence from which the jury might infer negligence, the frequent inspections of the crossing bell which, if not careless, should have disclosed any defect which made the bell uncertain in its operation; the evidence of prior occasions on which the bell failed, and the fact of its failure to operate at the time of the accident, which could be considered with all the other facts and circumstances in evidence on the question of defendant's negligence.

[14] The only evidence directed to the issue of defendants' want of care in maintaining and keeping the bell in repair, aside from the failure of the bell to ring on the occasion in question, is the testimony of three witnesses that at undefined times the crossing bell did not ring as trains approached the crossing.

Plaintiff's witness Magetti testified that he remembered "once a long time ago" the bell did not ring when a train was approaching. The witness Herrera, called by plaintiff, testified that during "a good many years" there were occasions when the bell did not ring—"there has been no telling, maybe a dozen times and maybe twenty times, I don't know"; and plaintiff's witness Miss Shurrager testified as to times, not specified, during an 8 years' residence near the crossing when she did not hear the bell ring as a train approached. This testimony falls short of a showing that the failure of the bell to ring on the day in question was due to the want of ordinary care on the part of defendant in keeping the automatic bell in working order, and does not support the allegation of the complaint charging negligence with respect to the maintenance of the bell nor justify the jury in finding that defendant failed to use ordinary care in inspection, renewal or replacement. The evidence is without dispute that the bell did ring on the approach of a freight train earlier in the day of the accident, and also that it rang when the train which struck the decedent's automobile backed up to the crossing after the accident.

Added to this, the witness Charles C. Anthony, consulting engineer of the National Safety Appliance Company of San Francisco and an expert on signal bells, testified that he was familiar with the circuits and operation of the particular crossing; that in his opinion these circuits are in accordance with good practice and in design to insure correct operation of the bell. Frank Philbrick, assistant signal supervisor of the defendant company, explained how the bell works, and testified that he inspected the bell in September, 1924, and found it in perfect condition; that about the latter part of March, 1924, or the 1st of April, they renewed the entire mechanism of this bell by putting in a new one; that one part of the mechanism, which is the circuit breaker, lasts about four years, due to the burning of the contacts, the remainder indefinitely. Thomas F. White, the signal maintainer of the defendant company, testified that he inspected the bell every day he worked—that is, 6 days a week—and had done so for 8 years; that he inspected it at 2 p. m. of the day previous to the accident; that it was then in good working order, and that there was no corrosion in the circuit breaker; that he inspected it about 25 or 30 minutes after the accident and found the bell was working fine, all its parts and mechanism were in good order, and its condition fine. There was neither, on the day before the accident when he inspected it nor some time after 2 o'clock on the day of the accident when he saw it, anything wrong with the bell in any way. Thomas J. Foley, defendant's trainmaster, called by plaintiff, testified that the bell was in operation at 4 p. m. the day of the accident, that he had never received "any report that that signal was not operating," and that he had never heard of that signal failing to operate.

There is no charge made in the complaint that the statutory signals by bell and whistle prescribed by section 486 of the Civil Code were not given, nor is it made to appear in the complaint or by the evidence that the signal bell was installed by virtue of any law, ordinance, or regulation of the Railroad Commission.

Our attention has not been called to any California decision on the subject of the quantum of care required of a railroad company which voluntarily installs an automatic bell at a crossing, nor have we found any such case. In Kingsbury v. Boston & Maine R. R., 79 N. H. 203, 106 A. 642, in which case the facts are analogous and the principle of law involved the same as in the present case, the court says:

> "The burden was upon the plaintiff under the second count to show by a preponderance of the evidence that the warning bell did not ring when the southbound train passed the crossing, and that its failure to ring was due to the negligence of the defendant. If it is assumed, in accordance with the testimony of the plaintiff and his brother, that it did not ring, there is no evidence that its failure in this respect was due to the defendant's negligence. It appears from the plaintiff's testimony that it did ring a short time before upon the approach of the northbound train. At that time the system was in perfect working order, and the defendant was not notified that it was defective in any respect. Nor does it appear that it had failed to properly inspect the apparatus, or that in the exercise of ordinary care it could have done anything more than it did do to ensure the ringing of the bell when trains were approaching. * * * What happened to the mechanism of the system that caused the bell circuit to be open and give no danger signal when the collision occurred, and to be closed immediately afterwards and to give the signal cannot be said to be due to any cause for which the defendant is responsible. The mere fact that the bell did not ring, if it is a fact, does not authorize the inference that its failure to do so was due to the defendant's negligence, since it is apparent it may have been due to some cause for which the defendant was not responsible. (Boucher v. Railroad, 76 N. H. 91, 79 Atl. 993 [34 L. R. A. (N. S.) 728, Ann. Cas. 1912B, 847] L. R. A. 1917A, 1174, Ann. Cas. 1913A, 366.) The question of the defendant's negligence upon this count was improperly submitted to the jury for want of evidence."

In Louisville & Nashville Railroad Co. v. Adams' Administrator, 205 Ky. 203, 265 S. W. 623, which was a crossing case in which it was claimed that the electric bell failed to operate at the time of the accident, the court instructed the jury that it was the defendant's duty to "cause the electric bell to sound so as to give timely warning of the approach of the train." There it is held that the duty does not go that far, but merely to the extent that the company "should use ordinary care to see that it was kept and maintained in working order, and that it would be liable for its neglect to do so."

[15, 16] Here, as in Kingsbury v. Boston & Maine R. R., supra, defendant had no notice, actual or constructive, of the failure of the bell to ring, nor does it appear that the railroad company failed to properly inspect the signal bell, or that in the exercise of ordinary care it was called upon to do anything more than it did to insure the ringing of the bell on the approach of trains. The plaintiff, on whom rests the burden of proving negligence, furnished no standard of care for acceptance by the jury; the jury therefore could not shut its ears to the only testimony on the question and set up a standard of its own. The case is not one involving the principle of res ipsa loquitor or of the violation of a statutory rule that the bell must ring on all occasions.

Respondent, in support of his position that the jury may infer from the failure of the bell to ring on former occasions the lack of care on the part of the person in charge of the inspection and repair of the bell, cites us to Lake Erie, etc., R. R. Co. v. Howarth, 73 Ind. App. 454, 124 N. E. 687. There the complaint alleges certain facts with reference to the installation of the bell, its condition as to being out of repair, and the length of time it had been in such condition. It also alleged that the bell did not give the warning for which it was designed. There was evidence which tended to show that the device which operated the bell was out of repair on the occasion in question, and that such condition had existed for a long time prior thereto. This evidence the court held was "admissible for the purpose of showing that appellant had, at least, constructive knowledge that the bell was not serving the purpose for which it was designed," and "further tends to show that this condition continued to exist for several months immediately following the accident to appellee."

McCarragher v. Rogers, 120 N. Y. 526, 24 N. E. 812, decided by the New York Court of Appeals, cited by respondent, was a case where a boy was injured in a printing establishment where to do his work he was required to sit on a table two feet in width extending across the end of a machine. The employer's attention had been called to the fact that a boy similarly employed had been injured three months before. The court held this evidence was admissible. In Long v. John Breuner Co., 36 Cal. App. 630, 172 P. 1132, also cited, it is held that evidence of previous accidents on an incline leading in front of the entrance to the store, which was a fixed visible condition, was admissible as notice to the owner of the dangerous character of the entrance.

In the present case there is no evidence tending to show that the signal bell was out of repair. On the contrary, the evidence offered by defendant, which is the only evidence on the question, is that the bell was in good condition. Also is the evidence of inspection undisputed, and the evidence of the failure of the bell to ring on various unlocated times in a spread of years prior to the accident did not tend to prove lack of care and inspection at or near the time in question. If the bell had failed to ring within a time approximate to the accident, and such failure had been noted by the witnesses testifying to the failure of the bell to ring on former occasions, the probability is, with the fact of the accident to direct their memory to such failure, that they could have fixed the time when such signal failed to function at least with some degree of certainty.

[17, 18] As to appellant's assignment of error in the giving and refusing of certain instructions, we think that taking the instructions as a whole, they sufficiently presented the law. It may, however, be said that the instruction given in the language of section 486 of the Civil Code, relative to the duty of placing a bell of at least 20 pounds weight on the locomotive to be rung at certain distances, etc., is not within the issues raised by the complaint; it is, however, a mere abstract statement of law, and, while the giving of the instruction would not of itself call for a reversal, it should not have been given.

The record failing to disclose a want of ordinary care and diligence on the part of defendant to keep the automatic crossing bell in good working order as alleged by plaintiff, and on whom the burden rests of proving such want of ordinary care, the judgment must be reversed, and it is accordingly so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

91 Cal. App. 631

DAVIS v. SCHNEIDER. (Civ. 5814.)★

District Court of Appeal, Second District, Division 1, California. May 7, 1928.

Hearing Denied by Supreme Court July 5, 1928.

1. Quieting title 🔑44(3)—Ruling that cause of action to quiet title was barred by laches held justified by evidence.

Evidence that plaintiff took no action to enforce her rights under quitclaim deed for seven years and eight months, during which time grantor and his wife resided on premises, nor any steps to notify grantor's administrator or widow of claim, but caused administrator to bring in first account current, and made no objection thereto, despite recital that property was asset of estate, received share of estate on partial distribution, and made no objection when inventory listing property as belonging to estate was filed, nor when family allowance was made and property set aside as homestead for widow, *held* to justify trial court's ruling that right of action to quiet title was barred by laches.

2. Equity 🔑67—Whether action is barred by laches depends on peculiar circumstances and is largely within trial judge's discretion.

In determining length of time that would bar action on ground of laches, peculiar circumstances of each case must be taken into consideration, and a large discretion is reposed in the trial judge.

3. Appeal and error 🔑941—Appellate court should not interfere with trial judge's conclusion that action is barred by laches, unless manifest injustice is shown.

The appellate court should not interfere with the trial judge's conclusion that an action is barred by laches, unless it is shown that manifest injustice was done.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action to quiet title by Mary Davis against George H. Schneider, as administrator de bonis non of the estate of James Kinley, deceased, and executor of the last will and testament of Anna Kinley, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 266 P. 959.

MacDonald & Thompson, and Kimball Fletcher, all of Los Angeles, for appellant.

Kennicott & Williams, of Los Angeles, for respondent.

WOOD, Justice pro tem. Plaintiff on September 21, 1923, filed a complaint in the usual form seeking to quiet title to an undivided one-half interest in a parcel of real estate. Defendants, in addition to denying plaintiff's allegations of ownership, set up the defenses of laches, estoppel, and the statute of limitations. The findings of the trial court were favorable to defendant on all of these issues, and judgment was accordingly rendered, from which plaintiff prosecutes this appeal.

Nearly all of the essential facts are covered in the following stipulation presented by the parties:

"(1) That upon the 1st day of August, 1913, title to the real property involved in this action was in Charlotte Stuckey, and Albert F. Stuckey, and that on said date they deeded the same to James Kinley and Anna Newheuser by a grant deed which was recorded August 7, 1913, in Book 5563 of Deeds, Records of Los Angeles

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★Hearing denied by Supreme Court.

County, California. (2) That the purchase price of said property was paid share and share alike by the said James Kinley and Anna Newheuser out of their own separate funds. (3) That subsequently, to wit, on the ——— day of August, 1913, the said James Kinley and Anna Newheuser intermarried, and immediately thereafter entered into the actual physical possession of the said property and premises, and continued to occupy the same as their home up to and including the date of the death of the said James Kinley, and that the said Anna Kinley, formerly Anna Newheuser, as the widow of the said James Kinley, continued in the actual physical possession thereof, occupying the premises as her home. (4) That plaintiff never at any time prior to the commencement of this action demanded the possession of the said property, and that, prior to the commencement of this action and service of process therein upon them, neither the defendant W. T. Largent nor the defendant Anna Kinley ever had any notice, or knowledge, of any claim of right of the plaintiff in or to said property, save and except in so far as the recording of the instrument under which plaintiff claims may have been constructive notice to them. (6) That all of the taxes and assessments for local improvements and expense of maintenance and repair have been paid from time to time by the said James Kinley, or Anna Kinley, or W. T. Largent as administrator of the estate of James Kinley, and without contribution from the plaintiff. (7) That the said James Kinley died on or about September 12, 1917, and the defendant W. T. Largent was duly appointed administrator of his estate on October 1, 1917; that he qualified as administrator, and ever since said date has been and now is acting as administrator. (8) That an inventory and appraisement was regularly filed in the said estate of James Kinley on the 3d day of January, 1918. That the third item mentioned in said inventory recites: 'Half interest house and lot 4452 Melbourne Ave., Los Angeles—lot 2, tract 822,' and the appraised value thereof is given as $1,000.00. That on February 23d, 1918, a petition was filed for an order to set aside a homestead for the said Anna Kinley, which said petition prayed that the said homestead consist of the undivided one-half interest of the decedent in the said lot 2, tract 822. That on the same date a petition was also filed asking for a family allowance to the said widow. That due notice of hearing of said petition was given, and thereafter the court did, on said hearing, set aside the homestead, as prayed, and ordered a family allowance to the said widow of $50.00 per month. (9) That on February 25, 1920, the plaintiff petitioned the court for an accounting, and distribution. That thereupon an order issued, and the administrator filed his 'first account current' on March 3d, 1920, which said account current contained the following item, among the items with which the said administrator charged himself: 'Half interest in house and lot situated at 4452 Melbourne avenue, Los Angeles, being lot No. 2 in tract 822, appraised at $1,000.00. Since appraisement, however, a homestead has been granted to Anna Kinley, widow of decedent, but the appraisement has not been changed—$1,000.00.' Upon subsequent proceedings duly noticed and heard, and on the 2d day of June, 1920, the court made its order directing a partial distribution of the estate, and in the same order, and as a part thereof, directed that the payment of the family allowance should cease. That by said order of partial distribution all of the estate in the hands of the said administrator was ordered distributed, save the property here involved, and a certain amount in cash. That the administrator thereupon made the said partial distribution as ordered, and the plaintiff herein accepted the part ordered distributed to her. That as appears from the reference thereto in the said 'first account current,' and as was brought out on the hearing thereon, the reason the estate was not in condition to be fully distributed at that time was that litigation was pending in the Supreme Court to determine certain claims against the estate. (10) That the said litigation was decided adversely to the estate, and upon further proceedings had in the superior court of Los Angeles county, judgment was rendered against the administrator, and the administrator has paid the said judgment out of the said undistributed portion of the said estate."

In addition to the facts set forth in the stipulation it was shown that plaintiff was a half-sister of James Kinley. She offered in evidence a quitclaim deed to the property in question, dated September 10, 1913, in which the interest conveyed was not limited to a one-half interest. This deed was recorded on August 3, 1918. Plaintiff testified that she first saw this deed about January 1, 1916, upon her arrival from her former home in Missouri and that James Kinley gave the deed to her at that time. He had told her that he wanted her to make her home on the premises. She further testified:

> "He wanted me to stay anyway after he got married, just the same as if he was not, and me do the cooking, and I said all right, and it was not congenial, and I did not stay there very much. I was there one time four or five months, and I was there every little while for a few days, but I did not stay there altogether."

No consideration passed between James Kinley and plaintiff.

[1] The ruling of the trial court that plaintiff's right of action, if any, was barred by her laches is justified by the evidence. She received the deed, according to her testimony, on January 2, 1916, but did not take action to enforce her rights for seven years and eight months. During this period Mr. and Mrs. Kinley continued to make their home upon the property until the death of Mr. Kinley on September 12, 1917, and thereafter Mrs. Kinley lived on the premises until the action was commenced. During the process of the administration of the estate of James Kinley the plaintiff took no steps to notify the administrator or the widow of any claim she might have to the property, but, on the contrary, caused the administrator to bring in his first account current, to which she made no objection despite the recital therein that the property now in litigation was an asset of

the estate with which the administrator had charged himself. After the account current was filed, plaintiff received a share of the estate upon partial distribution thereof by order of the probate court. She made no objection when the inventory of the estate was filed in which the property in dispute was listed as belonging to the estate of James Kinley, nor when a family allowance was made and the property set aside as a homestead for the widow. Doubtless the probate court considered the property in question as belonging to the estate when it made the family allowance to Anna Kinley. The amount of the allowance might have been different had the court known that plaintiff had a deed to a half interest in the property, and thus the interest of the various heirs might have been affected. She delayed action until after the death of the main witness who could testify to facts which would negative her claims.

[2, 3] There is no definite rule as to the length of time that would bar an action on the ground of laches. The peculiar circumstances of each case must be taken into consideration and a large discretion is reposed in the trial judge. The appellate court should not interfere with the conclusion reached by the trial judge, unless it is shown that manifestly an injustice has been done. Pratt v. Pratt, 43 Cal. App. 261, 184 P. 956. We cannot say that the trial court improperly exercised its discretion in the present case.

The disposition which we have made of the contentions of the parties on the subject of laches makes it unnecessary to discuss other points which appellant has presented and by which she contends that certain findings on the subject of the delivery of the deed are not supported by the evidence.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

91 Cal. App. 617

HOUSE v. COOK. (Civ. 6141.)★

District Court of Appeal, First District, Division 2, California. May 7, 1928.

Hearing Denied by Supreme Court July 5, 1928.

1. Brokers ⟹60—Unless owner prevents consummation of sale or payment, broker is entitled to compensation only when agreed part of price is paid.

When broker's contract with owner provides for the payment of a commission only when a certain portion of the purchase price has been paid to the owner, the broker is not entitled to any compensation for procuring a purchaser, if the stipulated portion of the purchase price has not been paid, unless the vendor, by his own acts, prevents the consummation of the sale or the payment of the stipulated purchase price.

2. Brokers ⟹75—When vendor agrees to pro rata commission as payments are made, entire commission becomes due on vendor's making it impossible to receive payments.

When vendor agrees to pay broker a pro rata commission as payments on the purchase price are made, the entire commission becomes due when the vendor puts it out of his power to receive the stipulated payments.

3. Brokers ⟹60—Broker held not entitled to commission before vendor received price, where contract so provided, and substituted contract containing changed provision was undelivered.

Where original contract provided that real estate broker was to receive commission only on payment of purchase price, fact that an instrument, substituted by the broker to correct an error in the description of the property, contained an altered provision as to compensation, *held* not to entitle broker to compensation otherwise than as provided under the original contract, where, though signed, substituted instrument was undelivered.

Appeal from Superior Court, Los Angeles County; Percy S. King, Judge.

Action by Gilbert T. House against Walter H. Cook. Judgment for defendant, and plaintiff appeals. Affirmed.

Van Lee Hood, of Los Angeles, for appellant.

J. Edward Johnson, of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued to recover the sum of $10,800 claimed to be due under an express contract for services rendered to defendant in securing a purchaser for real property owned by the defendant. The cause was tried before the court sitting without a jury, and resulted in a judgment for the defendant, from which the plaintiff has appealed on a typewritten transcript.

The amended complaint upon which the cause was tried alleged that the parties executed a written instrument on January 21, 1922, wherein defendant promised to pay plaintiff $10,800 for services rendered by plaintiff "in connection with the sale by the plaintiff of certain real property," and that no part of said sum had been paid. At the close of plaintiff's case he obtained leave of court to file an amendment to this complaint in which he alleged that the contract had been fully performed, except in so far as performance had been prevented by the defendant. The answer denied the execution of any contract on January 21, 1922, and alleged that on January 23, 1922, he executed a contract with plaintiff, but denied that he promised therein to pay plaintiff any sum for services rendered by plaintiff or that any services had been rendered by him. As a special defense, it was pleaded that on January 18, 1922, the parties executed a contract in writ-

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★Hearing denied by Supreme Court.

ing wherein defendant engaged plaintiff to sell the lands described, and agreed upon the compensation to be paid; that defendant, relying upon plaintiff's representations that they were able and willing purchasers, entered into a contract of sale with parties presented to him by plaintiff; that thereafter, on January 23, 1922, plaintiff and defendant entered into a contract providing the manner of payment of compensation to plaintiff, which contract is pleaded in full. This amendment to the answer was filed over objection of the plaintiff after all testimony was in.

The trial court found that no contract was executed on January 21, 1922, as alleged in the complaint; that the defendant executed the contract pleaded in his amendment to his answer on January 23, 1922, but that said contract was not delivered to plaintiff; that plaintiff took possession of it without defendant's knowledge or consent; that it was executed on the part of defendant upon misrepresentation of plaintiff, and was without consideration. It was also found that the purchasers did not pay the sum of $108,950; that they were not at any time ready, willing, and able to purchase the property; and that performance of the contract relied on by the plaintiff was not prevented by the defendant.

Some confusion has arisen because of the two contracts mentioned and because of the frequent amendments to the pleadings, and this confusion has been carried into the findings. Because of this, the appellant has advanced a number of technical points in his attack upon the findings, claiming that the trial court failed to find upon material issues; that the pleadings are inconsistent; and that the findings are inconsistent with the pleadings. We are not disposed to give consideration to the points raised, because it would not avail the plaintiff anything if the findings were changed to meet his demands, as, upon the undisputed facts of the case, the judgment must be affirmed.

These facts are that on January 18, 1922, the parties executed a written contract wherein respondent agreed to pay appellant the sum of $10,800 out of the money coming in from the sale of respondent's property after the sum of $108,950, had been so paid. On January 21st respondent executed a contract of sale of the property to the purchasers secured by appellant upon the terms proposed. On January 23d appellant, upon the representation that his commission contract of January 18th contained an error in the description of the property, presented to respondent another writing which he represented to be the same as the former, except as to this error. The respondent signed this writing on this representation, but without reading it, and left the paper with his contract on January 18th in his office without delivering either to appellant. While he was out of the office, appellant obtained possession of both papers, and appellant later discovered that the writing of January 23d provided for the payment of compensation to appellant after $60,000 had been paid in instead of $108,950, as provided in the original contract. Though the original contract has been lost or destroyed, the undisputed evidence is that it provided no compensation to appellant until $108,950 was paid on the purchase price, and, as the evidence fully sustains the finding as to the manner in which the second paper was signed, the appellant must recover, if at all, upon the original contract of January 18th.

[1] This leaves but a single question of law to be determined—when the broker's contract with the owner provides for the payment of a commission only when a certain portion of the purchase price has been paid to the owner, is he entitled to any compensation for procuring a purchaser if the stipulated portion of the purchase price is not paid? The authorities are uniform that a broker is not entitled to any commission under such circumstances, unless the vendor by his own acts prevents the consummation of the sale or the payment of the stipulated purchase price. Ford v. Brown, 120 Cal. 551, 553, 52 P. 817; Fiske v. Soule, 87 Cal. 313, 323, 25 P. 430; McPhail v. Buell, 87 Cal. 115, 25 P. 266; Beckwith-Anderson L. Co. v. Allison, 26 Cal. App. 473, 476, 147 P. 482.

[2] When, however, a vendor agrees to pay a broker a pro rata commission as payments on the purchase price are made, the entire commission becomes due when the vendor puts it out of his power to receive the stipulated payments. Ratzlaff v. Trainor-Desmond Co., 41 Cal. App. 586, 594, 183 P. 269.

[3] Here the trial court found that the vendor had not prevented or made impossible performance. The evidence is that the contract called for a flat commission of $10,800 when the sum of $108,950 was paid for the property. It did not mention the names of the purchasers procured by appellant, and did not make the commission contingent upon payment of the purchase price by any particular individual. If the vendor and the vendee, by mutual agreement, substituted another vendee, and the latter had paid the stipulated price to the vendor, the appellant would be entitled to his recovery under his contract, but this was an issue which he did not raise by pleading or proof.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

91 Cal. App. 420

BISSELL v. KING et al. (Civ. 6193.)★

District Court of Appeal, First District, Division 1, California. April 30, 1928.

Hearing Denied by Supreme Court June 28, 1928.

1. Partnership ⟹165—Partner's liability is measured by fact that he is partner, and not by impression of third party respecting interest therein.

Liability of a partner of a general partnership is not measured by impression third party dealing with partnership may have respecting his interest therein, but is measured by the fact that he is a partner.

2. Partnership ⟹217(3)—Evidence held to sustain finding that person loaning money on note executed by partner in name of partnership dealt with partnership.

In action to recover on note executed by partner in name of partnership, evidence *held* to sustain finding that plaintiff dealt with partnership and not with partner individually.

3. Partnership ⟹217(3)—Evidence held to sustain finding that person loaning money to partnership did not have constructive notice that partner had no authority to borrow money.

In action to recover on note executed in name of partnership by one of partners, evidence *held* to sustain finding that plaintiff did not have constructive notice that partner signing note had no authority to borrow money and execute note therefor.

4. Appeal and error ⟹931(4)—Finding in action on note executed by partnership, containing recital of testimony establishing promise of partner to pay note, held sufficient.

Finding of court, in action to recover on note executed in name of partnership by one of partners, containing recital of testimony establishing a promise on part of other partner to pay note, *held* sufficient, though not finding ultimate fact of promise, since appellate court, in case recital establishes promise, may so construe statement.

5. Partnership ⟹157(4)—Partner's statement that he would protect payee in note executed by other partner constituted ratification of partner's act in signing firm name.

Statement of partner after disappearance of other partner, having executed note in name of partner with full knowledge of facts in regard to loan that he would protect payee in note, constituted a ratification of the act of other partner in signing firm name to the note.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by L. H. Bissell against J. Charles King and George W. Lamb, individually and as copartners doing business under the firm name and style of King & Co., and King & Co., a copartnership. Judgment for plaintiff, and defendant Lamb appeals. Affirmed.

Corbet & Selby and W. C. Sharpsteen, all of San Francisco, for appellant.

J. W. O'Neill, of Oakland, for respondent.

Bradley L. Wallace, of San Francisco, for trustee.

CAMPBELL, Justice pro tem. This action is upon a promissory note brought against J. Charles King and George W. Lamb, individually and as copartners doing business under the firm name and style of King & Co., and King & Co., a copartnership.

King & Co. is the name of a partnership composed of appellant, Lamb, and the defendant King. The partnership was formed for the purpose of conducting the business of draying. King was to manage the business, but under the articles of copartnership executed November 1, 1906, had no power to incur any indebtedness other than for current expenses. King agreed to keep accurate books of account, which were to be always open to the inspection of appellant, and appellant was not required to devote any of his time to the business. On January 1, 1922, an agreement was entered into by the terms of which appellant agreed to sell to King his interest in the partnership for a specified sum, which was to be paid in installments of not less than $500 a month. King agreed to pay all of the debt and liabilities then existing and all that might be incurred, and to save appellant harmless against such debts and liabilities. It provided that the execution of the agreement should not dissolve the copartnership, and that the same should not be dissolved until the payment of the final installment of the purchase price and the performance of all of the conditions of the agreement, and further provided that King should not contract any obligations other than those incident to the copartnership business.

Subsequent to the execution of this second agreement in January, 1922, Lamb took no part in the business, and the business was managed and carried on by King. In 1922 respondent was told that Lamb had sold his interest in the partnership to King. Concerning this information, respondent testified:

> "I had a conversation with Mr. Lamb concerning his selling out his interest in King & Co. to King. It was in the Ferry building, and he told me he had sold out to King. I absolutely believed his statement. I had no reason to doubt it. Mr. King also told me he had purchased the interest of Lamb in the business. This was shortly after Lamb had given me the information in April or May."

Lamb testified that he recalled having a conversation with respondent in the Ferry building, in which he told respondent he had sold out to King; that he said to respondent, "I have signed a contract to sell to him, but it will take a long time for him to pay for the interest."

[1] Respondent, subsequent to the conversa-

★Hearing denied by Supreme Court.

tions with Lamb and King concerning the disposal or attempted disposal of Lamb's interest to King, loaned money to King & Co., taking the note of the partnership, and it being—as we held in Jacobson v. Lamb et al. (No. 6194) 267 P. 114, this day decided by this court—a general partnership, bound Lamb as a partner of King, irrespective of whether or not respondent thought Lamb owned an interest in the partnership, as a partner's liability is measured, not by the impression a third party dealing with the partnership may have respecting his interest in the partnership, but is measured by the fact whether or not he is a partner. Thus, in cases of secret partnerships and dormant partners, a creditor is entitled to recover from all the partners when discovered, though the debt was not originally charged to all (Kennedy & Shaw v. Taylor, 3 Cal. Unrep. 697, 31 P. 1122), and even though one partner holds himself out as the sole owner, the ostensible partner is the agent of the dormant one, and the latter is bound by his representations (Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 P. 106).

That Lamb was in fact a partner with King in the firm of King & Co. is not disputed, but it is claimed that the promissory note was made and delivered without the authority, assent, or knowledge of Lamb, and not for the use or benefit of the partnership.

Reverting a moment to the conversation between respondent and Lamb with respect to the sale of Lamb's interest in the business to King, did respondent believe that Lamb had sold his interest to King outright, or did he gather the impression, not that Lamb had sold his interest to King, but that he had agreed to sell it to him when he could pay for it—that King was buying his interest and paying for it in installments, and that it would be a long time before he completed his payments and succeeded to the interest? Appellant stresses the fact that respondent testified that he absolutely believed his statement, and had no reason to doubt it. There is nothing in this statement to lead respondent to believe—as it was Lamb's judgment that it would take King a long time to pay for the interest—that at the time the note here was executed King had succeeded to Lamb's interest, nor would it matter if he had so believed, as it was not a fact, and King had not acquired Lamb's interest up to the time of the commencement of the action.

During the period from January, 1922, up to February 26, 1924, King, in the name of the partnership, executed a number of partnership notes to International Harvester Company without the signature of Lamb. Some of these notes were paid off during that period out of the partnership funds, and some were paid off by Lamb out of the partnership funds after he took charge of the business. During the same period King, in the name of the partnership and without the signature of Lamb, borrowed $10,000 from the Bank of Italy, and gave a King & Co. note therefor. Part of this note was paid by King out of the partnership funds prior to February 26, 1924, when Lamb took charge of the business, and the balance was paid by Lamb out of the partnership funds after he took charge of the business. During that same two-year period King, without the signature of Lamb, purchased equipment from Emmons Drayage Company, and paid for the same out of the partnership funds. During that same period King, in the name of the partnership, and without the signature of Lamb, on four occasions borrowed money from respondent. representing each loan to be for partnership purposes, for which he gave notes signed "King & Co., J. Charles King." Each of such notes was paid by check drawn on the partnership bank account, excepting the last one, which is the subject of this action. During the same period of time Lamb never examined the books nor had them examined. Lamb made no objection at any time to the way King was running the business. After King left, Lamb paid off several notes given by King in the name of the partnership.

The basis of this suit is a promissory note in the sum of $10,000, dated January 22, 1924, payable February 29, 1924, with interest in the sum of $250, signed "King & Co., J. Charles King," which sum so borrowed on such note it is stipulated was deposited in the Bank of California to the account of "King & Company, Copartners." Judgment was entered in favor of plaintiff, respondent herein, and against the defendants for $10,000, also for attorney's fees—the note provided for attorney's fees—and costs, and from such judgment this appeal is instituted.

Appellant urges the following points on appeal: Respondent dealt with King as an individual and not as an agent of the partnership. Respondent had constructive notice that King had no authority to borrow money and to execute promissory notes therefor. That the partnership was what is known as a nontrading partnership, in which it is presumed that a partner has no authority to execute promissory notes in the firm name. Payment of usurious rates of interest is a circumstance tending to show want of authority. King had no authority under Exhibit 2 (agreement of January 1, 1922) to borrow money and execute promissory notes therefor. Borrowing money and executing promissory notes therefor, except as the act of both parties, was not an incident of the partnership business. The eighth finding must be disregarded. The court erred in its refusal to permit appellant to show that the money loaned by respondent was not used in the partnership business.

The points urged, that the partnership was what is known as a nontrading partnership, in which it is presumed that a partner has no authority to execute promissory notes in the firm name; that King had no authority under the agreement of January 1, 1922, to borrow money and execute promissory notes therefor; that borrowing money and executing promissory notes therefor, except as the act of both parties, was not an incident of the partnership business; and that the court erred in its refusal to permit appellant to show that the money loaned by respondent was not used in the partnership business—are passed upon in Jacobson v. Lamb et al. (No. 6194) 267 P. 114, in which case the facts are similar to the facts here, and wherein the same partnership of King & Co. is involved and the same party is appellant, this day decided by this court, and on the authority of that case the judgment here must be affirmed, unless the other errors assigned call for a reversal.

[2] As to the point urged that respondent dealt with King as an individual and not as an agent of the partnership, it may be said that the record shows that, when King borrowed the money evidenced by the note in this action, he represented to respondent that the money was required to purchase equipment for the partnership, as he had on the previous occasions represented that the money was for partnership purposes when he executed notes in the name of the partnership, and which previous notes were paid by checks signed by the partnership and drawn on the partnership account in the Bank of California, and the note here was signed "King & Co., J. Charles King," and not by King individually. This evidence supports respondent's contention that he dealt with the partnership and not with King individually.

[3] As to appellant's contention that respondent had constructive notice that King had no authority to borrow money and to execute promissory notes therefor, we think the record shows the contrary—that, if respondent had any notice in this respect, it was notice that King had authority. Respondent knew that Lamb and King were and had been partners for a considerable period of time, that King was in charge of the business, and would likely remain in charge for some time to come, as Lamb had told him that he had contracted with King to sell him his interest in the business, but that "it will take a long time for him to pay for the interest."

[4] Appellant's assignment that finding 8 must be disregarded is without merit. The court found in this finding:

> "That in March, 1924, defendant George W. Lamb called plaintiff to his office at the Southern Warehouse Company and advised plaintiff that he had just learned of the said $10,000 loan made by plaintiff on January 22, 1924, and asked to see said note. Thereupon plaintiff showed said note to defendant George W. Lamb, and defendant George W. Lamb then stated to plaintiff that he would see what he could do, and several weeks later defendant George W. Lamb stated to plaintiff that he (Lamb) was going to protect plaintiff in said note."

Appellant asserts that a reading of this finding shows that it is merely a recital of the testimony given by respondent, and is not a finding of any ultimate fact; that the court did not see fit to construe respondent's testimony that Lamb told him that he was going to protect him in the note as a promise to pay the note and make a specific finding of such promise. Appellant, however, concedes that, under the well-settled rule, if the recital establishes a promise on the part of appellant to pay the note, this court may so construe the statement. Appellant further urges that, unless appellant is liable on the note as a partner, the promise to pay—assuming that there was a promise—is not only unenforceable as being an oral promise to pay the debt, default, or miscarriage of another, but is without consideration, and cites us to Comstock v. Breed, 12 Cal. 286, and Marinovich v. Kilburn, 153 Cal. 638, 642, 96 P. 303. The former authority deals with the question of consideration and the promise by one person to pay the debt of another, and the latter with the inability of one bound by contract to shift the burden of his obligation by assigning the contract and the assignee consenting to the assignment without the consent of the party entitled to the benefits. While finding 8 does not find as an ultimate fact that Lamb in direct words promised to pay the note, yet, from the finding that defendant Lamb stated to plaintiff "that he was going to protect plaintiff in said note," the payment of the note is the ultimate fact that necessarily results therefrom, and the promise to pay the note or see that it is paid is the only promise that can be implied from the protection promised, and therefore such finding is sufficient. Coveny v. Hale, 49 Cal. 556; Mott v. Ewing, 90 Cal. 231, 27 P. 194; Alhambra Water Co. v. Richardson, 72 Cal. 598, 14 P. 379; Jessen v. Peterson, Nelson & Co., 18 Cal. App. 349, 123 P. 219.

[5] Even had King no authority to bind Lamb by the note in question, the testimony of respondent, which supports the finding quoted is that Lamb, after the disappearance of King and with full knowledge of the facts in regard to the loan, and after seeing the note, said he would see what he could do, and later stated that he would protect him in the note, is a ratification of the act of King in signing the firm name to the note.

Ratification may be either express or implied. Here we have both. Lamb not only failed to repudiate the note when he knew the facts, but expressly agreed to take care of respondent. "Where an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been thus done in his name, * * * else he will be bound by the act as having ratified it by implication." Ralphs v. Hensler, 97 Cal. 303, 32 P. 243.

This disposes of the points urged by appellant, with the exception of the one with relation to the payment of usurious interest, which we do not deem it necessary to discuss.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

CALPETRO PRODUCERS' SYNDICATE et al. v. CHAS. M. WOODS CO. (Civ. 6156.)★

District Court of Appeal, First District, Division 2, California. May 3, 1928.

Hearing Granted by Supreme Court July 2, 1928.

1. **Evidence 🔑417(12)—Parol evidence held admissible to show warranty of title under conditional sales contract containing no express warranty (Civ. Code, §§ 1763, 1765).**

In action to recover value of personalty for breach of warranty of title under conditional sales contract containing no express warranty or direct statement of ownership, parol evidence as to knowledge and understanding of parties as disclosed by negotiations between parties, resulting in conditional sales contract for purpose of determining existence of warranty of title as prescribed by Civ. Code, §§ 1763, 1765, was properly admitted.

2. **Sales 🔑441(2)—Evidence held to support finding that seller of drilling outfit did not expressly or impliedly warrant title under conditional sales contract.**

In action to recover value of drilling outfit for breach of warranty of title, finding that seller did not expressly or impliedly warrant title *held* supported by evidence showing that seller terminated conditional sales contract with third person defaulting in payments, that plaintiff accepted conditional sales contract with knowledge of third person's default, and that seller took possession under agreement with plaintiff, who expressed satisfaction with seller's title.

3. **Sales 🔑441(3)—Evidence held not to warrant admission of judgment in bankruptcy proceedings of conditional buyer to show conditional seller's breach of warranty of title, where seller was not sufficiently notified of proceedings.**

Where defendant, terminating conditional sales contract to purchase drilling outfit with third party conducting drilling operations for plaintiff, entered into new conditional sales contract with plaintiff for sale of machinery, and defendant had only general information that bankruptcy proceeding against third party voluntarily initiated by plaintiff was pending in federal court, and was not notified by plaintiff that trustee in bankruptcy of third party was asserting title and right to possession of machinery, and plaintiff did not request defendant to defend bankruptcy proceeding, defendant did not have such notice of bankruptcy proceedings or of plaintiff's petition to reclaim property from trustee as would warrant introduction to show a breach of warranty of title by defendant, in plaintiff's action for breach of warranty of title, of judgment in bankruptcy proceeding determining that third party's rights to machinery were not terminated, and that contract was equitable assignment of defendant's claims; such judgment not being conclusive against defendant.

4. **Sales 🔑441(3)—Seller held not bound by judgment in bankruptcy proceedings merely because its officer was called as witness as regards breach of warranty of title.**

That officer of corporation, entering into conditional sales contract, was called as witness in hearing before referee in bankruptcy of previous conditional buyer, was not sufficient to make judgment obtained in bankruptcy proceedings binding on corporation sued by second conditional buyer for breach of warranty of title, where such officer was not permitted to testify as to steps taken by him on behalf of corporation in retaking possession of property.

5. **Sales 🔑441(3)—Judgment in bankruptcy proceeding held not prima facie evidence of paramount title against conditional seller, not party thereto, sued for breach of warranty of title.**

In action to recover value of personalty purchased under conditional sales contract for breach of warranty of title, contention that judgment of federal court in bankruptcy proceedings of previous conditional buyer to which defendant seller was not a party is prima facie evidence against defendant as to paramount title, and that burden is on defendant to show that it is incorrect, cannot be sustained.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by the Calpetro Producers' Syndicate, a partnership, and others, against the Chas. M. Woods Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Athearn, Chandler & Farmer, Walter Hoffman, and Philip H. Angell, all of San Francisco, for appellants.

Hyams & Himrod, of Los Angeles, and Frank English, of San Francisco, for respondent.

MURPHEY, Justice pro tem. In this action the plaintiff is seeking to recover the value, because of an alleged breach of warranty of title, of certain personal property purchased from the defendant. It asks for approximately $15,000, being the value, as it contends, of the property either at the time of the alleged breach or at the time of the judgment.

A somewhat extended statement of the facts involved in this transaction is necessary in order to arrive at an intelligent understanding and determination of the questions of law involved. The Woods Company, defendant and respondent corporation, was engaged in the business of selling oil-drilling machinery. In January, 1923, it sold to one O'Hea, under a conditional sales contract, the property involved in this action. O'Hea

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★Superseded by opinion of Supreme Court, 274 P. 65.

was under contract with the plaintiff and appellant corporation to drill oil wells on two leases designated as well No. 1 on the Fleming lease, and well No. 2 on the Barnes lease; the drilling machinery in dispute being located on the last-named property. O'Hea became involved in difficulties in his drilling operations, and was in default in the payments to the Woods Company on the sales contract. In March, 1923, Smith, secretary and treasurer of the defendant corporation, went to the scene of operations, and, in the presence of representatives of the plaintiff, informed O'Hea that, unless he cleared up the default payments on the contract, he (Smith) would take possession of the drilling machinery, and remove it from the field of operation. In a discussion that ensued, O'Hea stated that he could not continue operations, and the representative of the plaintiff requested Smith not to disturb the machinery. A conference between plaintiff and defendant was arranged for the next day, and several such conferences thereafter were held, at which the entire subject-matter of O'Hea's indebtedness was discussed, and the terms and conditions of the conditional sales contract were also considered and discussed. Pending these negotiations, and on the 20th day of March, O'Hea suspended operations, and on the following morning the plaintiff reemployed the men who had theretofore been working for O'Hea, and resumed operations on the well with the machinery and the equipment connected therewith. This possession then taken by plaintiff has never been disturbed, unless, as contended by respondent, the acts of the trustee in bankruptcy, hereinafter referred to, amount to a dispossession. In any event, it is a stipulated fact that the plaintiff or its representatives has been in the physical possession of all of the machinery at all times since its abandonment by O'Hea.

After lengthy discussions of O'Hea's indebtedness both to plaintiff and defendant in March, 1923, the negotiations resulted in defendant assigning for cash certain contracts with O'Hea and other indebtedness against O'Hea to plaintiff. As to the property in question, a different procedure was agreed upon. Andrews, an attorney and coplaintiff, participated in these negotiations with several of his coplaintiffs. It was agreed that the Woods Company should send written notification to O'Hea terminating his contract for the purchase of the property; that it should place a keeper in charge to prevent the removal of any of the property by O'Hea; that plaintiff should continue in the operation of the property; and that, when these things were done, and they were done on or about the 27th day of March, 1923, Mr. Andrews for himself and his coplaintiff said they would take a conditional sales contract from the defendant, and would be satisfied with the title thereto so obtained. Under such conditions, the conditional sales contract involved in this action was consummated and executed. The defendant selected an employee of the plaintiff as its representative in charge of the property. In April, 1923, O'Hea, represented by Andrews, one of the coplaintiffs, filed a voluntary petition in bankruptcy, returning in his inventory the property here in question as one of his principal assets. Subsequently a person claiming to represent the trustee in bankruptcy nailed a sign on the derrick, the exact language is not disclosed, claiming the property as belonging to the estate of the bankrupt. No other acts were performed in this connection, and no change of possession or management of the property was attempted. Thereafter the plaintiff, while asserting dominion over the property and operating it, voluntarily brought a proceeding in the bankruptcy court entitled a "Petition for Order of Reclamation from Trustee." The matter was brought to issue, and the referee, after a hearing, decided on the evidence before him that the right of O'Hea had not been terminated; that the conditional sales contract was in effect an equitable assignment of the defendant's claims; and that the trustee in bankruptcy was entitled to the possession of the property, subject, however, to his repayment to the plaintiff within five days, the amount remaining due and unpaid to defendant on account of money advanced by it for the purchase price of the machinery. This determination by the referee was affirmed on appeal by the federal District Court. Subsequently the plaintiff herein purchased at trustee's sale the property involved in this action and all other property of the bankrupt's estate. Judgment in the trial court went for the defendant, and plaintiffs appealed.

On the statement of facts above set out the appellants contend: (1) That the written contract of sale between plaintiff and defendant gave rise to an express warranty of title; (2) that it gave rise to an implied warranty of title; (3) the court admitted in evidence the oral negotiations between the parties prior to the execution of the bill of sale, which action it is claimed is erroneous; (4) that the findings, even admiting parol evidence, failed to show that the warranty of title was waived by appellant; (5) that, in case of breach of warranty of title, a judgment recovered against the would-be buyer by the paramount owner is conclusive upon the warrantor where he was notified of the suit or where he had an opportunity to defend it or where he appeared as a witness in the litigation; (6) that, even where the warrantor had no notice of suit or opportunity to appear as a witness, the judgment is prima facie evidence aganst the warrantor, and he has the burden to show that the judgment was incorrect; (7) that the judgment of the referee as affirmed by the United States District Court was correct, together with other matters set out by appellant which will be considered in the course of the discussion where applicable.

The conditional sales contract between plaintiff and defendant contained the following language with reference to title:

> "(2) This proposal is made upon the following conditions: Title—That the title and ownership of the property herein specified shall remain in this company until final payment therefor has been made in full, * * * the title to said property shall not pass until such notes so given or extensions thereof, or such judgments taken, are fully paid in money and satisfied. This company shall have the right to discount or transfer any of said notes, and the title or right of possession in and to said property shall pass thereby to the legal holder of said notes.
>
> "(3) You shall at all times take such legal steps as may be required by the laws of the state in which said equipment, or any part thereof, may be situate for the preservation of this company's title as herein provided.
>
> "(5) It is expressly understood that this proposal made in duplicate contains all agreements pertaining to the property herein specified, there being no verbal understanding whatsoever."

It will be observed that the writing contains no express words of warranty of title and no direct statement of ownership. In support of his contention, appellant quotes from 2 Mechem on Sales, § 1300, p. 1120:

> "It is also everywhere agreed that, in a sale of a specific and ascertained chattel, any affirmation by the seller that the chattel is his is equivalent to an express warranty of title; and that this affirmation may be implied from his conduct as well as from his words, and may also result from the nature and circumstances of the sale."

From the same author, volume 2, § 1236, p. 1070:

> "Direct assertions or positive representations as to title, quality or condition, express stipulations concerning the description of the goods, explicit declarations that the negotiations are conditioned upon the existence of given attributes, capacities or characteristics, and the like, are a few of the many illustrations furnished by the cases of affirmations constituting express warranties within the foregoing rule."

Section 1763, Civil Code of the state of California, is as follows:

> "A warranty is an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction, whether past, present, or future."

Section 1765 of the same Code provides:

> "One who sells or agrees to sell personal property, as his own, thereby warrants that he has a good and unincumbered title thereto."

Counsel quotes from Polhemus v. Heiman, 45 Cal. 573:

> "We think the court erred in instructing the jury that the contract contained no warranty, and in taking from them the question whether there had been a breach of the warranty. It is certain that no particular words are necessary to create a warranty. Any affirmation made at the time of sale as to the quality or condition of the thing sold will be treated as a warranty if it was so intended. * * *
>
> "'To create an express warranty the word warrant need not be used, nor is any precise form of expression necessary, but every affirmation, at the time of the sale of personal chattels, amounts to a warranty. * * * No expression of an opinion, however strong, would import a warranty. But if the vendor at the time of sale affirms a fact as to the essential qualities of his goods in clear and definite language, and the purchaser buys on the faith of such affirmation, that we think is an express warranty. * * *'"

Other citations are made from Firth v. Richter, 49 Cal. App. 545, 196 P. 277, and Brock v. Newmark Grain Co., Inc., 64 Cal. App. 577, 222 P. 195.

[1, 2] If under the peculiar circumstances of this case parol evidence was not admissible as to the knowledge and understanding of the parties as disclosed by the negotiations between the parties which resulted in the conditional sales contract, the position of the appellant would no doubt be impregnable. However, in view of the absence of any express words of warranty or direct statement of ownership, we are of the opinion that the ruling of the trial court in admitting this testimony over the objection of the plaintiff must be sustained. The court specifically found:

> "That defendant at no time, either expressly or impliedly, warranted the title to said personal property or to any part or portion thereof, but that the plaintiffs, well knowing the facts as above found, agreed to accept, and did accept, whatever title defendant had in and to said personal property, without any express or implied warranty of title, and plaintiffs expressly waived any express or implied warranty of title as to said personal property and the whole thereof."

This finding is amply supported by evidence admitted over appellant's objection on the trial of the action.

With respect to the value of opinions and recitals as constituting warranty, we find in 35 Cyc. 375, the following:

> "The rule is broadly stated in most decisions that a mere affirmation does not constitute a warranty unless shown to be so intended and understood by the parties, and not as a mere matter of opinion; that in the contract of warranty there must be an agreement of the minds of the contracting parties as in all other contracts. * * * The true aim in construing every agreement, that of warranty included, is of course to reach the real intention of the parties to it. * * * It has been said that the decisive test in determining whether the affirmation was intended as a warranty is

whether the seller assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the seller has no special knowledge and on which the buyer may also be expected to have an opinion and to exercise his judgment. In the former case there is a warranty, in the latter, not."

24 Ruling Case Law, par. 455, p. 184, reads as follows:

"A warranty of title is annexed by law to a sale of personalty only where there is nothing in the circumstances of the case to rebut that presumption. This implication is rebutted where it is shown that the seller expressly refused to warrant, and that the purchaser agreed to take the risk of the goodness of the title, and oral evidence is admissible, though the contract of sale is in writing, to show that an implied warranty of title was expressly excluded. So where the seller expressly sells only such right as he may have no warranty of title will be implied, and the same has been held true where one sells simply his 'right, title and interest,' and generally where the facts are equally known to both parties, and the sale is made under circumstances indicating that the seller intends only to transfer his interest."

With respect to this last citation in the instant case, there can be no doubt that, at the time of the purchase of the property by the plaintiffs, they, as purchasers, were fully advised as to the exact condition of the defendant's title.

In 62 Am. Dec. 465, is the following language:

"The presumption of warranty of title is annexed by law to a sale of personalty only where there is nothing in the circumstances of the case to rebut that presumption. The warranty is implied only where good faith requires that it should be."

Williston on Sales (2d Ed.) § 219, provides:

"Whether the seller is in or out of possession there can be no doubt that by appropriate words he may sell simply such interest as he may have in the property. The intent to limit the seller's undertaking to a mere quitclaim may be expressed not only by an agreement in terms to sell such interest as the seller has, but otherwise, as by a refusal to warrant title. The nature of the seller's right may also be known to the buyer and may be of such doubtful character that it must be assumed the parties intended to buy and sell, only such title as the seller had."

In Croly v. Pollard, 71 Mich. 612, at page 615, 39 N. W. 853, 854, the court said:

"There is no doubt, I apprehend, but that a sale of personal property implies an affirmation by the vendor that the property is his, and he therefore warrants the title, unless it is shown by the facts and circumstances accompanying the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the property."

2 Mechem on Sales, p. 1127, § 1309, states:

"The implied warranty of title being one which the law imputes to the seller by reason of the circumstances under which the sale was made, and in furtherance of good faith, it follows necessarily that if those circumstances are absent, or if, though certain of them are present, there are others which show more clearly that the implied warranty was excluded, or that good faith does not require it, it will not arise. If, therefore, the seller expressly refuses to warrant the title, and the buyer agrees to take his chances; or if the seller expressly sells simply such interest as he has; or if the origin and character of the seller's title are fully known to the buyer, and the seller simply parts with whatever title he himself acquired—in these and like cases, for obvious reasons, no warranty will be implied."

In two cases the Supreme Court of this state has expressly upheld the introduction of oral testimony to determine the existence or nonexistence of express or implied warranties. In the case of Miller v. Van Tassel, 24 Cal. 459, which case is cited by appellant, the court says:

"The plaintiff urges that there being a bill of sale of the property, the warranty of title arising by implication attaches itself to the writing, and becomes a part of the written instrument, and thus is subject to the rule of law forbidding an instrument of writing to be contradicted by parol testimony. There is much force in the point, but in our opinion it is untenable. No case is cited by the respondent directly to the point, and it is doubtful if any well adjudged case can be found sustaining that doctrine."

In the case of Johnson v. Powers, 65 Cal. 179, 3 P. 625, the Supreme Court, in discussing the case of Miller v. Van Tassel, supra, said:

"The vendor of personal property in his possession warrants his title to the same by implication. And whether such sale be by written bill of sale, or oral, the implied warranty of title may be rebutted by parol, that is to say, the vendor may overcome the legal presumption by proof that he did not warrant the title. Miller v. Van Tassel, 24 Cal. 459. In such case the vendor does not add to the terms expressed in the writing, but he only rebuts a legal presumption, not itself expressed in writing, but arising from that which is expressed."

In 22 California Jurisprudence, § 11, p. 916, the two cases last above cited are given as authority in support of the following proposition:

"In defense of the action the seller may show that he refused to warrant title to the property, and that the transfer was made pursuant to an understanding that the buyer took the property at his own risk. Nor is evidence to this effect objectionable by reason of the fact that the seller executed a bill of sale—the case not being within the rule which forbids the introduction of extrinsic evidence to contradict the parties' written contract. The proof of oral agreement is held not to affect the terms of the writing, but only to rebut the legal presumption of warranty which arises from the fact of the sale."

To the same effect is 22 Corpus Juris, p. 1097, § 1454, and 22 Corpus Juris, p. 1261, § 1681. It is said in section 1681:

> "Parol evidence which does not contradict the express terms of a record or instrument in writing is usually held to be admissible to rebut a presumption or implication which would or might otherwise arise therefrom, or to oppose a conclusion of fact which it tends, as circumstantial evidence, to establish."

Counsel for appellant attempts to distinguish the determination of this subject-matter as outlined in the cases of Miller v. Van Tassel and Johnson v. Powers, but in our opinion, in cases of this character, until such time as the Supreme Court shall expressly overrule the doctrine contained in those cases, we see no reason for departing therefrom. This determination is, in the absence of an express warranty, logical, just, and fair. It seems to us that it would be a strange distortion of the law of implied warranty to hold that a purchaser who is fully cognizant of the exact status of the seller's title, fully aware, as a result of a prolonged discussion participated in and dominated by its attorney, of any defects and infirmities in the seller's title, should be permitted, when complications arise with reference to the title to the purchased property, to assert that he was induced to purchase the property by reason of his reliance on such implied warranties. It seems to us that, if there ever was a case in which the trial court would be justified in permitting parol evidence to determine the existence of any kind of a warranty title, this case, in view of all the circumstances, falls clearly within that category.

If this conclusion is correct, the evidence introduced at the trial of the action fully warrants and supports the finding of the trial court that no warranty, either expressed or implied, was given by the defendant to the plaintiff upon the sale of the personal property involved in this controversy. In this connection the court found:

> "That it was understood and agreed by and between plaintiffs and defendant that the defendant should take possession of said personal property and place a man in charge thereof, and that notice should be given to the said O'Hea declaring a termination of the rights of said O'Hea under said contract because of the failure of said O'Hea to comply with the terms of said contract. That, in pursuance of said agreement and understanding, defendant did take possession of said personal property, and did place one Thomas Eckman in charge thereof, and did notify the said O'Hea in writing that defendant had elected, and did elect, to terminate all his rights under said contract because of the failure of said O'Hea to comply therewith.
>
> "That prior to said 3d day of April, 1923, plaintiffs expressly agreed with the defendant that, if said defendant would take the action above set forth in regard to the termination and foreclosure of the rights of said O'Hea under said contract, that the said plaintiffs would purchase the said personal property and would be satisfied with the title thereto so obtained."

The plaintiffs question sufficiency of the evidence to support these findings and quote elaborately from the record, but in our opinion the most that can be said of this contention is that it is an attempt to resolve a conflict in the evidence against the finding and judgment of the trial court.

The next contention of the appellant is that, where one is liable over to another as in case of warranty of title, a judgment recovered against the would-be buyer of the paramount title owner is conclusive upon the warrantor where he was notified of the suit or where he had an opportunity to defend it or where he appeared as a witness in the litigation. With respect to this issue the trial court specifically found:

> "That the only knowledge which defendant had of said bankruptcy proceedings or of any of the proceedings or actions taken therein was the general information that a bankruptcy proceeding was pending in the federal court and before the referee in bankruptcy, and that a hearing was had before the referee in bankruptcy on or about April 28, 1923, at which hearing J. A. Smith, secretary and treasurer of the Charles M. Woods Company, was called as a witness and was asked questions regarding steps taken by him on behalf of his company in retaking possession of said personal property, but was not allowed to answer questions so propounded.
>
> "That the plaintiffs did not at any time prior to the commencement of this action notify the defendant that the trustee in bankruptcy was asserting title and right to possession of said property, nor of the nature of the proceedings in bankruptcy court with relation to the title to said property, and did not at any time request or demand that defendant appear in said proceeding, and did not request or demand that the defendant defend said proceeding, and did not at any time give or offer to give the defendant an opportunity to so defend, or notify it that if it did not defend it would be held responsible for any damage or detriment suffered by plaintiffs."

It may be stated further that the record discloses in this contention that defendant Smith was notified of the proceeding or requested to be present as a witness in the bankrupt proceedings not more than three or four days prior to the time he appeared as such witness.

[3] In view of these findings, concerning which, however, there is sharp conflict in the evidence, we think that the law is clear that the defendant had no such notice of the trial or proceeding or hearing of the petition to reclaim or of the issues involved therein before

the referee in the bankruptcy (which proceeding was voluntarily instituted and initiated by the plaintiff herein) as would warrant the introduction of the judgment roll in that proceeding in the present case to bind the defendant. The leading case in California, and a case relied upon by appellant, is that of Pezel v. Yerex, 56 Cal. App. 304, 205 P. 475. In that case the record discloses that the party against whom the judgment roll was introduced was informed by letter as follows:

> "You are therefore notified that in the event the said E. S. Faxon is successful in his suit against me, that I shall institute suit against you to recover the amount recovered against me. Of course, these two trials mean additional court costs and attorneys' fees, while I believe that a good settlement could be made at this time. I would advise that you secure the services of an attorney and take such action as seems appropriate in the action against me."

The letter further stated:

> "I would therefore suggest that you consult your attorney with a view of negotiating a settlement and obviate the additional costs as well as to take such action as he deems advisable in the pending suit. Will you kindly advise me of your decision in the matter."

The defendant paid no attention whatever to either of the above-mentioned letters, and the question arose of the admissibility of the judgment roll in the Faxon case. The court said:

> "The decisions upon the question as to the sufficiency of such notices are varied, extending from those which hold that mere notice of the pendency of the action will suffice (of which Drennan v. Bunn [124 Ill. 175, 16 N. E. 100, 7 Am. St. Rep. 354], supra, is an example), to those holding that the defendant in the action must give unequivocal, express, and certain notice to the person who is responsible over, requiring the latter to defend the suit, or giving him an opportunity to do so. Consolidated, etc., Co. v. Bradley, 171 Mass. 127 (68 Am. St. Rep. 409, 50 N. E. 464), a case involving a warranty of title to land, is a fair example of those cases which hold that the warrantor must be requested to come in and defend the action, or be given an opportunity to do so. Our attention has not been called to any decision in this state that is directly in point. We shall assume, however, that in this state the rule is every whit as strict as that announced by the Massachusetts court in Consolidated, etc., Co. v. Bradley, supra. There the court employed the following language in announcing the rule: 'Whatever may be the form of such a notice, we think that, under the circumstances in which it is given, it should call upon the person notified to come in and defend the suit, or should offer him an opportunity of doing so. * * * The decisions of different courts in this country are not uniform upon the requirements of such a notice, but the weight of authority in this commonwealth is that the notice must be such in substance as to give the person notified information that he is called upon to come in and defend the suit, or that he is given an opportunity to do so, and that if he does not defend it he will be held responsible for the result.' * * * We think that the notices given in the instant case meet the most exacting requirements. * * * In one letter he is urged to take such action in the suit brought by Faxon as seems 'appropriate'; in the other he is advised to take such action 'in the pending suit' as his attorney 'deems advisable.' By these letters the defendant was unequivocally invited to take any action in the pending suit that he or his counsel might deem appropriate or advisable. By this broad invitation defendant clearly was given an opportunity to come in and defend. More than that was not necessary. See Boston v. Worthington, 10 Gray [Mass.] 496, [71 Am. Dec. 678]."

The general rule, as gleaned from the textbooks, may fairly be expressed by what is said in 1 Freeman on Judgments (5th Ed.) § 449:

> "It seems, however, upon the principle that no one shall be condemned or made answerable without an opportunity to defend, that in order to bind one by a judgment to which he is not a party, he should be allowed all the means of defense open to him had he been made a party; and that a nominal party wishing to bind by a judgment one not a party to the action must not only notify him of its pendency, but give him to understand that he is desired to defend it, and will be allowed such control as may be essential to his defense. A notice which merely indicates that the person liable over is expected 'to assist' in the conduct of the defense, is insufficient since it implies that the indemnitee intends to retain control."

The nearest approach to a definite and specific determination of the rule in this state is found in the case of Pezel v. Yerex, 56 Cal. App. 304, 205 P. 475, above cited. This case, as above stated, is cited by appellant, but, in view of the findings of the court as to the notice the defendant had of the proceedings in the federal court, it would seem that one must indulge in an abundance of optimism to find support for its contention in the reasoning of that case. The court by the strongest implication adopts the rule announced by the Massachusetts case, as between which and the instant case, with respect to the sufficiency of notice, there is no reasonable ground for comparison. The notice in the Massachusetts case, 171 Mass. 127, 50 N. E. 464, 68 Am. St. Rep. 409, which was deemed insufficient by that court, was in the following words:

> "The suit of Tierney v. Consolidated Hand-Method Lasting Machine Company for the death of John Tierney, January 1, 1891, when he was killed, the result of touching or holding the electric light apparatus in the room occupied by the machine company, where the electricity was furnished by you, will come on for trial on Monday next, in the second session of the superior court. We hope and expect to be able to win the case and thus relieve the parties from liability. In case, however, we should be beaten, we shall look to you to recompense

the machine company; and we shall expect you to assist in the conduct of the defense of the case."

In holding this notice insufficient, that court stated:

> "Whatever may be the form of such a notice, we think that, under the circumstances, in which it is given, it should call upon the person notified to come in and defend the suit, or should offer him an opportunity of doing so. The party notifying cannot insist upon retaining control of the defense, and yet hold the party notified bound by the result of the suit."

[4] It seems to be the contention of the plaintiffs that the mere fact that an officer of the defendant was called as a witness in the hearing before the referee in bankruptcy is all that is required to make any judgment obtained in that action binding upon the defendant. In this connection 2 Black on Judgments, § 569, states:

> "We have said that the warrantor must have notice of the action against his grantee, in order to be bound by the result. By this is meant a notification proceeding from the latter. Merely that he knew of the action and talked about it, and intimated that he had evidence which would defeat it, is not enough. And the mere fact that a person testifies as a witness on the trial of a suit is not sufficient evidence that he had such legal notice as the law intends him to receive, in order to be bound by the judgment."

Section 449a of Freeman on Judgments is as follows:

> "The necessity of proof of such a notice cannot be avoided by showing that the warrantor sought to be bound, was a witness, or knew and talked of the action, said he had an agreement which would defeat it, and was informed of the time and place of the trial."

[5] It is further contended by the appellant that the judgment of the federal court, if not conclusive, is prima facie evidence against the defendant as to paramount title, and that the burden is placed upon the respondent to show that it is incorrect. In support of this contention the appellant does not cite any California cases. It may be stated that the authorities are not harmonious as to the correctness of their disposition. There are no California cases in point, but we are satisfied that the weight of authority is adverse to the appellants' contentions. In the case of Council Improvement Co. v. Pacific & Idaho Co., 29 Idaho, 113, 157 P. 258, a suit for damages for breach of warranty of title of real estate, the question arose as to whether a judgment in a case in which the defendant was not a party, and of which the defendant had no notice, was prima facie evidence of a paramount title in the party prevailing in such suit. The court decided that such judgment was prima facie evidence, and the Supreme Court of Idaho reversed that judgment. It stated:

> "While considerable diversity of opinion may be found in the adjudicated cases upon this question, the weight of authority supports the rule stated in Devlin on Deeds, vol. 2, § 937, as follows:
>
> " 'Of course, such a judgment cannot bind the covenantor. The only question that can arise is one of evidence. It has been asserted that, although the defendant might inquire into the merits of the judgment, yet it was prima facie evidence of the existence of a paramount title. But the most reasonable rule, and the one sustained by authorities, is that the judgment, where no notice has been given, and the covenantor is not a party to the suit, is not even prima facie evidence that the eviction was founded upon an adverse and paramount title.' "

The same rule was announced in Black on Judgments in volume 2, § 571.

In Peabody v. Phelps, 9 Cal. 213, the court said:

> "Of the action the defendant received no legal notice, and the judgment cannot, therefore, be evidence against him of a paramount title in Larkin. Mere cognizance of the existence of the action is not notice in the legal sense. To be available, the notice must apprise the party whose rights are to be affected, of what is required of him and the consequences which may follow if he neglect to defend the action."

This case was cited with approval in the case of Sampson et al. v. Ohleyer, 22 Cal. 200.

Furthermore, in this connection the trial court found:

> "That prior to said April 3, 1923, said defendant took possession of said personal property, and foreclosed all rights of said O'Hea under said contract, and on said April 3, 1923, said J. E. O'Hea had no right, title, or interest in or to said personal property.
>
> "That plaintiffs were on said April 3, 1923, and for a long time prior thereto had been, the owners of a certain oil lease of certain real property in the county of Los Angeles, state of California, and prior to said April 3, 1923, had entered into a contract with the said J. E. O'Hea for the drilling of an oil well on the property covered by said lease. That said personal property described in said contract so attached to the complaint herein was used by said O'Hea prior and up to March 21, 1923, in the drilling of said oil well. That on said March 21, 1923, said plaintiffs took possession of said personal property and evicted said O'Hea from said premises.
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> "That * * * plaintiffs knew that the said defendant had retaken possession of said personal property and had foreclosed and terminated all the rights of the said O'Hea thereunder, and in and to the personal property described therein, and at all said times plaintiffs had full and complete knowledge of all the facts concerning and connected with the retaking of possession of said personal property by defendant herein and of the termination and foreclosure of all the rights of the said O'Hea under said contract and in and to the property described therein, and plaintiffs were at all times

familiar with, and knew, each and every action and proceeding taken by the defendant in the retaking of the possession of said personal property and in the termination and foreclosure of the rights of said O'Hea under said contract."

And the court further found that with a full knowledge of all these facts the plaintiffs agreed to purchase the said personal property, and that they would be satisfied with the title thereto so obtained.

There is evidence in the record to support all of these findings, contradictory though it may be. It may be further stated in this respect that O'Hea abandoned the property and machinery on the 20th day of March, 1923, which was prior to the time when the defendant took possession by placing an employee of plaintiff in charge; that subsequently thereto O'Hea told the representative of the defendant Smith that he realized that he was in default, and that he was willing to give up the property; this was prior to the petition in the bankruptcy proceedings.

There is an elaborate discussion in the record as to whether the federal court had jurisdiction to try and determine, in the action between the plaintiff herein and the bankrupt estate, the question involving the title to the property described in the complaint. In view of the conclusions hereinbefore reached, however, it would seem to be unnecessary to determine the question.

It follows from the foregoing that the judgment of the trial court was correct, and it is therefore affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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91 Cal. App. 649

PEOPLE v. HAFLINGER. (Cr. 1618.)

District Court of Appeal, Second District, Division 1, California. May 8, 1928.

1. Criminal law ⚷1158(4)—Judge's determination of admissibility of confession on conflicting evidence should not be disturbed on appeal.

Trial judge *held* under duty to determine admissibility of confession, and conclusion, based on conflicting evidence as to whether confession was free and voluntary, should not be disturbed on appeal.

2. Criminal law ⚷660—Trial during short absence of defendant's counsel held not error without court being notified of necessity for absence or requested to delay or to strike evidence.

Where defendant's attorney was absent for short period during first day of trial, though attorney for other defendants was present, and court directed counsel to show absent attorney portion of testimony read to jury, and counsel did not notify court of any necessity for his absence, nor request delay or present motion to strike out evidence received in his absence, court did not err in proceeding with trial, in absence of defendant's counsel.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Wilfred Haflinger was convicted of robbery in the second degree, and he appeals. Affirmed.

Hugh Dickson, Ben S. Hunter, and James Farraher, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

WOOD, Justice pro tem. Appellant was found guilty by a jury of the crime of robbery in the second degree. One Guy Sweinhart was walking with a lady along the ocean front between Venice and Ocean Park about 9:15 p. m. on October 12, 1927, when he was robbed at the point of a revolver in the hands of Melton Ball. The appellant, Ball, and one Russell, were jointly accused of the crime. Sweinhart testified that, as he walked along he saw three men ahead of him leaning over the railing by the sidewalk. As he passed them, one of the three, identified as the defendant Ball, drew the weapon, placed it against the witness' stomach, and took his watch and a small amount of cash. The witness could not identify the other two men.

In his brief appellant states:

> "So the issues narrow themselves down to the questions: Whether the confession introduced was free and voluntary, and whether the court erred in proceeding with the trial in the absence of appellant's counsel and without seeking appellant's permission to so do."

[1] Evidence was introduced by the prosecution to prove the confession was free and voluntary, while evidence to the contrary was presented by the defendants. It was the duty of the trial judge to determine the admissibility of the confession, and his conclusion, based upon conflicting evidence, should not be disturbed on appeal. People v. Fouts, 61 Cal. App. 242, 214 P. 657; People v. Grafft, 61 Cal. App. 7, 214 P. 273. Appellant points out that the testimony of Officer Steckel, given at the preliminary examination, was read to the jury, in which Steckel stated that officer Ross had held out certain promises to the defendant, Ball. It was established by Officer Ross, however, that his statement to Ball had been made after the other two defendants had signed the confession. He testified:

> "Did that conversation take place after this statement was made which the defendants Haflinger and Russell signed, or prior to that time? A. Why, as I recall the statement I made, I talked to Ball after the statements

were made and signed by the other two boys. He refused to sign it.

"Q. After Ball refused to sign it? A. After he refused to sign it."

[2] Appellant was represented by Attorney Dickson, and the other two defendants were represented by Attorney Clay. The record discloses that during the first day of the trial both lawyers were present. At the opening of the session of the following day Mr. Clay was present, but Mr. Dickson was absent for a short period. The court proceeded with the trial, and, when Mr. Dickson arrived, directed counsel to show him the part of the testimony of Officer Steckel that had been read to the jury. Mr. Dickson remarked that he "had to be in federal court." The record discloses that counsel for appellant did not notify the court of any necessity for his absence during the short period of the session. No request for delay was made, and no motion was presented to strike out the evidence received in his absence. In State v. Newman (S. C.) 80 S. E. 482, the rule is properly stated:

> "It is true appellant's counsel was absent during a part of the charge, upon what he thought was a necessary absence. But the proper practice is for counsel to ask permission to be absent, and request the court to suspend, stating the necessity; because it is for the court and not counsel to determine the necessity."

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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91 Cal. App. 521

HILLIKER v. BOARD OF TRUSTEES OR CITY COUNCIL OF CITY OF SEAL BEACH et al. (Civ. 5982.)★

District Court of Appeal, Second District, Division 2, California. May 2, 1928.

Hearing Denied by Supreme Court June 28, 1928.

1. Mandamus 🔑154(6), 182—Municipal corporations 🔑159(1)—Recall petitions, petition for writ of mandate, and writ itself, held not insufficient for referring to officers sought to be recalled as "member of board of trustees," "city trustees," and "city councilmen" (St. 1927, p. 1093, § 1; St. 1911 [Ex. Sess.] p. 128).

Under St. 1927, p. 1093, § 1, amending section 751 of "an act to provide for the organization, incorporation, and government of municipal corporations," which provides that government of city shall be vested in "a board of five trustees to be known as the city council," recall petitions, petition for writ of mandate, and writ itself were not insufficient because they referred to officer sought to be recalled as "member of the board of trustees of said city," and as "board of trustees or the city council," and to individuals as "city trustees or city councilmen," in absence of anything in statute requiring petition to contain exact official designation of officer sought to be removed, and since St. 1911 (Ex. Sess.) p. 128, does not require such degree of particularity.

2. Officers 🔑70½—Statute providing for recall of elective officials should be liberally construed.

Statute providing for recall of elective officers should receive a liberal construction, so as to promote the purposes for which it was enacted.

3. Appeal and error 🔑440—Trial court had inherent power, after appeal was taken, to set aside and amend judgment on ground it did not state what actually occurred.

Under trial court's inherent power to make its records state what actually occurred, such court had power to set aside and amend judgment on ground that it did not state what actually occurred, even after appeal therefrom had been taken, though by such appeal it lost jurisdiction of the cause.

4. Appeal and error 🔑74—Order made after judgment is not appealable, if appeal presents same questions as would be presented on appeal from judgment.

If appeal from order made after judgment presents same questions as would be presented on appeal from judgment, the order is not appealable.

5. Appeal and error 🔑82(2)—Order denying defendants' motion to set aside and amend judgment as not stating truth held appealable (Code Civ. Proc. § 963, subd. 2).

Order denying defendants' motion to set aside and amend judgment on ground that recital therein that defendants' counsel stipulated in open court that plaintiff have judgment as prayed for was not true, *held* appealable under Code Civ. Proc. § 963, subd. 2, providing that appeal may be taken from any special order made after final judgment.

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

Action by J. L. Hilliker against the Board of Trustees or the City Council of the City of Seal Beach and others. From a judgment granting writ of mandate directing the calling of a special recall election, and from order denying motion to amend judgment, defendants appeal. Order reversed; judgment affirmed.

Burr A. Brown, of Long Beach, for appellants.

Charles D. Swanner and Roland Thompson, both of Santa Ana, for respondent.

THOMPSON, J. The plaintiff filed an action in the superior court against respondents (appellants here), in which they sought a writ of mandate directing the respondents to call a special election responsive to recall petitions seeking the recall of R. E. Dolley, J. R. John, and C. O. Wheat, as members of the board of trustees or city council of the city of Seal Beach. The respondents by way of

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★Hearing denied by Supreme Court.

return to the alternative writ demurred to the petition, and also made a motion to quash the alternative writ of mandate. After argument, the court overruled the demurrer, and denied the motion, and, upon the statement of counsel for respondents that he did not desire to raise any issue of fact, but desired to stand upon his demurrer and motion, judgment was entered that the peremptory writ issue, and from that judgment the respondents appeal. On the same day that respondents filed their notice of appeal from this judgment, they served upon counsel and filed in the court below a notice of motion to set aside and amend the judgment on that ground that the judgment recited that counsel for respondents "on behalf of said defendants, and each of them, stipulated in open court that said plaintiff have judgment as prayed for, and that a peremptory writ of mandamus issue in said matter," whereas in truth he did not so stipulate, but, on the contrary, "announced in open court that said defendants, and each of them, proposed to stand upon said motion and demurrer, and would not plead further in said action; * * * that, in order to shorten the time for appeal and the final determination of said action, judgment might be entered upon the rulings on said demurrer and motion in favor of said plaintiff." When this last motion, pursuant to the notice, was made, it was denied by the court, and respondents also filed notice of appeal from that order.

[1] The question raised by the demurrer and motion and relied upon here relates to the sufficiency of the recall petitions. It is contended that they are insufficient, because in each instance they referred to the officer sought to be recalled "as member of the board of trustees of said city of Seal Beach." Our attention is directed to the fact that at the last legislative session the Legislature adopted an act to amend section 751 of "an act to provide for the organization, incorporation, and government of municipal corporations" (Stats. 1927, p. 1093), which, so far as material here, reads as follows: "The government of said city shall be vested in: A board of five trustees to be known as the city council." Counsel for appellants annexed to and made a part of their notice of motion to quash the alternative writ what purports to be a copy of an ordinance adopted by the city council of Seal Beach, which, so far as it can possibly be said to affect this proceeding, recites that the ordinance is passed for the purpose of conforming to the amendment which we have just quoted, and provides that "* * * the hereinafter named city officers and officials shall be designated by the following titles and positions: 'A member of the board of trustees shall be officially known as a councilman."

Assuming solely for the purposes of argument, that the court had the right to consider the averment that the city council regularly adopted the ordinance of which this is said to be a copy, we are of the opinion that appellants' argument is wholly without solid foundation. Considering now only the alleged insufficiency in form of the petition, the provisions of "an act to provide for the recall of elective officers of incorporated cities and towns" (Stats. 1911 [Extra Sess.] p. 128) do not require the same degree of particularity in this respect as contended for by appellants. It reads:

> "The procedure to effect such removal or recall shall be as follows: A petition demanding the election of a successor to the person sought to be removed shall be filed with the clerk of the legislative body of such city or town, which petition shall be signed by qualified voters equal in number to at least twenty-five per cent. of the entire vote cast within such city or town for all candidates for the office which the incumbent sought to be removed occupies, at the last preceding regular municipal election at which such officer was voted for * * * and shall contain a statement of the grounds on which the removal or recall is sought, which statement is intended solely for the information of the electors." (There then follows a statement that the insufficiency of the last statement shall not affect the election and a statement of the things to be done and information to be supplied by the individual signers.)

[2] Nowhere do we find a requirement that the petition shall contain the exact official designation of the officer sought to be removed. We may assume that it is necessary to sufficiently designate him so that no ambiguity shall exist concerning the office from which it is sought to recall the person, but that requirement is amply satisfied in the present instance by designating him as a member of the board of trustees. No possible uncertainty could exist in the minds of the legislative body or of the signers of the petition relative to the office or officer intended to be described. The amendment of 1927 upon which appellant relies, and which we have already quoted, uses the expression "a board of five trustees." It is as though it read "a board of five trustees constituting the city council." So far as the statute is concerned, it would be entirely proper to refer to one of the individual members of the council as one of the five trustees composing the council. When we advert to the well-established principle that the statute providing for the recall of elective officials "should receive a liberal construction so as to promote the purposes for which it was enacted" (Magoon v. Heath, 79 Cal. App. 632, 250 P. 583, and cases there cited), we are bound to declare that its provisions have been fully complied with in this instance. The requirement in the Recall Act that "there shall be printed on the recall ballot, as to every officer whose recall is to be voted on thereat, the following question: 'Shall (name of person against whom the recall petition is filed)

be recalled from the office of (title of the office)?'" does not alter the situation. It may indicate the necessity of designating the office with sufficient certainty that those whose duty it is to prepare the ballot may designate it officially, but the duty there imposed refers to the preparation of the ballot, and not to the form of the petition.

Appellants also rely upon the same argument with respect to the sufficiency of the petition for the writ and the writ itself. The caption of the petition refers to respondents there (appellants here) as "board of trustees or the city council of the city of Seal Beach," and to the individuals as "city trustees or city councilmen of said city of Seal Beach." The body of the petition refers to them as the "board of trustees or city council" and as "city trustees or city councilmen." The peremptory writ is directed to "board of trustees, known as the city council of the city of Seal Beach," and to individual members (naming them), "trustees and members of the city council." A statement of the situation is a sufficient refutation of the argument. The petition might perhaps have been drawn so as to designate the respondents as the board of trustees, known as the city council, but it is obvious that it was drawn with care to describe them by their proper official title whether as trustees or as councilmen. It would be absurd and unjust to hold that the petition or the writ was insufficient for the reason urged. A court of justice is not the proper place to give serious consideration to a play upon words without substance.

[3] Counsel have argued the question of whether the order made by the trial court denying the motion to set aside and amend the judgment is an appealable order, and also whether the trial court had any jurisdiction to entertain such a motion subsequent to the appeal from the judgment. Considering the last of these questions first, we think counsel for respondents mistake the nature of the motion when they insist that the trial court had no jurisdiction to entertain it. The motion was one in effect to correct the judgment and make it speak the truth. The court always has the inherent power to make its record state what actually occurred. Boyd v. Burrel, 60 Cal. 280; Fay v. Stubenrauch, 141 Cal. 573, 75 P. 174; Biaggi v. Ramont, 189 Cal. 675, 209 P. 892. As said in Fay v. Stubenrauch, supra:

"It is true that the court by the appeal loses jurisdiction of the cause, for the purposes of the appeal, but it does not lose jurisdiction of its records."

[4, 5] The same misconception of the nature of the motion is manifest from counsel's argument that the order is not appealable. Of course, it is the law, for which there is abundant authority, that if the appeal from the order made after judgment would present the same questions as would be presented on an appeal from the judgment, the order is not appealable. That, however, is not the situation here. The proposition advanced on the appeal from the order is that the court had no right to decline to entertain a motion to correct the recitals in its judgment in accordance with the facts, so that appellants would not be foreclosed of the right of appeal from the judgment. Subdivision 2 of section 963 of the Code of Civil Procedure provides that an appeal may be taken "from any special order made after final judgment." This is such an order. The same persuasive reason exists for holding that the order is appealable as existed in the case of In re Yoder, 199 Cal. 699, 251 P. 205, to wit: The circumstances are such that "'an appeal from the final order would be vain for lack of a record showing the right of the aggrieved party.'" Here the appellants would have been precluded of their right of appeal by the recital in the judgment that it was by stipulation.

We are not unmindful of the intendments which must ordinarily be indulged in favor of the orders or judgments of the trial court. In this instance, however, the court declined to consider, and denied, the motion for lack of jurisdiction. The facts appearing in the affidavits without denial present a situation showing, not only that the court had jurisdiction, but also that the motion, in so far as it attempted to correct the judgment, should have been granted. The order denying the motion must therefore be reversed. In the interests of justice, and to expedite the disposition of the cause, we have considered the appeal from the judgment on its merits, and as though the motion had been granted. From the discussion it is obvious that the reversal of the order does not require a reversal of the judgment.

Order reversed. Judgment affirmed.

We concur: WORKS, P. J.; STEPHENS, Justice pro tem.

91 Cal. App. 516

PEOPLE v. PYLER. (Cr. 1623.)★

District Court of Appeal, Second District, Division 1, California. May 2, 1928.

Hearing Denied by Supreme Court June 28, 1928.

1. Criminal law 🔑1159(4)—Appellate court may not reverse judgment because testimony of other witnesses differs from testimony of witnesses introduced by prosecution.

That in their testimony other witnesses may have differed from testimony of witnesses introduced by prosecution affords no legal reason to appellate court for reversal of judgment.

2. Criminal law 🔑1142—Record is presumed correct on appeal.

On appeal, record is presumed to speak truth.

3. Criminal law 🔑1119(1)—Record held not to show prejudice from alleged error in refusal to permit defendant to discharge attorney during trial.

Where trial court's refusal to permit defendant to dismiss attorney in course of trial was assigned as error, assuming that defendant ineffectually endeavored to dismiss his attorney during course of trial, nevertheless, since only complaint with reference to matter was that he was not permitted to conduct own defense, and was thereby prevented from introducing evidence, substance of which was not shown by affidavit in record, *held* that such alleged error did not show defendant's rights had been prejudiced.

4. Criminal law 🔑1163(1)—Error in trial, to be available to appellant, must affirmatively appear to have been substantial, prejudicial, and to have resulted in miscarriage of justice.

On appeal from judgment in order that alleged error committed on trial may be made available to appellant, it must affirmatively appear that such error was substantial, that it prejudicially affected rights of appellant, and that it resulted in miscarriage of justice.

5. Criminal law 🔑992—Defendant could not complain of failure of trial judge to follow jury's recommendation of leniency; imposition of sentence being solely for judge.

Where jury, in rendering verdict of guilty, recommended that defendant be given light sentence, and judge declined to accept verdict in such form, but requested jury to separate its verdict from recommendation of leniency, it being clear that judge was fully aware of substance and effect of recommendation, *held* that, since final determination of matter rested solely with judge of trial court, if in opposition to such recommendation he chose to follow own judgment, defendant could not complain.

6. Criminal law 🔑1186(4)—In prosecution for assault, prosecutor's statement that defendant had been jailed for failure to support child, though prejudicial, held not ground for reversal; no miscarriage of justice resulting (Const. art. 6, § 4½).

In prosecution for assault to do great bodily harm, where prosecutor, in argument to jury, stated that defendant had served in jail for failure to support his child, *held* that, though statement was manifestly prejudicial, yet, since evidence amounted to practical demonstration of defendant's guilt, and examination of entire case convinced appellate court that error did not result in miscarriage of justice under Const. art. 6, § 4½, it was not grounds for reversal.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Tom Pyler was convicted of an assault to do great bodily harm, and he appeals. Affirmed.

Tom Pyler, in pro. per.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

HOUSER, J. The appeal herein is prosecuted by defendant personally from a judgment of conviction of the crime of assault by means and force likely to produce great bodily harm. Many different points for reversal of the judgment are advanced by appellant; but no authorities are cited in support of any or either of his several contentions. Grave charges against nearly every one who in any wise was connected with the trial in the lower court, together with intemperate, disrespectful language, are freely interspersed throughout appellant's brief. Were it not for the consideration which this court is constrained to give to a defendant who, on appeal from a judgment of conviction of the commission of a criminal offense, is without legal counsel, resort to steps which might involve unpleasant consequences to the author of such a "brief" would clearly be indicated. In the circumstances here present, the lack of regularity in arrangement and conformity with established rules in the presentation of a brief will be overlooked, and due consideration will be given to the substance of the appeal.

[1] In effect, appellant's first specification of error is that the verdict of the jury was contrary to and without support of the evidence. An examination of the record on appeal discloses the fact that each of several witnesses clearly and positively testified to facts from which the jury was fully justified in reaching the verdict of which complaint is made. That in their testimony other witnesses may have differed from the testimony of the witnesses introduced by the prosecution affords no legal reason to an appellate court for a reversal of the judgment.

[2-4] It is next urged by appellant that the trial court erred in refusing to permit defendant to dismiss his attorney in the course of the trial. The transcript on appeal fails to show that any such request was made by defendant until after the verdict had been returned by the jury—at which time the request was granted. However, by affidavit, each of two persons deposed to the legal con-

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★Hearing denied by Supreme Court.

clusion, only, that on the day on which the trial occurred she "did hear and see Tom Pyler try to dismiss his attorney, and the judge would not give him a hearing." No counter affidavit respecting such alleged incident was filed. But, when it is considered that the record is presumed to speak the truth, and that, on an occasion subsequent to the rendition of the verdict, when the question of the correctness of the reporter's transcript of the proceedings in that connection was raised, the judge of the trial court stated that at the time in question defendant made no audible request that his attorney be dismissed, it must be concluded that, if such request was ever made by defendant, it was done in such a low voice that neither the judge nor the stenographic reporter heard it. Moreover, even if it be assumed that defendant ineffectually endeavored to dismiss his attorney during the course of the trial, his only complaint with reference to the matter is that, because he was not permitted thereafter to conduct his own defense, he was prevented from introducing testimony which would have been given in his behalf by certain witnesses. The record contains no affidavit, even by the defendant, as to what testimony would have been given by any or all of such witnesses had they or any of them testified on the trial of the action. With reference thereto, the most that may be gathered from scattered statements contained in defendant's brief relates to immaterial matters, which, on objection thereto, properly would not have been admitted in evidence. On appeal from a judgment, in order that alleged error committed on the trial of an action may be made available to an appellant, it must affirmatively appear that such error was substantial, that it prejudicially affected the rights of the appellant, and that it resulted in a miscarriage of justice. Nothing contained in the record in this case indicates that the alleged error of which appellant complains brings it within such rule.

[5] Inferentially only, it appears from the transcript of the proceedings that the verdict of guilty as originally returned by the jury contained a recommendation to the judge of the trial court to the effect that defendant be given a light sentence; that the judge declined to accept the verdict in such form, and required the jury to separate its verdict proper from any recommendation of leniency to defendant in the matter of sentence or judgment which might thereafter be pronounced. While appellant criticizes the action of the trial court in the premises, it is impossible to perceive how or in what manner any prejudice to defendant's substantial rights could have resulted therefrom. No claim is made by appellant that any difference in the degree of the offense committed by defendant existed as between the original and the final verdict of the jury. Nor is authority cited by appellant which in a case of the kind before the court authorizes the jury to make a recommendation of any kind; or in case a recommendation be made which enjoins upon the judge of the trial court the duty of even considering the suggestion made by the jury, much less in any way that the judge be bound by it. In other words, it may be said that the action of the jury in the premises was a "pure gratuity," entirely outside its functions, and which, if attempted by a private person, undoubtedly would have been resented by the trial court as an affront to its dignity, and resulted in serious consequences to the individual who had the temerity to attempt to unlawfully interfere with, or to influence, the judgment of the court. But, aside from such considerations, it may be noted that the judge of the trial court in no way prevented, or attempted to prevent, the jury from presenting its suggestion or recommendation with reference to the sentence or judgment thereafter to be pronounced. In fact, it inferentially appears from the record that the verdict as originally returned by the jury, without being officially filed with the clerk of the court, nevertheless was retained by him, and presumably was placed among the records in the action. At any rate, it is clear that the judge was fully aware of the substance and effect of the recommendation which the jury desired to make regarding the sentence which should be imposed upon defendant. The final determination of the matter rested solely with the judge of the trial court. If, in opposition to the recommendation made by the jury, he chose to follow his own judgment, the point is not available to the defendant.

[6] Misconduct on the part of the deputy district attorney in charge of the prosecution is relied upon by appellant as a sufficient reason for a reversal of the judgment. In the course of the trial, the fact developed that, prior to the time of the commission of the assault of which defendant was convicted, he had been incarcerated in the county jail. In addressing the jury, the deputy district attorney in charge of the prosecution stated that "the reason Tom Pyler served in jail was because he failed to support his child." On objection being made to such remark by counsel representing defendant, the jury was instructed by the court that:

> "The jury will disregard all remarks by counsel which are not supported by the evidence. As I have heretofore informed you, the statement of counsel is not to be regarded as evidence of any fact."

It is clear that the statement made by the deputy district attorney was entirely uncalled for, and that it had no place in legitimate argument in the action on trial. The deputy district attorney was not a witness on the trial of the action, and in argument had no right to presume to inform the jury as to any matter of fact, especially as to one which had no relevancy to the question of defendant's guilt of the offense of which he was charged. That such a statement ordinarily would have a tendency to prejudice the jury against the defendant is manifest. While presumably the instruction by the court given to the jury in connection therewith may have had some effect in the way of eradicating such statement from the minds of the members of the jury, it is entirely possible that such instruction was of no avail. However, the evidence in the case amounted to a practical demonstration of defendant's guilt; and, "after an examination of the entire cause, including the evidence," this court is of the opinion that the error of which complaint is made did not result "in a miscarriage of justice." Section 4½, art. 6, Const.

Various other points are suggested by appellant as affording reasons for a reversal of the judgment—none of which appears to be seriously argued. Consideration of each of such points fails to convince this court of its merit, or that it is of that importance which would justify discussion.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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91 Cal. App. 590

JAMESON v. WARREN et al. (Civ. 6017.)

District Court of Appeal, First District, Division 1, California. May 4, 1928.

1. Appeal and error 🔑108—Order denying motion to amend conclusions of law and for entry of different judgment held appealable.

Order denying motion to amend conclusions of law or findings of fact and for entry of different judgment *held* appealable.

2. Judgment 🔑276, 388—Notice of entry of judgment filed before entry held ineffectual, and notice of intention to vacate judgment filed 20 days thereafter was timely (Code Civ. Proc. § 663a).

Where notice of entry of judgment was mailed to defendant's attorneys four days before judgment was entered, such notice was premature and ineffectual, and notice of intention to move to vacate judgment, made 20 days after defective notice, was within time prescribed by Code Civ. Proc. § 663a.

3. Corporations 🔑121(1)—Finding requiring return of stock fraudulently procured by defendant, and transferred to secure loan on plaintiff paying amount secured supported personal judgment against defendant for like amount.

In action to rescind exchange of stock, finding that exchange was induced by fraud of defendant, and that stock received by plaintiff was valueless, together with further finding that plaintiff was entitled to return of his stock, which had been pledged to another on payment of amount secured by third party's lien on stock, *held* sufficient to support personal judgment against defendant for like amount.

4. Usury 🔑41—Interest contingently payable, putting lender's lawful profit in hazard, need not be limited to legal rate (St. 1919, p. lxxxiii).

When payment of full legal interest or any part thereof is subject to contingency, so that lender's lawful profit is wholly or partially put in hazard, interest contingently payable need not be limited to legal rate, providing parties are contracting in good faith, and without intent to avoid statute (St. 1919, p. lxxxiii) against usury.

5. Usury 🔑52—Contract adding dividends on stock pledged to interest, thus exceeding lawful rate, held intended to violate usury law, making agreement effective only for amount of loan (Usury Law).

Where large dividends on stock pledged to secure loan were anticipated, and it was contemplated by parties that such dividends, added to stipulated interest for loan agreed to be paid at maturity, in any event would exceed lawful interest, and more than equal amount of loan, it sufficiently appeared that parties intended to violate Usury Law (St. 1919, p. lxxxiii), and effect of agreement was to exact for use of money loaned sum in excess of lawful interest, and hence court did not err in concluding that agreement was not in full force and effect, except as to amount of loan.

6. Corporations 🔑123(11)—Pledgee in good faith of stock procured by defendant by fraud held entitled to possession as security for repayment of loan, though usurious (Civ. Code, §§ 2986, 2988).

In action to rescind exchange of stock procured by defendant through fraud, and pledged to third party without notice of fraud, for loan based on usurious interest, third party, as pledgee, was entitled to possession of stock as security for repayment of amount of loan under Civ. Code, §§ 2986, 2988.

Appeal from Superior Court, Alameda County; J. T. B. Warne, Judge.

Action by Henry Jameson against C. C. Warren, doing business under the fictitious name of C. C. Warren & Co., and others. From an order denying motion to amend conclusions of law and to enter different judgment, defendants appeal. Cause remanded, with instructions to modify judgment, and, subject to modification, order affirmed.

Clark, Nichols & Eltse, of Berkeley, for appellants.

Dozier, Kimball & Dozier, of San Francisco, for respondent.

CASHIN, J. An appeal by the defendants from an order denying a motion to amend the conclusions of law upon the findings of fact in the above-entitled action and for the entry therein of a different judgment.

Respondent makes the preliminary objections that the order was not appealable, and that the notice of intention to move to vacate the judgment was not given within the time prescribed by section 663a of the Code of Civil Procedure.

[1] As held in the following cases, the order was appealable: California Delta Farms v. Chinese, etc., Farms (Cal. Sup.) 255 P. 1097; Condon v. Donohue, 160 Cal. 749, 118 P. 113.

[2] This section required that the notice of intention therein provided for should be served and filed within ten days after notice of the entry of judgment. The notice of entry of the judgment and the only notice served was mailed to the attorneys for appellants on November 14, 1924; but, as shown by the record, the judgment in the action was not entered until November 18, 1924. This notice was premature, and therefore ineffectual (North American Dredging Co. v. Outer Harbor, etc., Co., 178 Cal. 406, 173 P. 756; Grimes v. Lamar, 60 Cal. App. 623, 213 P. 270), and the notice of intention, which was served and filed on December 3, 1924, was within time.

The action was one for rescission; the complaint alleging that the plaintiff was induced by the fraudulent representations of defendant Warren to exchange 100 shares of the stock of Guarantee Mortgage Company for certain shares of the common and preferred stock of Morosco Holding Company, Inc., owned by Warren. It was further alleged that defendant Lynip claimed an interest in the stock transferred by the plaintiff to Warren, and that the claim was without right.

The court found the allegations of fraud to be true, and that the plaintiff was entitled to rescind. It was further found that the stock of the Morosco Holding Company was valueless, and, by implication, that the stock of the Guarantee Mortgage Company had been pledged to defendant Lynip by Warren to secure the payment of a promissory note executed by the latter for the sum of $2,000; that no part of the note nor any sums under the contract hereinafter mentioned had been paid to Lynip; and that the latter acquired an interest in the stock in good faith for value and without notice of the fraud or the claim of plaintiff, it being further found, however, with respect to this transaction "that the said loan, promissory note, and contract above set forth are not in full force and effect, except to the extent of $2,000."

The contract referred to as shown by the findings was in the form of a letter signed by Lynip, and addressed to and approved in writing by Warren, and of which the following is a copy:

"October 1, 1923.

"Mr. C. C. Warren, Oakland, Cal.—Dear Sir: I am this day receiving from you a certificate No. 410, dated July 9th, 1923, signed by W. A. Swall, president, and W. H. Lemman, sect., for one hundred (100) shares of capital stock of the Guarantee Mortgage company, San Francisco, U. S. A., incorporated under the laws of the state of California, 1919. And I hand you herewith my check for two thousand dollars ($2,000.00) for which I am receiving your note for two thousand ($2,000.00) dated this 1st day of October, 1923, bearing interest at the rate of eight per cent. (8%) per annum. Conformable to the agreement which we had this day I am accepting the above described certificate of stock as security for the loan of two thousand ($2,000.00), and I agree to return to you, provided the loan is not paid within fifteen days (15), one-half of all the amount received on said stock from the Guarantee Mortgage Company as a dividend over and above four thousand dollars ($4,000.00).

"Should the same be paid within fifteen days I will deliver to you three-quarters (¾) of the amount over and above the two thousand dollars ($2,000.00) received from the dividends. It is understood that the first money received from the Guarantee Mortgage Company is to apply on the principal of the note. It is understood and agreed that the note of $2,000.00 received from you for my check for like amount will be paid on October 31, 1923, as specified in said note, and that the amount received from the dividends from said company will be paid to you as above stated together with the two thousand dollars ($2,000.00) which you may pay on October 31, 1923.

"[Signed] B. F. Lynip."

As conclusions of law it was found that the agreement between the plaintiff and Warren was fraudulent and void, and that the stock of the Guarantee Mortgage Company should be delivered to the plaintiff subject to a lien thereon in favor of the defendant Lynip in the sum of $2,000; that the plaintiff should take judgment against Warren for the sum of $2,000, and that the stock of the Morosco Holding Company be delivered to Warren upon the payment of the money judgment against him; and, further, that Lynip had no right, title, or interest in the stock of the Guarantee Mortgage Company, except to the extent of his lien thereon.

The judgment followed the above conclusions; and, as grounds for the motion, it was urged that the conclusions that plaintiff was entitled to a money judgment against Warren, and that the contract between the latter and Lynip was usurious or otherwise illegal, and should not be enforced according to its terms, were not supported by the findings.

Appellants moved for an order vacating the judgment, amending the conclusions of law, and for the entry of a new judgment denying a personal judgment against Warren and adjudging Lynip to be entitled to enforce the contract with Warren according to its terms, with the right to the possession of the stock of the Guarantee Mortgage Company as therein provided.

[3] The findings that the exchange of stock between the plaintiff and Warren was induced by the fraud of the latter, and that the stock received by the plaintiff was valueless, with

the further finding that the plaintiff was entitled to the return of the stock of the Guarantee Mortgage Company upon payment of the amount secured by Lynip's lien thereon, were sufficient to support a personal judgment against Warren for a like amount, and the motion to amend the conclusions of law in this respect was properly denied.

Appellants contend that, without a finding of facts showing that the contract between them was usurious or otherwise illegal, the conclusion of the trial court that the same was "not in full force and effect, except to the extent of $2,000," cannot be sustained.

The usury law provides that no person shall directly or indirectly take or receive any money, goods, or things in action, or in any other manner whatsoever, any greater sum or any greater value for the loan or forbearance of money, goods, or things in action than at the rate of $12 upon $100 for one year; and that any agreement or contract of any nature in conflict with this provision shall be null and void as to any agreement or stipulation therein contained to pay interest. St. 1919, p. lxxxiii.

According to the contract, the stock was delivered to Lynip as security for a note dated October 1, 1923, which Warren agreed to pay in any event on October 31, 1923. In addition to such payment, it was agreed that the lender should be entitled to certain sums from any dividends made by the corporation—which, as may be inferred from the pleadings of the defendants, was in course of liquidation; the amounts being dependent upon whether the note be paid before or after fifteen days from its date. As the contract appears to have been construed by the trial court (with which construction we agree), it was agreed that, should the loan with interest be paid within 15 days, the lender, still being entitled to retain the stock, should receive, in addition to such payment, the first $2,000 paid as dividends, and one-quarter of all further dividends. If the note was not paid within 15 days, he was to retain the sum of $4,000 out of such dividends, plus one-half of all further dividends, it being further stipulated, however, that, in case the borrower repaid the loan on October 31, 1923, he would be entitled to the return thereof, but only out of dividends received by the lender over and above the sum of $2,000.

[4] The interest on the note at the rate stipulated, namely, 8 per cent. per annum, would at maturity have amounted to $13.33, and would have amounted to $20 had the parties stipulated for the maximum amount of interest that could be legally exacted. When the payment of the full legal interest or any part thereof is subject to a contingency so that the lender's lawful profit is wholly or partially put in hazard, the interest so contingently payable need not be limited to the legal rate, providing the parties are contracting in good faith, and without intent to avoid the statute against usury. 39 Cyc., Usury, p. 952.

[5] In the present case, however, while the evidence respecting the condition of the corporation is not before us, it sufficiently appears from the record that large dividends upon the stock pledged were anticipated, and that it was contemplated by the parties that such dividends, added to the stipulated interest on the loan—which with the principal Warren agreed to pay at maturity in any event—would not only exceed the lawful rate of interest but would more than equal the amount of the loan. We think it is sufficiently shown by the terms of the contract that it was the intention of the parties to violate the usury law; and that the effect of their agreement, in view of what fairly appears to have been the condition of the corporation within their knowledge, was to exact for the use of the amount loaned sums in excess of a lawful rate of interest.

[6] While we agree with the conclusions of the trial court as to the effect of the transaction, and that the stipulation for the payment of interest is unenforceable, we are nevertheless of the opinion that Lynip, as a pledgee, was entitled to the possession of the stock as security for the repayment of the amount loaned (Civ. Code, §§ 2986, 2988; Puckhaber v. Henry, 152 Cal. 419, 93 P. 114, 125 Am. St. Rep. 75, 14 Ann. Cas. 844), and that the motion to that extent should have been granted.

The judgment for the above reason should be modified by providing therein that certificate No. 410 for 100 shares of the capital stock of Guarantee Mortgage Company now in possession of the clerk of the superior court of the state of California in and for the county of Alameda be delivered to B. F. Lynip, as pledgee thereof, and that the same is subject to a lien thereon in favor of said pledgee as security for the payment of the sum of $2,000.

It is therefore ordered that the cause be remanded, with instructions to the court to modify its judgment in accordance with the above, and, subject to such modification of the judgment, the order appealed from is affirmed, appellant Lynip to recover his costs of appeal.

We concur: TYLER, P. J.; KNIGHT, J.

91 Cal. App. 554

THOMPSON et al. v. THOMPSON et al.★
(Civ. 6124.)

District Court of Appeal, First District, Division 2, California. May 3, 1928.

As Modified May 29, 1928. Hearing Denied by Supreme Court July 2, 1928.

1. Wills 🔑88(2)—Under deed delivered to third person to hold until grantee's death, vital question is whether grantor intended to vest present title or title was conditional on grantor's prior death.

In construing deed handed to third person, with instructions to hold same until death of grantor and then to deliver to grantee, vital question to be determined is whether grantor intended to vest a present title in grantee on delivery to holder, or whether delivery by holder to grantee was conditional upon prior death of grantor.

2. Wills 🔑88(4)—Deed delivered to third person to give to grantee on grantor's prior death is testamentary and subject to rules of wills.

Deed delivered to third person to give to grantee on condition of grantor's prior death is testamentary and subject to all rules required by law of wills.

3. Wills 🔑88(4)—Deed delivered to third person for delivery to grantee on grantor's dying before grantee did not then vest title.

Deed delivered to third person for delivery to grantee, conditional on grantor's dying before grantee, *held* not then to vest title in grantee; being testamentary in character.

4. Trusts 🔑103(5)—Decedent's former partner and business associate held required to deal with decedent's executor as if fiduciary of decedent, making void, as against heirs, obtention of property by misrepresentations.

Decedent's former partner and corporation business associate *held* required to deal with decedent's executor, in the acquisition of decedent's property, as if he were a fiduciary of decedent, where either the partnership existed at time of decedent's death, or, if corporation then existed, it was merely a thinly disguised partnership, making fraudulent and void, as against decedent's heirs, such surviving partner's obtention of property by misrepresentations as to decedent's interests therein.

5. Equity 🔑56—Equity will look through form and see real partnership disguised in corporation.

Equity will look through the form of a corporation and see the real partnership thinly disguised behind the corporate dress.

6. Fraud 🔑7—Fiduciary relations are not found solely in legal relationships, but are found where relation of trust and confidence exists between friends.

Fiduciary relations are not found solely in those legal relationships, such as guardian and ward, husband and wife, trustee and beneficiary, but are also found where, in effect, the relation of trust and confidence exists between trusting friends.

7. Trusts 🔑110—Evidence held to support finding that between defendant and deceased former partner such confidential relationship existed as to require defendant to deal with deceased's executor, in acquiring property, as fiduciary (Code Civ. Proc. § 1963).

Evidence *held* to support finding that there existed between defendant and his deceased former partner and corporation associate such confidential relationship as to require the defendant in dealing with deceased's executor in acquiring property from the estate, to negotiate, because of Code Civ. Proc. § 1963, as fiduciary.

8. Partnership 🔑259—Presumption that thing once proved to exist continues as long as usual with such things would support finding partnership between defendant and decedent existed to time of decedent's death (Code Civ. Proc. § 1963).

Presumption, under Code Civ. Proc. § 1963, that a thing once proved to exist continues as long as is usual with things of that nature would support finding that partnership relation between defendant, accused of fraudulently obtaining property of partner after partner's death, and decedent, existed to time of decedent's death.

9. Trusts 🔑103(5)—Surviving partner, procuring decedent's corporation stock by misrepresentation, held involuntary trustee for heirs (Civ. Code, § 2224).

Surviving partner's misrepresentations to decedent's executor, inducing sale of decedent's corporation stock by causing executor to believe statements as to its value, *held* to make such survivor, because of Civ. Code, § 2224, involuntary trustee of the property for the heirs.

10. Executors and administrators 🔑453(4)—Decree for disposition of decedent's property held fraudulent and not binding on heirs, where purchaser was decedent's fiduciary.

Decree relative to disposition of decedent's property in executor's hands *held* fraudulent and not binding on decedent's heirs because of purchaser's fraud, where purchaser was decedent's fiduciary due to previous partnership relation.

11. Trusts 🔑103(5)—Decedent's fiduciary, who, on purchase from executor, of corporation stock, became involuntary trustee thereof, became trustee of corporation's physical properties (Civ. Code, § 2243).

Decedent's fiduciary, who, on purchase from executor of corporation stock, became involuntary trustee thereof, also became, under Civ. Code, § 2243, involuntary trustee of corporation's physical properties, precluding his being able to convey to himself a good title to such corporate properties.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Edith Thompson and others against Omer C. Thompson and others. From the judgment, plaintiffs appeal. Reversed with instructions.

★Hearing denied by Supreme Court.

Gordon Gray and Walter Ames, both of San Diego, and Hewitt, Ford, Crump & Penn of Los Angeles, for appellants.

Carl Alex Johnson, Sloane & Sloane, and Tomkins & Clark, all of San Diego, for respondents.

NOURSE, J. Plaintiffs sued as legatees of specific bequests under the will of George G. MacKay, deceased, charging the defendant Thompson with fraud, deceit, and concealment through which he obtained the bulk of the MacKay estate. The cause was tried before the court sitting without a jury, and resulted in findings and judgment favorable to the defendants, from which the plaintiffs have appealed upon a bill of exceptions.

MacKay died testate on the 18th day of October, 1921, and by the terms of his will, executed May 20, 1921, he made specific bequests aggregating $150,000 to the plaintiffs herein—two sisters, a brother, and two nieces, all of whom resided in Canada at all stages of this proceeding. In due course of administration of the estate a final decree of distribution was entered February 14, 1923, reciting that all the money on hand for the payment of such bequests was the sum of $20,808.81, and awarding to each of said legatees a proportionate amount of the sum named in the will, leaving an unpaid balance to plaintiff Edith Thompson of over $43,000 and an unpaid balance to each of the four other legatees of over $21,000. Charging that the defendant Thompson immediately upon the death of the deceased entered into a scheme to defraud the estate of valuable assets, and that, as a part of such conspiracy, he deceived the executor and his attorney by misrepresenting to them material facts and by withholding and concealing valuable information from them, the plaintiffs by this action seek to have certain deeds and transfers annulled and set aside certain court proceedings declared void, and ask that the shares of stock of the two corporations organized by the deceased and defendant Thompson be declared property of the MacKay estate or that in lieu thereof the defendants be adjudged to hold the properties of said corporations in trust for the plaintiffs or be required to pay from the proceeds thereof the unpaid balance which plaintiffs claim to be due under the terms of the will.

The business association of MacKay and Thompson began some time in 1905 for the purpose of acquiring real property in the city of San Diego. MacKay was a resident of the city of Los Angeles, where he was employed as a silk buyer and was reputed to be a man of means, and Thompson was an employee in the shoe department of a dry goods concern located in the city of San Diego. The two were warm friends, who trusted each other implicitly, and entered into their real estate venture without any formal articles of partnership. In this manner they acquired a number of properties in that city, title always being taken in the name of Thompson, but in February, 1910, they executed a partnership agreement reciting the fact that they had acquired the properties in the manner stated, and that the purpose of the agreement was to declare that each owned an undivided one-half interest in all the properties acquired; that is to say, the properties which they at the time held and which were expressly described in the partnership agreement. Thereafter, and on September 21, 1910, MacKay signed a grant deed conveying to Thompson an undivided one-half interest in all the real property described in this partnership agreement, and handed the deed to a notary public, who took the acknowledgment, with instructions to deliver it to Thompson on the death of the grantor. The parties continued under their partnership arrangement to buy and sell other properties in the city, and some time in the year 1913 they erected the Knickerbocker Hotel on lots A and B of block 63; lot A being one of the lots which was included in the partnership agreement as well as in the MacKay deed of 1910 and lot B having been acquired by the parties at a time subsequent thereto, which is not disclosed by the evidence. In 1915 defendant Thompson left the shoe department and became the manager of the Knickerbocker Hotel, which position he occupied at the time of the death of MacKay.

In the latter part of this year and in January, 1916, Thompson was sued by a creditor named Daugherty and actions were threatened by other creditors. To avoid these creditors, Thompson organized two corporations, one the Thompson-MacKay Company, incorporated for 1,000 shares, and the other the Omer C. Thompson Company, incorporated for 150 shares. One share of stock of each of these corporations was issued to Thompson and two dummies who were named as incorporators, and who became, with Thompson, the directors of each corporation. Thompson was elected president, treasurer, and general manager, and in fact became the sole directing head of both corporations. At the time of incorporation Thompson procured the passage of a resolution by the board of directors of the Thompson-MacKay Company, reciting that an offer had been received from MacKay to sell to the company all the real properties described in the partnership agreement (except two lots which are not involved here) and also lot B of block 63, one of the lots upon which the Knickerbocker Hotel had been built. This offer was formally accepted by the directors, and in consideration of this transfer 997 shares of its stock were issued to MacKay. At the time of this resolution, and for the purpose of carrying it into effect, the defendant Thompson filed a sworn statement with the commissioner of corporations seeking permission to issue 997 shares of the stock of this corporation to MacKay for the purpose of enabling the corporation to take over and operate "real estate holdings of George G. MacKay, now under record ownership of Omer C. Thompson, holding such as trustee for said George G. MacKay." On the same day defendant Thompson and his two associate directors of the Omer C. Thompson Company passed a resolution reciting an offer by Thompson to sell and convey to the company other real estate located in San Diego, and, for the purpose of carrying out this transaction, defendant filed another sworn application with the commissioner of corporations to take over and operate real estate holdings of the said defendant. In support of these applications, the defendant Thompson filed with the commissioner of corporations appraisals, sworn to by Nat R. Titus and one other, reciting that the properties conveyed to the Thompson-MacKay Company were of the value of $315,000, and that the properties conveyed to the other corporation were of the value of $55,000, and the defendant Thompson filed with the commissioner a sworn statement to the effect that mortgages outstanding against the former company amounted to $199,500 and that mortgages against the property conveyed to the latter company amounted to $33,500. Upon these representations the commissioner of corporations authorized the issue of the stock as requested, and certificates were accordingly drawn and delivered to MacKay covering 997 shares of the Thompson-MacKay Company and 147 shares of the Omer C. Thompson Company. MacKay took complete possession and control of these certificates of stock, continued to vote the shares, either in person or by proxy, and pledged them to one S. M. Wilson for a personal loan of $50,000. From the date of issue of these certificates—March 27, 1916—until March 28, 1922, some five months after the death of MacKay, all this stock stood of record in his name upon the books of both corporations. During the year 1916 Thompson testified in supplemental proceedings in a suit brought by one of his creditors against him that MacKay was the absolute and full owner of the stock of both companies and that he (Thompson) had no interest of any nature in any of this stock. On numerous occasions prior to the death of MacKay, Thompson asserted that the ownership of the entire stock was in MacKay, and as president of both corporations he participated in meetings and signed minutes reciting the fact of this ownership.

On the day following the death of MacKay, Thompson and his agent, Nat R. Titus, moved quickly to perfect their plan to acquire possession of all the property and interest which MacKay had in these corporations. First Titus went to the executor named in MacKay's will and advised him that the hotel property in San Diego was mortgaged for all it was worth. A few days later he produced the deed executed by MacKay in 1910 and had it recorded, and, at about the same time, recorded the partnership agreement executed in the same year. He was then elected director and vice president of the Thompson-MacKay Company and participated in a resolution of the board of directors of that company voting to Thompson back salary at the rate of $500 per month from March 1, 1916, to November 1, 1921, totaling the sum of $34,000. At the same time the directors of this corporation, without any pretense of consideration, authorized a conveyance of all its properties to the defendant Thompson and Titus, and Steinmetz, the other of the three directors, who was also an agent of Thompson, joined in the execution of such a deed. In order to effect this transfer, Thompson signed what he termed a "consent to sale," in which he recited that he was the owner of 998 shares of the stock of the corporation. Similar proceedings were had by the same directors in the Omer C. Thompson Company, and there Thompson signed a consent to sale reciting that he was the owner of 148 shares of the stock of that company, whereas the owner of record of this stock in both corporations was George MacKay. Both deeds of conveyance were executed by Titus and Thompson's agent, and were recorded with Thompson's "consent to sale" attached to them.

Thereafter, and on November 16, 1921, less than 30 days from the death of the decedent, Thompson served upon the executor written notice that he owned all the stock in both companies. On the same day Thompson, Nat R. Titus, and Thompson's attorney, Johnson, went to Los Angeles and conferred with the executor and his attorney, one W. W. Butler. The testimony of no one of the five parties present at this conference agrees as to what occurred. But it stands out unmistakably from the record that Thompson, his agent, and his attorney did everything possible to deceive the executor and his attorney as to the facts relating to the ownership of the properties in San Diego, and that they concealed from them practically all the facts and circumstances relating to the various transfers and other transactions which we have heretofore recited. The executor who had been a warm friend of the deceased, and who now became a partisan of the defendant Thompson, was apparently satisfied by what occurred at this conference to sit idly by and let Thompson have his own way as to the disposition of the properties which might otherwise have been claimed by him on behalf of the heirs of the estate. He immediately petitioned the probate court for a reduction of his bond as executor from $100,000 to $25,000, and this was granted upon his representation that he had discovered within this short period of time that the estate did not own the properties in San Diego claimed by the decedent. No investigation was made by the executor or his attorney as to the merits of the claims presented by the defendant Thompson and his agent, but, acting upon these representations alone, the executor permitted this defendant and his attorney to conduct a sale of all the stock which had been issued to the decedent to satisfy the claim of Wilson, who held the stock as pledgee to a purported loan to the decedent, which loan was not evidenced by any writing other than a canceled check. It is claimed by the plaintiffs that this sale was all a part of a scheme planned by this defendant and his attorney to lead the executor to believe that the estate had no claim which it could assert against the defendant Thompson, that as a part of this scheme these parties, well knowing that the value of this stock was approximately $105,000, arranged to have a dummy bid it in at the sale for the sum of $5,000, which sum was supplied by Thompson, and that, for the purpose of preventing others from bidding at the sale, they represented that the entire physical properties of the corporations were mortgaged for all they were worth, and for the same purpose they instituted suit in the superior court of San Diego county against the MacKay estate and Wilson to quiet title to the pledged stock, claiming Thompson to be the owner. Concealment on the part of this defendant is charged in his failure to disclose at this time that the corporations had on deposit in the name of the Knickerbocker Hotel $8,369 in cash. In any event, the plans of this defendant were successful because neither the executor nor his attorney attended the sale and no bid was offered excepting one in the name of the defendant A. B. Titus in the sum of $5,000, and the stock was accordingly sold to him for that amount. Immediately thereafter the action to quiet title to the stock commenced in San Diego county on February 21st was dismissed, and on March 1, 1922, Thompson filed suit to quiet title against the executor and A. B. Titus, the purchaser at the pledgee sale. Process was served upon both defendants, but the executor failed to appear, and his default was accordingly entered. The defendant Titus, however, did appear by one of Thompson's attorneys, and these parties entered into a stipulation which gave to Thompson all that he could possibly have asked for, and upon which a decree was entered quieting title in Thompson of all the stock of these corporations. Soon thereafter Thompson procured an order of court dissolving both corporations.

As pointed out by the trial court in summing up the evidence at the close of the trial, there was so much false testimony and concealment on the part of Thompson that it is difficult to analyze the evidence as to what has been proved and what has been left to conjecture. The facts which we have heretofore stated, independent of the contentions of the respective parties, were all found to be true by the trial court, but upon these facts the trial court drew the conclusion that the plaintiffs had failed to prove a case of fraud which would justify the court in setting aside the pledgee's sale of the stock, decree quieting title thereto or the final settlement and decree of distribution in the probate proceedings. On this appeal it is the theory of the appellants that the pledgee's sale was so tainted with fraud that the court should have no hesitation in declaring it void and of no effect; that the decree quieting title to the stock, which was based upon this sale and the collusion of the parties to that suit, was procured wholly through extrinsic fraud on the part of the respondents, and that equity should declare that decree void and of no effect; that the final settlement and decree of distribution in the probate proceedings are not necessarily attacked in this action, but that the court could, if it supported appellants' charge of fraud, declare what portion of the property involved rightly belonged to the MacKay estate and that that property could then be administered on in the probate proceedings as property discovered after the final decree of distribution. The trial court, in ruling upon appellants' contentions, took the position that, though the facts proved unquestionably showed unfair and reprehensible conduct on the part of Thompson and inexcusable stupidity and incompetence on the part of the executor and his attorney in their failure to protect the interest of the heirs in the probate proceedings, there was no duty upon Thompson or his agent to play fairly with the executor or his attorney, and hence his conduct was not actionable. It is the theory of the appellants that a partnership relation existed beween Thompson and MacKay from 1910 to October, 1921, the date of MacKay's death, or that, if this partnership was dissolved by the formation of the corporations in 1916, nevertheless the evidence amply supported the trial court's finding that "at the time of MacKay's death there existed between said Omer C. Thompson and George Grant MacKay the most friendly and confidential relationship." Upon these premises the appellants argue that, when the respondent Thompson, immediately after the death of MacKay, approached the executor and his attorney, he at least gave the latter the impression that Thompson and MacKay were in partnership at the time of the latter's death and that whatever information Thompson gave could be treated as coming from a partner and a confidential friend of the deceased. From this it is argued that, because of the confidence which this respondent invited from the executor and his attorney, these representatives of the heirs of the estate were led to rely upon the representations of this respondent to the injury of the heirs. It is then argued that, because Thompson and MacKay were partners at the time the corporations were formed, and because these corporations were formed solely for the purpose of helping Thompson defraud his creditors, the business being conducted in practically the same way as during the partnership, the confidential relation which existed between the two as partners continued down to the death of MacKay and made Thompson an involuntary trustee of the partnership property for the benefit of MacKay's heirs, and that, because of this fiduciary relation between Thompson and the heirs, Thompson was required to use the utmost candor and strictness of accountability in his dealing with the executor while the latter acted in the capacity of an agent or representative of the heirs.

In defending the judgment, respondents emphasize three defenses which they insist are conclusive against any cause of action urged by the appellant. These are, first, the transfer by the decedent, in his lifetime, to Thompson of all his interest in the physical properties of the partnership; second, the subsequent purchase at the pledgee's sale by Thompson of all the stock in the two corporations; and, third, the decree of the superior court quieting title in Thompson to this stock and to the physical properties held by the corporations.

As to the deed executed by the decedent in 1910, conveying to Thompson an undivided one-half interest in the real property owned by the partnership, the trial court found that it was delivered to Nat R. Titus by the decedent, with instructions to hold the same until the death of decedent and thereupon to deliver the same to Thompson. From these facts the trial court concluded that the decedent thereupon surrendered the possession and control over the deed to Titus, and reserved no right to recall it or to change its provisions. This finding is attacked by the appellants upon the ground that it is not supported by the evidence. The evidence of the actual transmission of the deed is found in the testimony of Nat R. Titus alone. When asked to state the circumstances of the execution and delivery to him he answered, "Well, I told you I didn't remember so much about the execution of it, but I remember his giving it to me and telling me to hold it, *and, if he died before Thompson*, to give it to Thompson." On further examination of this witness by respondents' counsel he repeated that nothing had been said to him by the decedent excepting what has just been quoted. But later in his examination, in answer to the question, "Precisely just what were his instructions to you?" the reply was, "To give it to Thompson when he died." As bearing upon the intention of the grantor in making and delivering this deed, we find the testimony of respondent Thompson that "MacKay and I had this understanding, when he died his property—all his property—should come to me; and I had this understanding with MacKay, when I died all my property should go to MacKay." There is also the testimony of the witness Campbell, executor of the MacKay estate, to the effect that MacKay said there was such an understanding between himself and Thompson, and the testimony of the same witness that MacKay informed him "that several years ago a deed had been prepared, executed and prepared and placed in trust, of all the property in San Diego, and was to be delivered upon—to Mr. Thompson, upon his death, whenever it might be." Then there is the testimony of Dr. Cook, an intimate friend of the two partners, that the decedent said to him, "I have deeded the San Diego property to Thompson in case of my death." And the testimony of the witness Campbell that the decedent informed him that he and Thompson had so arranged their affairs that in the event of his death everything went to Thompson, and in the event of Thompson's death everything went to him, an arrangement which was conceded by Thompson but which apparently was not carried out on his part. This is all the testimony bearing upon the matter of the execution and delivery of the deed upon which the trial court was required to find whether the grantor intended to pass a present title, except the undisputed evidence that from the time of the execution and delivery of the deed down to the death of the decedent the grantor continued to claim and assert title in himself, and the grantee, fully aware of all the circumstances, continued to recognize the grantor as the equitable owner of all the interest purported to have been conveyed by the grantor, and except, also, the inferences to be drawn from the conveyance to the corporation and the general conduct of the parties.

[1-3] The vital question to be determined in a case of this kind is whether the grantor intended to vest a present title in the grantee upon delivery to the holder of the deed or whether delivery by the holder to the grantee was conditional upon the prior death of the grantor. If the latter, the purpose of the grant is deemed to be testamentary and subject to all the rules required by the law of wills, and, if these rules have not been complied with, the deed cannot be given effect as vesting any title in the grantee. Williams v. Kidd, 170 Cal. 631, 637, 151 P. 1, Ann. Cas. 1916E, 703. The best evidence of the intention of the grantor is the evidence of the instructions given by him to Titus at the time of the delivery of the deed. This evidence is that the grantor told Titus to hold the deed and to deliver it to Thompson if he (the grantor) died before Thompson. This clearly implies that the delivery of the deed was conditional upon the prior death of the grantor, and demands a holding that it was ineffectual for the purpose of vesting a present title in Thompson. Stone v. Daily, 181 Cal. 571, 575, 185 P. 665. These facts, taken with the un-

disputed evidence of the conduct of the parties with full knowledge of the transaction, would require a finding that the deed was testamentary in character and was not intended to vest a present title in the grantee.

But aside from this the trial court found upon undisputed evidence that for a period of six years after the execution of this deed the parties continued to deal in the properties covered by the deed as partners or joint owners, each owning an undivided one-half thereof. During all this time the record title of all the properties involved stood in the name of Thompson, and the interest of MacKay therein was fixed so far as any writing is concerned by the articles of copartnership wherein the interests of the two parties were declared to be an undivided one-half of the whole. This condition continued until the formation of the two corporations in 1916, when Thompson, holding the record title of all the property, and with full knowledge of the MacKay deed, voluntarily conveyed all to the Thompson-MacKay Company and added to the deed a lot which was not included in the MacKay deed. At this time Thompson took oath that all the property belonged to MacKay, and thus denied any claim which could have been made at that time that the MacKay deed vested complete title in him. This arrangement, it is true, was made by Thompson for the purpose of defrauding his own creditors, but it nevertheless served the purpose of transferring to the corporation all the title which Thompson had or might claim either legal or equitable in all the properties mentioned in the MacKay deed. Thus if the MacKay deed had transferred to Thompson the equitable title to one-half of the property, the deed of Thompson to the corporation made six years thereafter transferred to the corporation all the title which Thompson then had both legal and equitable, and the subsequent testimony of Thompson, given to the commissioner of corporations and in the superior court on supplementary proceedings, to the effect that MacKay was the sole owner of the stock of the corporation to which this property had been transferred, and that he (Thompson) had no interest or claim to any portion of the stock or assets of the corporation, disposes of any claim which he may make at this time that he was in fact an equitable owner of a one-half interest in the physical property of the corporation by reason of the MacKay deed.

The second and third defenses urged by the respondents are sufficient only in the event that it should be held that the conceded transactions of the respondent Thompson immediately following the death of MacKay, consisting of misrepresentation, concealment, and deceit, all intended to mislead the executor and to prevent him from taking any steps to protect the interest of the heirs of the estate, do not constitute actionable fraud. In determining this question it is necessary to first look to the relationship existing between Thompson and MacKay and between Thompson and the executor of the MacKay estate.

[4] We are satisfied from our review of the undisputed evidence that the court erred in concluding from the evidence and its findings that the deceit and misrepresentations of Thompson were made between parties acting at arm's length and did not constitute actionable fraud. The evidence and the findings show that Thompson upon more than one theory was bound to act toward the executor and the legatees, whom the latter represented, with the honesty and fidelity exacted by law of a trustee. This is the pivotal point in the case, for, once granting that Thompson could not deal with the executor as one at arm's length, it then follows: First, that his misrepresentation to the executor of facts concerning the property of the estate was actionable fraud; second, his misrepresentation forestalling a defense to the action quieting title to the stock was extrinsic fraud preventing the appellants herein from having their day in court; third, his misrepresentation forestalling the executor from reclaiming the pledged stock to the estate was also actionable fraud which entitled those who were defrauded thereby either to sue in damages for the deceit or to follow in equity the said stock so fraudulently obtained by Thompson and to claim the property into which the said stock was transmuted by Thompson's subsequent machinations.

[5, 6] Thompson was bound to this degree of fidelity to the representative of the deceased because: (1) He was the surviving partner of a partnership which owned the property which stood in the name of the corporation(s), equity looking through the form of the corporation and seeing the real partnership thinly disguised behind the corporate dress; (2) or because he was a surviving partner of a partnership which may have been temporarily dissolved at the time of the formation of the corporation(s) but which sprung into existence again immediately thereafter and then owning as its partnership property not the property which had been conveyed to the corporation entity, but the stock in that corporation; (3) because, even if the partnership was so ragged that it could not be said in law to be a real partnership, nevertheless the relations between Thompson and the deceased at the latter's death were one of trust and confidence in fact. Fiduciary relations are not found solely in those legal relationships, such as guardian and ward, husband and wife, trustee and beneficiary, but are also found where in fact the relation of trust and confidence exists between trusting friends. Palladine v. Imp. Valley F. L. Co., 65 Cal. App. 727, 745, 225 P. 291.

Whether Thompson comes within one or the other of the three categories just enumerated is immaterial in this case. His duty was the same in each. There might have been some difference as to the form of accounting and remedy available to appellants if the partnership owned stock in a corporation and not the very property of the corporation, but that difference can now no longer exist, because Thompson has again transmuted the corporate stock back into tangible property.

[7, 8] The trial court found that at the time of MacKay's death "there existed between said Omer C. Thompson and George Grant MacKay *the most friendly and confidential relationship.*" And, in an opinion filed by the trial judge immediately following the submission of the case, his views upon this issue were expressed as follows:

> "It is my opinion that from the date of the written partnership or property agreement, in February, 1910, down to the death of Mr. MacKay, in October, 1921, the Thompson and MacKay San Diego property, including the stock of Thompson-MacKay Company (after its incorporation), was owned jointly by Thompson and MacKay, an undivided one-half interest in each, and that both Thompson and MacKay so understood it, regardless of what either of them said about the ownership of the property for the purpose of evading or defrauding creditors, or for any other purpose, and regardless of who had possession of the stock or other property or in whose name it appeared on the records."

These views of the trial judge are fully supported in the evidence, and this evidence supports the finding of fact just referred to. But we are convinced from our examination of the record that the conduct of the parties throughout this entire period showed unmistakably that they intended that the partnership arrangement should still continue irrespective of who held the legal title to the real property or as to who appeared as the record holder of the certificates of stock of the corporation, there being no evidence of any character showing an intention to dissolve the partnership. The presumption that a thing once proved to exist continues as long as is usual with things of that nature (section 1963, Code Civ. Proc.) would have supported a finding that the partnership relation between these parties continued to exist down to the death of MacKay.

But the question of the existence of the partnership at the time of MacKay's death is important only in so far as it goes to the matter of the degree of good faith required on Thompson's part. The theory upon which the appellants proceeded is that Thompson occupied a position of trust and confidence with MacKay, and that he dealt with the executor of the estate on the basis of this fiduciary relation; that, immediately upon the death of MacKay, Thompson and his agent Titus made every effort to gain the confidence and trust of the executor and his attorney, and that they trusted these parties implicitly and dealt with Thompson as the confidential representative of the deceased. In Hemenway v. Abbott, 8 Cal. App. 450, 463, 97 P. 190, 195, it is said that this fiduciary relation "exists and relief is granted in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations, and those informal relations which exist wherever one man trusts in and relies on another." The facts here are similar to those in Morgan v. Asher, 49 Cal. App. 172, 193 P. 288, where the court required of an executrix a greater degree of good faith because of her confidential relation with the decedent who was her husband. Here Thompson was the trusted agent and business associate of the decedent for a period of eleven years or more, during a portion of which time he acquired real property, had taken the legal title in his own name, and managed all the business affairs of the two after the corporations were formed as well as before. In the Morgan Case the court said:

> "She is averred to have occupied toward her said husband during the latter days of his lifetime and up to the date of his death the position of his agent, intrusted by him with the exclusive custody and control of the whole of his real and personal property, and particularly of that most important portion thereof which consisted of bonds and other securities of the value of at least one hundred thousand dollars. As to these latter properties she was his trustee, as such agent, at the time of his death, and immediately upon his death she became the trustee of all those persons, who, either as heirs or legatees, were entitled to share in his said estate by virtue of this relationship or under the provisions of his will."

[9] It cannot be disputed that Thompson not only failed to state truly what he told the executor, but that he also suppressed and concealed material facts in his plan to acquire the property of the estate. On the day following MacKay's death, his associate, Nat R. Titus, informed the executor that the San Diego properties were mortgaged for all they were worth, Titus and Thompson then arranged for the recording of the articles of copartnership and the MacKay deed both executed in 1910; they arranged for a meeting of the directors of the corporation controlled entirely by them, and fraudulently voted to pay Thompson back salary in the sum of $34,000; they fraudulently authorized the corporations to convey all their physical properties to Thompson and deeds of conveyance were executed by Thompson's agents for this purpose. Within 30 days after the death of MacKay they called upon the executor in company with Thompson's attorney, Johnson, and informed the executor that Thompson owned all the stock and all the physical properties of the corporation, that neither the stock nor

the properties were of any value over the indebtedness, *but failed to inform* him or his attorney of the circumstances under which the deed of 1910 was executed and delivered, or that subsequent to the execution and delivery of that deed Thompson voluntarily deeded all interest in the properties to one of the corporations. By these acts of misrepresentation and concealment and by the institution of an action to quiet title on behalf of Thompson to all the stock immediately preceding the pledgee's sale, and by the failure to disclose to the executor that the corporations had money in bank under the name of the Knickerbocker Hotel amounting to over $8,000, Thompson prevailed upon the executor to absent himself from the pledgee's sale and to allow Thompson's dummy to purchase all the stock upon the single bid of $5,000. The trial court did not find as to the source of the funds used by Thompson for this purpose, but the inference may be fairly drawn that he used these corporate funds directly for the stock purchase or reimbursed himself from this deposit. In any event, he obtained possession of the entire deposit, in addition to the stock of an estimated value of over $100,000, without a fair disclosure. The estate was injured to the extent of being compelled to pay $20,000, the balance of the pledge, whereas, if the executor had been the successful bidder at the sale, the amount paid would have lessened the liability of the estate to the pledgee. It cannot be disputed that, if the estate had purchased the stock, Thompson could not have successfully asserted any claim to it because of his fraud in permitting MacKay to become apparent owner. Thus, as the purchaser at this sale would have become the valid owner of the stock, notwithstanding the false claims of ownership of the physical properties of the corporations, he would have had clear title to the money on deposit. All this Thompson obtained by his influence upon the executor; thus making him an involuntary trustee for the heirs under section 2224, Civil Code.

[10] While holding this stock as a trustee for the heirs, Thompson commenced an action against the estate and A. B. Titus, purchaser, to quiet title. Relying upon the representations theretofore made to him by Thompson, the executor permitted his default to be entered and made no appearance at any stage of the proceedings. The dummy who had been procured by Thompson to purchase the stock at the pledgee's sale was represented in court by counsel employed by this respondent. The two respondents herein, then having control of both sides of the litigation, stipulated to everything which Thompson desired in order to procure a judgment quieting title to all the stock in him. This entire transaction was a fraud upon the court and a fraud upon the executor and upon the MacKay heirs. The case comes squarely within the rule of Newport v. Hatton, 195 Cal. 132, 143, 231 P. 987, and cases cited. This decree was therefore fraudulent and of no binding effect upon the MacKay heirs.

[11] Having obtained possession of all the stock of the corporation belonging to the MacKay estate through fraud and breach of his fiduciary relation, Thompson went through the form of conveying all the physical properties of the corporation to himself by representing himself to be the legal owner of the stock, but as trustee for the heirs in the stock he also became trustee of the physical properties of the corporation, because, not being the legal or equitable owner of the stock, he was not able to convey to himself a good title to the corporate properties This follows because of section 2243, Civil Code, which provides:

> "Every one to whom property is transferred in violation of a trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration."

Upon the undisputed facts in the record, the appellants were entitled to a decree canceling the deed from MacKay to Thompson made in 1910, adjudging and declaring void as to them the decree quieting title to the corporate stock entered on March 24, 1922, and adjudging and decreeing that the respondents hold as trustees for the appellant an undivided one-half interest in all the properties and assets owned by the Thompson-MacKay Company at the time of MacKay's death and the rents, issues, and profits accruing thereafter, to the extent that such portion of the properties, rents, issues, and profits of this corporation come within the unpaid balance of the individual legacies to each of the appellants, and that, if said legacies cannot be paid in full then each of the appellants is entitled to judgment proportionate to the amount of the unpaid balance of each.

In explanation of the foregoing, it should be said that the appellants have throughout this litigation insisted that, because all the stock of both corporations was issued and held by MacKay as a part of a scheme to defraud Thompson's creditors, Thompson is thereby estopped and foreclosed from making any claim to any of the stock of either corporation upon the well-settled rule found in Moore v. Schneider, 196 Cal. 380, 385, 238 P. 81. The respondents concede the rule, but insist that it is not applicable here because they were not the moving parties in this litigation, and because MacKay, having knowledge of the fraudulent purpose of the transfer, is also estopped through his heirs from claiming any benefits out of Thompson's fraud. No authority has been cited holding that a party who has thus been estopped from becoming an actor in a court of equity because of his own fraud may obtain all that he could seek in a court of equity by committing another fraud which puts his adversary on the offensive. We are not disposed to examine the point further, because we are convinced that the evidence fully supports the conclusion of the trial court that from the time of the organization of the corporations down to the death of MacKay the latter held all the stock of the Omer C. Thompson Company in trust for Thompson, and that he held all the stock of the Thompson-MacKay Company in trust for Thompson and himself according to their proportionate share. We are also convinced that the undisputed evidence compels a finding that the interest of Thompson and MacKay in the stock of the Thompson-MacKay Company was an undivided one-half interest in each. It will, however, be necessary to take further evidence to determine the values of these properties and assets and to take an accounting as prayed for in the complaint.

The judgment is therefore reversed, with instructions to the trial court to take evidence upon these issues alone and to enter judgment in accordance with the views expressed herein, awarding to each appellant his proportionate share, and to grant to the appellants such further relief as may be necessary to finally dispose of the controversy.

We concur: KOFORD, P. J.; STURTEVANT, J.

PEOPLE v. GIBBONS. (Cr. 1637.)★

District Court of Appeal, Second District, Division 2, California. May 9, 1928.

Hearing Granted by Supreme Court July 5, 1928.

1. Burglary ⟹4—Defendant could not be convicted of burglary where structure from which property was alleged to have been stolen was bin open on one side.

Defendant could not be convicted of crime of burglary where structure from which property was alleged to have been stolen consisted of bin having three sides and a roof, since breaking into some kind of a structure is essential element of burglary.

2. Criminal law ⟹1114(1)—Appellate court must apply law to record before it.

It is duty of appellate court to apply law to record before it.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Venice Gibbons was convicted of burglary in the second degree, and he appeals. Reversed.

M. H. Broyles, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant, Venice Gibbons, and two codefendants, Tippen and Simpson, were charged jointly by an information filed by the district attorney of Los Angeles county with burglary, with receiving stolen property, and conspiracy to commit a felony. During the trial counts 2 and 3, charging receiving stolen goods and conspiracy to commit a felony, respectively, were dismissed. Appellant was convicted of burglary in the second degree, and from the judgment pronounced by the court thereon he appeals.

[1, 2] It is first contended that the verdict is contrary to the evidence because, it is said, the structure from which the evidence tended to show the stolen property to have been taken was not of such a nature as to permit of the crime of burglary being committed therein. In this regard the record discloses that certain aluminum was taken from a bin having three sides and a roof. However, the roof consisted of the floor of a building called by the witnesses a "bag house," which it was testified was completely inclosed. The side of the bin which was open faced on a yard which was entirely fenced, but there was no roof over the yard. In response to questions by the trial court, the witness Snyder, an officer of the corporation owning the premises from which the aluminum was taken, stated that the bin is not a cellar or basement; that it is on a level with the lot; that over this bin is "a bag house for the reception of all smokes"; that the floor of the bag house is up from the ground some six or eight feet, and forms the roof of the bin, "and it is walled in except one side."

It is true, as stated in People v. Coffee, 52 Cal. App. 118, 198 P. 213, that in this state the statutory definition of burglary is much more comprehensive than the definition of the same offense at common law. In that case a chicken house was held to be a structure which might be burglarized. The same was the ruling in People v. Stickman, 34 Cal. 242, and in People v. Franco, 79 Cal. App. 682, 250 P. 698, a showcase was broken open. It was held that the taking of shoes therefrom was burglary, because, it was pointed out, the showcase was a part of, and was under the roof of, the store building to which it was attached, and the court concluded that such a showcase was a "house" within the meaning of section 459 of our Penal Code.

However, in each of these cases, and others cited in People v. Franco, supra, the structure had four sides and a roof. The showcase was completely inclosed, and so were the chicken houses. We are cited to no case, and know of none, where the element of the definition of burglary which requires a breaking into some kind of structure has

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★Superseded by opinion of Supreme Court, 273 P. 32.

been held to be nonessential. The common law, of course, required that the building be a human habitation. This is not necessary under our statutes, but as said in People v. Coffee, supra, the structure need only be one having four sides and a roof. The bin in question being open on one side does not measure up to that definition. This case may be another example of a guilty man escaping punishment because the prosecuting officer has persisted in pressing a charge which is not justified under the evidence when apparently there was ample evidence to sustain a verdict of guilty of grand theft. It is the duty of this court, of course, to apply the law to the record before us, and since the testimony is uncontradicted in establishing the facts as above related, the defendant's contention is fully sustained.

It is not necessary to pass upon other points presented by the appellant.

The judgment is reversed.

We concur: WORKS, P. J.; THOMPSON, J.

91 Cal. App. 640

SIMPSON et al. v. SCHURRA et al.
(Civ. 5816.)

District Court of Appeal, Second District, Division 1, California. May 8, 1928.

1. Husband and wife ⚿267(1)—Contract for sale of community realty signed only by husband held not binding on wife (Civ. Code, §§ 172a, 1624).

The relation of husband and wife does not of itself confer on husband any authority to act for wife, and, under Civ. Code, §§ 172a, 1624, wife was not liable on contract for sale of community property signed only by husband, in absence of proof of his authority to sign for her.

2. Vendor and purchaser ⚿345—Purchasers not complying with land contract held not entitled to damages for vendor's breach (Civ. Code, §§ 1439, 1440).

Where purchasers tendered one mortgage instead of two provided for by escrow instructions and their tender of performance was in other respects defective, they were not entitled to damages for vendor's breach of contract, under Civ. Code, §§ 1439, 1440.

3. Vendor and purchaser ⚿22—Provision of land contract excepting one-half acre with 72-foot frontage out of frontage of 464 feet held unenforceable for indefiniteness.

In contract for sale of land having about 464-foot frontage, provision reserving to vendor the right to move house on property to give vendor a frontage of 72 feet and including area of one-half acre *held* unenforceable for want of definite description of land excepted in reservation; parol evidence being inadmissible to furnish description.

4. Vendor and purchaser ⚿22—Uncertainty of description of property reserved to vendor by land contract held not to render entire contract void but exception only fell.

Where exception in land contract reserving portion of land to vendor was unenforceable because of uncertainty of description, *held*, that uncertainty did not render entire contract void, but exception only failed, leaving contract to stand without the exception.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by J. B. Simpson and others against Celestine Schurra and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Tanner, Odell & Taft, of Los Angeles, for appellants.

Clark & Law, of Los Angeles, for respondents.

SHAW, Justice pro tem. This is an action by the purchasers to recover from the vendors damages for breach of a contract for the sale of real property. The court found that the defendants Schurra refused in bad faith to perform the contract; that the plaintiffs had performed all of the conditions thereof on their part to be performed and suffered certain damages by reason of defendants' nonperformance; and that defendants Meiling did not refuse to perform, but were ready and willing to do so. Judgment was rendered against both defendants Schurra for the amount of the damages so found, and from this judgment they appeal.

From the evidence the following facts appear: The real property involved in this controversy is a rectangular tract of land described as lots 132, 133, 134, 135, 164, 165, 166, and 167 of the East Ocean park tract (which tract is a subdivision of a portion of the Rancho La Ballona District Court Case 965), and a vacated railway right of way 50 feet wide running between lots 133 and 166 on one side and lots 134 and 165 on the other. On October 20, 1923, the defendant J. A. W. Meiling owned in severalty the northerly part of this tract of land, and the defendant Celestine Schurra owned the remainder of said tract as the community property of himself and his wife, the defendant Nellie Schurra. On the date last mentioned, the plaintiffs and the defendants Celestine Schurra and J. A. W. Meiling entered into a written agreement as follows:

"Oct. 20/23.

"A temporary agreement between F. B. Simpson, J. G. Guerin, Walt Keeshen, the buyers, and Celestin Schurra, J. A. W. Meiling's concerning the sale of a piece of property known as Rancho La Ballona District Court Case 965, lots 132, 167, 133, 166, 134, 135, 165, and 164.

"The parties of the second part agrees to sell the above-mentioned property for a considera-

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tion of $28,000.00 net to us on the following terms of $1,000.00 cash which receipt is hereby acknowledged by the party of the second part and the balance of $9,000.00 cash to be paid at close of escrow (the escrow to be put through the Title Guarantee Trust, Fifth and Broadway, Los Angeles), together with $18,000.00/100 as a first mortgage to run for three years bearing 7 per cent. interest. The parties of the second part agrees to give a mortgage with release clauses and will permit the property to be subdivided as the buyers think fit.

"The release clause will contain the following conditions the parties of the second party will release the lots when 50 per cent. of the selling value is paid up in full.

"The parties of the second party agree to permit the parties of the first to move the house now on the property at the expense of the parties of the first part. The house to be moved so as to give the party of the second part 72-foot frontage, the total ground space including one-half acre. The frontage to be on Burkshire avenue. The parties of the second part are released from paying any commission on this deal. F. B. Simpson.
"J. G. Guerin.
"Walt Keeshen.
"C. Schurra.
"J. A. W. Meiling."

On October 22, 1923, these parties went to the office of the Title Guarantee & Trust Company, and certain escrow instructions were then signed and delivered to said company. In behalf of the purchasers these instructions were signed only by plaintiff Keeshen, although the instructions called for a deed conveying the property to all of the plaintiffs. The instructions were also signed by the defendant J. A. W. Meiling and Celestine Schurra. These instructions were in the usual form of such documents and they differed from the agreement above quoted by excepting from the property to be conveyed the east one-half of lot 165, and by including therein "that portion described as parcel 2 in T. I. & T. Co. Guar. 619426." We assume, although we have found no evidence to that effect, that the last-mentioned parcel was the right of way above mentioned. Different provisions were also made regarding the mortgage which the purchasers were to execute, and the form of the release clause to be contained therein, the escrow instructions calling for one mortgage securing a note for $7,500 in favor of J. A. W. Meiling on the land owned by him and another mortgage securing a note for $10,500 in favor of defendants Schurra, as joint tenants, on the land owned by Schurra. They also provided that the buyers would take the property subject to certain incumbrances not mentioned in the agreement.

After these escrow instructions were drawn, and while the parties were still in the escrow office, the plaintiff Keeshen wrote, and the defendant Celestine Schurra signed, the following paper:

"Memorandum of Agreement.

"On this 22d day of October, I, Celestine Schurra, do hereby agree to transfer my right and title to the ½ acre of block 165 excepted from escrow, in exchange for a tract of land out of original acreage sold to Walt Keeshen, John Guerin, and F. B. Simpson, which must total ½ acre with not less than 72-foot frontage on Burkshire boulevard. It being understood that Mr. Schurra's house is to be moved, if necessary, to permit surveyors to subdivide property in such manner as to give largest number of lots without waste of land. This transfer to be executed at close of escrow.

"It will be further understood that acreage accepted by Mr. Schurra must also front new boulevard, to be laid out, as well as Burkshire boulevard.

"Signed this 22d day of October, 1923.
"By C. Schurra."

After considerable negotiation the plaintiffs were unable to agree with defendant C. Schurra as to the location of the land to be retained by him. Schurra refused to perform the agreement as demanded by the plaintiffs, and they refused to accept performance on Schurra's terms, and this suit followed.

The appellants made and deposited in escrow with the Title Guarantee & Trust Company a deed conveying to the plaintiffs the whole of the land above described, except a strip fronting 72 feet on Burkshire avenue and extending back 302 feet along the northerly side of the proposed new boulevard.

The plaintiffs deposited in the same escrow a mortgage and notes. This mortgage itself was present at the trial, but for some reason it was not introduced in evidence and is not in the record. The only definite showing as to its terms was while plaintiff Simpson was on the stand. The mortgage was shown to him by Mr. Odell, counsel for appellants, on cross-examination, and thereupon the following occurred:

"Mr. Odell: Counsel stipulated this morning —I thought he stipulated that this did cover the whole property without any exception. Is that the stipulation that you are willing to enter in?

"Mr. Law: I stipulated that it covered all the property that I understood they were given.

"Mr. Odell: In fact, it covers the whole property. I have checked it over. I think it covers the whole property, including everything Schurra should have excepted, which is all the lots. That describes the railroad right of way by metes and bounds.

"Mr. Law: Really, I don't know. I can't tell what it does cover. * * *

"Mr. Odell: I would like counsel to check it because I say it does cover the whole property without any exception whatever. * * *

"Q. You never did sign any other mortgage, did you, than this one? A. Nothing more than I—

"Mr. Law: We will stipulate, if it will do you any good, that this mortgage will cover all the property.

"Mr. Odell: Then it is so stipulated."

From this we understand that there was only one mortgage and that it covered all the property above described, including the railway right of way which was not included in the first contract, and the half of lot 165, which was excepted by the escrow instructions.

[1] From the foregoing review of the evidence it appears that none of the writings connected with the transaction were signed by the defendant Nellie Schurra; nor was there any proof of an authority, written or otherwise, empowering C. Schurra to act for her. She was the wife of C. Schurra, and the property was their community property. The first point made by appellants is that these two facts alone do not warrant a judgment against her for breach of the contract. Respondents concede that this point is well taken and consent to a reversal of the judgment against Nellie Schurra. We fully agree with appellants and respondents that the judgment against her cannot be supported. The relation of husband and wife does not of itself confer upon the husband any authority to act for his wife. Section 172a of the Civil Code provides that no contract of sale of the community real property is valid against the wife unless she joins with her husband in executing it. A holding that she is liable on such a contract which she did not execute at all would directly contravene this section and also section 1624 of the Civil Code, which requires such a contract to be in writing subscribed by the party to be charged.

Appellants contend that the plaintiffs are not entitled to sue for a breach of the contract, because the plaintiffs did not perform the contract on their part, and that the finding in plaintiffs' favor on this issue is not supported by the evidence. One who sues another for breach of a contract must show that he has performed all conditions of the contract on his part which are precedent to performance by the defendant and that he is able and has offered to perform all concurrent conditions on his part, except when he is excused from such performance. Civ. Code, §§ 1439, 1440; 6 Cal. Jur. 480. Before applying this rule it is necessary to ascertain what obligations are imposed on the plaintiffs by the contract, and this leads us to the inquiry: What is the contract between the parties in this case? The evidence discloses that three written instruments were signed by some or all of the parties, and the plaintiffs' claim is that these are not two or three separate agreements but one agreement, and that from them all a definite written agreement appears for the sale of the property described in the complaint on the terms set forth therein. The rule is well established that:

> "When several papers concerning one subject-matter are separately executed by the same parties, all are to be construed together as one contract. The intention of the parties is to be gathered from all the instruments, taken together, and the recitals in each may be explained or corrected by reference to any other." 6 Cal. Jur. 298; Civ. Code, § 1642.

Here, however, no two of the papers were signed by the same parties, and hence the application of this rule to them may be doubted.

[2] On examining the instruments in question we see that the second, the escrow instructions, if effective, must have superseded the first, which was, in its own words, "a temporary agreement"; for the escrow instructions covered the same ground and made different provisions for nearly all parts of the agreement except the parties and the price. It further appears, however, that, while the same three purchasers were named in the escrow instructions as in the first agreement, only one of them signed the instructions. The question at once arises whether the want of the signatures of the other two purchasers prevented the instructions from becoming effective. This question we need not decide, because the papers tendered by plaintiffs as performance did not satisfy either of the instruments in question. Under either of them the execution of the mortgage or mortgages by the plaintiffs must be regarded as a condition concurrent with the conveyance of the land by the defendants, and the plaintiffs must therefore have performed or offered to perform it in order to recover in this action. They make no contention that they were excused from doing so, and hence we give no consideration to that as a possibility. As we have already seen, the mortgage which they tendered in performance covered the vacated railway right of way, which was not described in the first agreement, and hence their tender was not insufficient under that agreement. They tendered only one mortgage instead of two as provided in the escrow instructions, and it covered the east half of lot 165 which was excepted from those instructions, and the tender therefore failed as a compliance with the instructions.

The third writing relates and refers only to the escrow instructions. It does not purport to be a modification of the agreement set forth in the instructions, but is merely an attempt to confer on the plaintiffs, who did not sign it, and hence cannot be bound by it, an option to require an exchange of the properties therein referred to. It appears to be fatally uncertain in its description of the property to be received by Schurra, under the rule hereinafter stated on that point. However it is regarded, it does not help plaintiffs' tender as an offer of performance under the escrow instructions. Since the plaintiffs made no other tender than that which we have already considered and found insufficient, the finding in their favor on the issue of performance is without support in the evidence. The error in this finding necessitates a reversal of the judgment as to both appellants.

[3] Appellants in their answer set up a

counterclaim against the plaintiffs for damages for breach of the same contract on which plaintiffs sued and contend on this appeal that they should have had judgment on the counterclaim. In view of the possibility of a new trial this contention should be disposed of. In order to recover damages for such a breach appellants also must show that they performed or offered to perform their obligations under the agreement. This they did not do. The deed tendered by them in performance excepted a considerable parcel of land which was covered by the first agreement and by the escrow instructions. They claim that this exception was authorized by the concluding paragraph of the first agreement, which provides for the moving of a house on the land. The intent to except a part of the land described in the agreement from the conveyance to be made is not clearly expressed in the language used; but, if such an intent can be found therein, the provision is uncertain and incapable of enforcement for want of a definite description of the land excepted. The only matters of description stated in connection with the supposed exception are that the land excepted shall have a total ground space of one-half acre, and a frontage of 72 feet on Burkshire avenue. There is a map in evidence which shows that Burkshire avenue was an existing street when this agreement was made, and that the land described had a frontage thereon of about 464 feet. The 72-foot frontage mentioned in the supposed exception could, so far as the agreement provides, be located anywhere on this 464 feet. The fact that there was a house on the property does not identify the land excepted because of the provision that the house is to be moved. This is an uncertainty which cannot be removed by parol evidence.

"The contract or memorandum in writing must so describe the property which is contracted for that it can be identified with reasonable certainty. It is insufficient to describe it by quantity alone, or by a quantity to be taken out of a larger tract without indicating out of what part it is to be taken, or giving to one party the right to select such tract, or by giving only the starting point and one side." 39 Cyc. 1223, 1224.

"Parol evidence cannot be heard to furnish a description. The only purpose for which such evidence can be heard is to apply the description given to the subject-matter. * * * It is not sufficient to allege that, by the imperfect description given in the contract, the parties intended to convey certain property." Marriner v. Dennison, 78 Cal. 202-208, 20 P. 386, 389.

"An agreement for the sale of real property must not only be in writing and subscribed by the party to be charged, but the writing must also contain such a description of the property agreed to be sold, either in terms or by reference, that it can be ascertained without resort to parol evidence. Parol evidence may be resorted to for the purpose of identifying the description contained in the writing with its location upon the ground, but not for the purpose of ascertaining and locating the land about which the parties negotiated and supplying a description thereof which they have omitted from the writing. * * * The statute of frauds was originally enacted 'for the prevention of frauds and perjuries,' and an agreement for the sale of land is required to be in writing in order that this purpose may be accomplished. The whole object of the statute would be frustrated if any substantive portion of the agreement could be established by parol evidence. A description of the land intended to be conveyed is one of the most essential parts of the agreement, and must be contained in the writing." Craig v. Zelian, 137 Cal. 105, 69 P. 853.

[4] This uncertainty in the exception does not void the contract as a whole. The exception only fails, leaving the contract to stand without the exception. Lange v. Waters, 156 Cal. 142, 103 P. 889, 19 Ann. Cas. 1207.

The judgment appealed from is reversed.

We concur: HOUSER, Acting P. J.; YORK, J.

PEOPLE v. SMITH. (Cr. 1576.)★

District Court of Appeal, Second District, Division 2, California. May 10, 1928.

Hearing Granted by Supreme Court July 9, 1928.

1. **Embezzlement 🔑44(6)—Evidence held to sustain conviction of city treasurer for embezzlement of city's funds manipulated through other accounts, notwithstanding deficit was made up.**

In prosecution of city treasurer for embezzlement by withdrawing funds from city treasury and manipulating them through other accounts, including his own, evidence *held* sufficient to sustain conviction, notwithstanding fact that defalcations were subsequently made up.

2. **Criminal law 🔑823(1)—Instruction that public official's restoration of property authorized court to mitigate punishment for embezzlement, though incorrect, held not ground for reversal, in view of other instructions.**

In prosecution for embezzlement, instruction to jury that defendant's restoration of embezzled property "authorized the court to mitigate the punishment" *held* not ground for reversal as inducing jury to convict, with expectation that punishment would be minimized, notwithstanding trial court's lack of authority to mitigate penalty of public official convicted of embezzlement, in view of other instructions that jury should not consider penalty in determining defendant's guilt.

3. **Criminal law 🔑982—Public officials embezzling funds of their offices must be denied probation.**

Public officials who embezzle funds of their officers must be denied probation, and jury have no authority to accompany their verdicts with recommendations for probation.

★Superseded by opinion of Supreme Court, 273 P. 789.

4. Criminal law 🔑822(1)—Court's charge must be considered as a whole.

Court's charge must be read together as a whole in determining whether error was committed.

5. Criminal law 🔑823(5)—Instruction that jury's belief in facts disclosed beyond reasonable doubt would as matter of law render defendant guilty held not prejudicial, in view of other instructions submitting intent (Pen. Code, § 20).

Instruction that, in case of jury's belief beyond reasonable doubt in facts disclosed by evidence, defendant would as matter of law be guilty of embezzlement, *held* not prejudicial, where court elsewhere charged jury, under Pen. Code, § 20, that defendant's intent to convert and embezzle moneys to his own use must be proved beyond reasonable doubt.

6. Criminal law 🔑1186(4)—Instruction that defendant who offers himself as witness may be cross-examined, though erroneous as to defendant not testifying, held not prejudicial, where admitted facts established guilt (Const. art. 6, § 4½).

In prosecution for embezzlement, instruction that defendant in a criminal case cannot be compelled to take the stand against himself, but that, if he offers himself as a witness, he may be cross-examined, though erroneous as to defendant not testifying, *held* not prejudicial so as to require reversal under Const. art. 6, § 4½, where, on admitted facts of case, defendant's guilt was established beyond question.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

W. D. Smith was convicted of embezzlement, and he appeals. Affirmed.

Edgar B. Hervey, of San Diego, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Elmer W. Heald, Dist. Atty., and Edward B. Patterson, Deputy Dist. Atty., both of El Centro, for the People.

CRAIG, J. The appellant was convicted by a jury in the superior court of Imperial county of the crime of embezzlement. The indictment charged that on or about November 9, 1926, the said W. D. Smith was the duly elected, qualified, and acting city treasurer of the city of Imperial, a city of the sixth class; that, by virtue of his trust as such city officer, there came into his possession and under his control the sum of $218.46 of the personal property of said city, and that, while said money was so in his possession and under his control as such officer, appellant feloniously and fraudulently appropriated it to his own use, not in the due and lawful execution of his official trust.

It appears that on the date mentioned the city recorder of the city of Imperial had on deposit with the Farmers' & Merchants' Bank the sum of $342, which had been collected in fines from various defendants who had been brought before him; that he delivered to the city clerk a check for that amount, which check the clerk in turn delivered to appellant, and was given a receipt therefor by the latter as city treasurer; that Smith deposited the same in said bank to the account of "Imperial Street Improvement Bond." Thereafter, and on November 9, 1926, appellant withdrew from the account last mentioned $218.46, by a check which he made payable to the Pacific Southwest Trust & Savings Bank, and which he signed, "Imperial Street Improvement Bonds, by W. D. Smith, City Treasurer," and deposited with the latter by deposit slip dated "11—9—1926," to the account of "Depositor: W. D. Smith, Trustee." It appears by documentary evidence and the testimony of witnesses for the people that the fines collected were deposited in an account other than that legally provided therefor; that, on the same day on which he drew the check for $218.46, he withdrew from this account and paid to the said Pacific Southwest Trust & Savings Bank, by a check which was introduced in evidence, the sum of $176.99, on account of his personal note to said bank, and during the succeeding six days appellant paid other personal obligations by checks drawn upon the amount so deposited of the funds withdrawn from the Farmers' & Merchants' Bank.

[1] This appeal from the judgment, founded upon the jury's verdict of guilty and from an order denying a new trial, is based principally upon the contention that the evidence is insufficient to sustain such judgment. The facts herein stated are set forth in appellant's brief, and it is there admitted that they were "undisputed, and constituted the evidence relied upon by the prosecution for the conviction." It is argued, however, that Smith could not legally be guilty of embezzlement, since he was permitted to show, over objections of the prosecution, and it is also undisputed, that on November 15, 1926, or about two weeks after having received the check for $342, he deposited another check for that identical amount of money in the Imperial city treasury account, and that an official audit thereafter showed that there was no deficiency. No authorities are attempted to be cited in support of appellant's theory, but it is insisted that, had he at the outset deposited to the credit of the city treasury account $342 of his own funds, and used the moneys represented by the check of the city clerk, no offense would have been committed; that the street bond account was at no time short; that at the time of the audit, and at the conclusion of his term of office, all of the various accounts were properly balanced; and that the prosecution therefore failed to prove a shortage. Assuming, but not deciding, that such would have been the result were

appellant's theory borne out by the facts, it remains that there was a shortage of $342 in the city treasury account for a period of several days, and that appellant used funds belonging to the city of Imperial by manipulating them through other accounts, including his own. Public moneys are jealously safeguarded by the statutes of this state, and we know of no authority which exempts or affords immunity from punishment to those who unlawfully expend public funds or who misappropriate them with the intention of subsequently reimbursing the municipality, even though such intention be fulfilled. The evidence was obviously sufficient, regardless of succeeding events, to support the verdict and judgment convicting the defendant of the offense with which he was charged, since the fact that he appropriated personal property of the city to his own use is not denied, but is in fact frankly admitted.

[2] It is next complained that the trial court erred in its instructions to the jury, in that they were told that restoration of embezzled property "authorizes the court to mitigate the punishment." It is argued that this left for the jury to decide as to whether or not there had been a restoration, coupled with an inducement to convict, with the expectation that the punishment would be minimized, whereas the court had no power to mitigate the term of imprisonment of one convicted of the offense under consideration. Authorities are cited by appellant which condemn instructions tending to hold out some promise, or to lead the jury to believe, that, if a verdict of guilty be returned, the sentence will be light. The trial court had no authority to mitigate the punishment of a public official convicted of embezzlement, but it has been held that, where the court stated to a jury, in response to a question by the foreman asking if the jury might recommend leniency, that they might make any recommendation they saw fit, it was not prejudicial, since their province was solely to determine the guilt or innocence of the accused, and that such instruction did not contain any intimation of the effect of such recommendation, nor lead them to suppose that the court would in the event of a conviction reduce the punishment. People v. Caiazza, 61 Cal. App. 505, 510, 215 P. 80. The situation here presented is the same in principle. Furthermore, in the instant case the jury were expressly instructed as follows:

> "It is the duty of the jury to decide whether the defendant is guilty or not guilty of the offense charged, considering all the evidence submitted to you in the case. It is not for you to consider the penalty prescribed for the punishment of the offense, and, if you are aware of the penalty prescribed by law, it is your duty to disregard that knowledge. In other words, your sole duty is to decide whether the defendant is guilty or not guilty of what he is charged with. The prosecution of punishment is left wholly to the court, except as the law circumscribes its power."

[3] It appears that the jury appended to their verdict a recommendation that the defendant be placed on probation. Appellant also obtained from four of the jurors, and incorporated in the record upon appeal, affidavits wherein they asserted that they were influenced to arrive at such verdict by the belief that leniency would be extended by the trial court. It is the law of this state that public officials who embezzle the funds of their offices must be denied probation, and juries have no authority to accompany verdicts with recommendations. People v. Caiazza, supra. Hence it seems clear that the argument that such recommendation and the affidavits of the jurors adds weight to the contention that an inadvertent and improvidently worded instruction, though nonprejudicial, constitutes reversible error, is without merit.

[4, 5] It is next seriously insisted that certain instructions which related the facts of the case as heretofore stated, and charged that, if they should be believed from all of the evidence beyond a reasonable doubt, in that event the defendant would as a matter of law be guilty of embezzlement, were prejudicial, because they omitted the element of fraudulent and criminal intent. It appears that the charge to the jury embraced the provisions of section 20 of the Penal Code, that "in every crime or public offense there must exist a union, or joint operation of act and intent," and other admonitions of like import, by which the jurors were told that they should not return a verdict of guilty in the case before them, unless convinced beyond a reasonable doubt that the defendant intended to convert to his own use and to embezzle moneys of the city of Imperial, of which he was the duly constituted and acting treasurer. From the charge as a whole, which must be read together, it cannot be said that there is ground for complaint that this element of the offense was withheld from the jury's consideration. People v. Troutman, 187 Cal. 313, 201 P. 928.

[6] The only other instruction given which requires consideration is one to the effect that a defendant in a criminal case cannot be compelled to take the stand as a witness against himself, but that, if he offers himself as a witness, he may be cross-examined by counsel for the people as to all matters about which he was examined in chief; that his neglect to testify cannot in any manner prejudice him nor be used against him. It is contended that this instruction singled out the defendant, centering the attention of the jury upon the fact that he did not testify, and may have led them to believe that he refrained from doing so through fear of cross-examination. We agree with appellant that, in view of the fact that the defendant did not take the stand, the giving of this instruction was clearly error. However, in the instant case

we are satisfied from a careful reading of the entire record that, upon the admitted facts, the defendant's guilt was established beyond question; and that no substantial right of his was prejudiced by this wrongful instruction; that no miscarriage of justice can result from affirming the judgment, and, on the authority of section 4½ of article 6 of our Constitution, it will not be made a basis for reversal.

The only remaining points attempted to be made by appellant consist of assignments of alleged error in refusing certain instructions that were offered. Those tendered, and to which exceptions are taken, were either not justified by the evidence or were fully covered by instructions given.

No error appearing, the judgment and order denying motion for new trial are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

91 Cal. App. 684

PEOPLE v. McKELVEY. (Cr. 1626.)

District Court of Appeal, Second District, Division 1, California. May 9, 1928.

1. Criminal law ⟹1144(12)—Where young girl, complaining witness in prosecution for lewd conduct, was examined on voir dire and defendant's counsel made no objection to her testifying, court must assume defendant was satisfied she was not disqualified (Pen. Code, § 288).

In prosecution for violation of Pen. Code, § 288, denouncing as a felony, lewd and lascivious conduct, where young girl, complaining witness, before being allowed to testify, was examined on voir dire both by district attorney and by court, and defendant's counsel declined to further examine witness and did not object to her testifying on ground of incapacity, court must assume that defendant was satisfied complaining witness was not disqualified as witness because of immature years.

2. Criminal law ⟹1159(2)—Weight to be given testimony is for jury, and not appellate court.

Weight to be given testimony of witness is for jury, and neither trial court nor appellate court, on review, will interfere with jury's decision unless it appears verdict was without substantial foundation.

3. Criminal law ⟹1159(3)—Where evidence is conflicting, appellate court will not disturb jury's verdict.

Where evidence is in conflict, appellate court on appeal, will not disturb jury's verdict.

4. Witnesses ⟹40(2)—Matter of determining whether child was qualified to testify was within trial judge's discretionary power.

Matter of determining whether child was or was not qualified to testify as witness in prosecution for violation of Pen. Code, § 288, was within discretionary power of trial judge.

Appeal from Superior Court of Los Angeles County; Charles W. Fricke, Judge.

James McKelvey was convicted of violation of Penal Code, § 288, and he appeals. Affirmed.

See, also, 260 P. 397.

Thomas P. White, A. P. G. Steffes, and Vincent C. Hickson, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem. Appellant was charged, by an information filed by the district attorney of Los Angeles county, with the crime of violation of section 288 of the Penal Code of the state of California. This section is commonly referred to as the "lewd and lascivious section," and denounces as a felony, lewd and lascivious conduct when displayed, in the manner provided in the section, upon the body of a child under the age of 14 years.

From a verdict of guilty, and the judgment pronounced by the court thereon, the defendant prosecutes this appeal.

Two grounds are presented upon which a reversal is urged. First. That the evidence is insufficient to justify the verdict. Second. That the trial court erred in refusing to permit one Alice Loomis, a six year old child, offered as a witness by the defendant, to testify. In view of our conclusions upon the points raised by appellant, we do not deem it necessary to give an extended recital of the evidence presented in the trial.

The complaining witness was a young girl seven years of age at the time of the trial. The offense charged is alleged to have occurred about six months prior thereto. The defendant admitted, as testified to by the complaining witness, that she was a stranger to him; that he met her on her way home from school; and that upon his invitation she accompanied him to his home, where he gave her some moving picture films. The child's story of misconduct of the defendant in a street tunnel, shortly after the defendant first accosted her, and of continued acts of misconduct when she was with him in his home was denied by the defendant. She further testified that no one else was present at the time they were in the tunnel together, and that she saw no one other than the defendant when she was in his house.

[1] Appellant, in urging his first point, that the evidence is insufficient to sustain the verdict, contends at length in his brief that the testimony of the complaining witness, by reason of her immature years, is entitled to but little, if any, weight, and further points

out that there is some difference between her story as told on the witness stand and statements previously made by her in connection with the occurrences prior to and at the time the alleged offense was committed. It appears from the record that before the complaining witness was allowed to testify, she was carefully examined on voir dire both by the district attorney and by the court. When counsel for the defendant was invited to further examine the witness for the purpose of determining whether or not she was qualified to testify, he declined to do so, nor did he make any objection to the witness testifying on the ground of her incapacity. We are therefore justified in assuming that the defendant was satisfied that the complaining witness was not disqualified to testify as a witness by reason of her immature years.

[2] The voluminous record discloses a marked conflict in the testimony as to matters having a material bearing upon the question of guilt or innocence of the defendant. Offenses of the character here charged, as a rule, are not committed under circumstances that furnish direct corroboration to the story of the complaining witness as to the acts of mistreatment. Hence the character, intelligence, and demeanor of the witnesses who testified before the jury may be of controlling importance in determining where the truth lies, and this becomes especially true in weighing the testimony of an immature witness who may be lacking in that direct and intelligent response to questions which is expected from mature witnesses. While the uncorroborated story of the complaining witness, if believed by the jury, is sufficient to support a verdict of guilty, here, in addition to the child's recital, is the admission of the defendant that he met her on her way home from school, and, although a stranger to him, he took her to his home and there gave her the picture films, the offer of which, according to the child's testimony, was what induced her to accompany him to his home. In addition, there is testimony of the officers as to certain statements made by the defendant when he was arrested and, also, their testimony describing his conduct and demeanor when he was being questioned by the officers concerning the child's story. This testimony was of such a character that, if believed by the jury, it might well have formed the basis from which the jury would have been justified in drawing inferences that would corroborate the child's story.

To the jury, as the sole judges of the credibility of a witness, is assigned the duty of determining the weight to be given to the testimony of a witness, and, when the jury has performed this function and entered its decision, neither the trial court nor this court on review will interfere with that decision unless it appears that the verdict was without substantial foundation. We are frank to say that, so far as the cold transcript would disclose, the continuity of the story as told by the child, the concise answers given to questions propounded to her, her adherence under cross-examination to the same incidents in substantially the same way, all would do credit to a child twice as old as the complaining witness. While there is some conflict, as pointed out by appellant, in the different recitals given by the child of the incidents leading up to and occurring during the alleged misconduct, it does not appear that these discrepancies differ in character or extent from those which not infrequently appear in the several stories of an incident given by matured men and women. Furthermore, the fact that the trial judge denied the defendant's motion for a new trial has an important bearing in our consideration of this question. It cannot be denied that evidence was presented in the trial which tended to prove the charge, and the learned judge of the court below, in refusing to grant a new trial, has indicated that he is satisfied with the sufficiency of the evidence. He had the opportunity, which is not presented to us, to observe the witnesses and form a better conclusion upon the weight and effect of their testimony than we have by reading the cold recital as it appears in the record. We are justified in assuming that if the complaining witness' testimony was accompanied by the indications of weakness that are urged by appellant, the learned trial judge would have observed such deficiency and granted a new trial. People v. Kuches, 120 Cal. 566, 52 P. 1002; People v. Ellis, 188 Cal. 682, 206 P. 753.

[3] A careful review of the evidence as shown by the record convinces us that the instant case is one that comes well within the rule that, where the evidence is in conflict, this court, on appeal, will not disturb the jury's verdict. People v. Nowak, 76 Cal. App. 216, 244 P. 634.

[4] The second point urged by appellant arises from a ruling by the court refusing to permit one Alice Loomis, a six year old girl, to testify as a witness on behalf of the defendant. The record discloses that a somewhat extended examination on voir dire was had to determine the qualifications of the child. Without detailing this examination, it suffices to say that the child disclosed a marked inability to remember things which most children of that age would recall. In any event, we are satisfied that the matter of determining whether the child was or was not qualified to testify as a witness was well within the discretionary power of the trial judge, and, in our opinion, the court did not abuse its discretion in refusing to permit the child to testify. People v. Dunlop, 27 Cal. App. 460, 150 P. 389; People v. Craig, 111 Cal. 460, 44 P. 186; People v. Gregory, 8 Cal. App. 738, 97 P. 912.

This disposes of the only points raised by appellant. The judgment is therefore affirmed.

We concur: CONREY, P. J.; YORK, J.

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91 Cal. App. 606

HOGAN v. PADDON et al. (COLEY et al., Interveners). (Civ. 3501.)

District Court of Appeal, Third District. California. May 5, 1928.

1. Appeal and error 🔑1236—Proceeding to obtain, on motion in original suit, judgment against sureties on appeal bond is permitted only on statutory undertaking (Code Civ. Proc. § 942).

Proceeding to obtain on motion in an original suit judgment against sureties on undertaking on appeal under Code Civ. Proc. § 942, is permitted only on statutory undertaking.

2. Divorce 🔑283—Where husband appeals from alimony order, court may consider monthly allowance and probable duration of appeal in fixing amount of supersedeas bond (Code Civ. Proc. § 942).

Where husband appeals from order in divorce action that he pay wife certain sum a month as alimony, court is authorized, in determining amount of supersedeas bond required by Code Civ. Proc. § 942, to take into consideration amount of monthly allowance and probable duration of appeal.

3. Appeal and error 🔑1236—Sureties to undertaking on appeal in effect voluntarily made themselves parties to action and submitted themselves to court's jurisdiction (Code Civ. Proc. § 942).

When sureties to undertaking on appeal under Code Civ. Proc. § 942, agreed that in case of affirmance of judgment by appellate court and of its nonpayment by judgment debtor judgment might be entered against them in court from whose judgment appeal was taken, they in effect voluntarily made themselves parties to action and submitted themselves to jurisdiction of court.

4. Appeal and error 🔑1236—By signing appeal bond, sureties consented judgment should be entered against them on motion for amount as to which judgment appealed from was affirmed.

Where court estimated duration of appeal from alimony order at 17 months, which would have placed amount of judgment at $5,100, and fixed amount of undertaking on appeal from order at $10,200, but length of time that elapsed from date of order to date of affirmance by Supreme Court was 19 months, making amount husband was directed to pay wife by virtue of order and affirmance $5,700, exclusive of interest and costs, sureties were liable for $5,700, plus interest and costs, since by signing undertaking sureties consented that judgment should be entered against them on motion for amount as to which judgment appealed from was affirmed.

5. Judgment 🔑887—Where execution was issued for full amount of judgment, but sheriff erroneously levied for smaller amount, plaintiff did not release part of judgment.

Where execution was issued for $6,595.38, full amount of judgment against sureties on appeal bond, but sheriff, through error, neglected to fill in copies of execution with sum of judgment, filling in blank for costs to amount of $73 only, and sheriff levied execution on real estate and sold same for $40, making sale and giving and recording notices of levy and sale in accordance with erroneous amount of judgment, but made return upon original execution showing full amount of judgment, judgment creditor did not release all of judgment in excess of $73.

6. Appeal and error 🔑1227—Where husband paid money to wife after affirmance of judgment for alimony without directions, wife could apply payments on alimony accruing after affirmance (Civ. Code, § 1479, subd. 2).

Under Civ. Code, § 1479, subd. 2, where husband, after affirmance of order to pay alimony to wife, made payments to her without directing application of money, wife could apply such payments to monthly alimony accruing after affirmance of judgment, and was not bound to credit such payments on judgment against sureties on husband's appeal bond.

7. Principal and surety 🔑113—Generally, where principal makes payment from his funds free from equity in favor of surety, surety cannot direct application of payment.

Generally, where principal makes payment from funds which are his own and which are free from any equity in favor of surety to have money applied to debt for which surety is liable, surety has no power to direct that payment shall be applied to any particular debt.

8. Appeal and error 🔑1236—Bond given on appeal from alimony order held to be "statutory bond," and court could render judgment thereon without notice to sureties (Code Civ. Proc. § 942).

Bond given on appeal by husband from order to pay wife alimony, for sum of $10,200, being double amount named in court's order for period of 17 months, stating that if order appealed from should be affirmed appellant would pay plaintiff amount directed and damages and costs, and if he did not make payment within 30 days after filing remittitur judgment might be entered on motion against sureties, *held* to be statutory bond under Code Civ. Proc. § 942, and court was authorized to render judgment thereon without notice to sureties.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Statutory Bond.]

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action to vacate judgments and to restrain enforcement thereof by Walter L. Hogan against Una Margaret Locke Paddon and others, in which J. A. Coley and another intervened. From the judgment, plaintiff and interveners appeal. Affirmed.

Harold C. Faulkner, of San Francisco, for appellant Hogan.

H. M. Anthony, of San Francisco, for intervening appellants.

Preston & Duncan and C. A. Linn, all of San Francisco, for respondents.

JAMISON, Justice pro tem. This was an action brought by appellant Walter L. Hogan, in which interveners joined, to vacate a certain judgment theretofore rendered against plaintiff and Charles L. Paddon and to restrain respondents from the enforcement of said judgment and to vacate a certain judgment rendered against interveners and to restrain the enforcement of said last-named judgment.

The facts leading up to the bringing of this action are as follows:

On November 3, 1922, in a certain action then pending, wherein Una Margaret Locke Paddon was plaintiff and William Locke Paddon was defendant, the court made an order requiring said defendant to pay to said plaintiff, pendente lite, alimony in the sum of $300 per month and the further sums of $200 on account of attorney fees and costs amounting to $100.

From this order said defendant appealed, and, to stay execution, executed an appeal bond in the sum of $10,200 with W. L. Hogan and Charles L. Paddon as sureties. The said order appealed from was affirmed, and thereafter, on motion of Una Margaret Locke Paddon, judgment was rendered in her favor against the said sureties on said appeal bond, namely, W. L. Hogan and Charles L. Paddon, for the sum of $6,595.38.

From this judgment appellant Hogan and his cosurety Charles L. Paddon appealed, and upon this appeal gave a supersedeas bond in the sum of $13,200 to stay execution, with the interveners herein as sureties. The appeal of said Hogan and said Charles L. Locke Paddon was dismissed, and thereafter, on motion, judgment was rendered against said interveners, as sureties on said last-named appeal bond for $6,773.55. On January 27, 1926, respondent Una Margaret Locke Paddon had an execution issued against appellant Hogan and his cosurety, Charles L. Locke Paddon, on said judgment rendered against them as aforesaid, for the amount of said judgment, to wit, $6,595.38, directed to the sheriff of the city and county of San Francisco, and thereafter said sheriff returned said execution satisfied to the extent of $38.40.

On April 2, 1926, said Una Margaret Locke Paddon had another execution issued on said last-named judgment for the sum of $6,788.37 against said appellant Hogan and his cosurety, Charles L. Paddon, which was levied upon the lands of appellant Hogan, and the same were advertised for sale by said sheriff of the city and county of San Francisco. Thereupon appellant Hogan began this action, and upon the trial thereof judgment was rendered in favor of respondent Una Margaret Locke Paddon, and from which judgment appellant Hogan and said interveners have appealed.

Appellants have specified five reasons why this last-named judgment should be reversed, the first of which is that the supersedeas bond given by William Locke Paddon to stay execution upon appeal from the order for the payment of the $300 per month alimony to said Una Margaret Locke Paddon, in her action against William Locke Paddon, and which appeal bond was signed and executed by appellant Hogan and his cosurety, Charles L. Paddon, was not a statutory bond; that is to say, it was not the kind of a bond upon which the court was authorized to enter a judgment on motion after an affirmance by the Supreme Court.

[1] It is well settled by the decisions of the higher courts that a proceeding to obtain, on motion, in an original suit, a judgment against sureties, under section 942 of the Code of Civil Procedure, is permitted only on a statutory undertaking. McCallion v. Hibernia Savings & Loan Society, 98 Cal. 442, 33 P. 329; Loudon v. Loudon, 63 Cal. App. 204, 218 P. 442.

The first bond filed by William Locke Paddon on his appeal from the order of the court that he pay alimony to Una Margaret Locke Paddon in the sum of $300 per month was for the sum of $7,500. On December 28, 1923, by stipulation of the attorneys representing Una Margaret Locke Paddon and William Locke Paddon, the court ordered this bond to be withdrawn and one for $10,200 filed in its place and stead; said last-named bond being as follows:

(Title of court and cause.)

"Whereas, the defendant, William Locke Paddon, in the above-entitled action, has appealed to the Supreme Court from an order made and entered against the defendant in said action, in the said superior court, in favor of the plaintiff in said action, on the 3d day of November, 1922, for the sum of $300.00 per month and the sum of $200.00 counsel fees and $100.00 costs of suit and from the whole thereof.

"The sum of $300.00 having been paid on account of said order.

"And, whereas, the appellant is desirous of staying the execution of said order so appealed from, we, the undersigned, in consideration thereof, and of the premises, jointly and severally, undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of ten thousand two hundred dollars, being double the amount named in the said order for a period 17 months from the date of said order, that if the said order appealed from, or any part thereof be affirmed, or the appeal be dismissed, the appellant will pay the plaintiff herein the amount directed to be paid by the said William Locke Paddon, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, that if the appellant does not make such payment within thirty (30) days after the filing of the remittitur from the Supreme Court in the Court from which the appeal is taken, judgment may be entered on motion of the respondent, in plaintiff's favor against the undersigned sureties for said sum of $10,200.00, or the amount of the judgment affirmed together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant on the appeal.

"Witness our hands this 21st day of December, A. D. 1923.

"W. L. Hogan.
"Chas. L. Paddon."

This appeal bond appears to follow in all respects the requirements of section 942 of the Code of Civil Procedure, which provides that if the appeal is from a judgment or order directing the payment of money, the execution thereon is not stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, in double the amount named in the judgment or order. Said section further provides that if the judgment or order be affirmed the appellant will pay the amount directed to be paid by the judgment or order affirmed, together with damages and costs awarded against the appellant on the appeal, and that if he does not make such payment within 30 days after the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondent in his favor against the sureties for such amount.

Appellant asserts that this bond is not a statutory bond, because the amount of the bond was fixed by stipulation and not by the statute. As a matter of fact, the amount of the bond was designated by order of the court upon the stipulation of the parties. In the case of Hammond v. United States F. & G. Co., 29 Cal. App. 464, 155 P. 1023, the court said:

"It would seem hardly open to question that in lieu of having the amount of the undertaking fixed by the court, the parties may be permitted to stipulate as to what that amount shall be."

[2] In a case of this kind, that is to say, in an action for divorce, brought by a wife against the husband, in which the court has made an order for the payment by the husband to the wife of a certain sum per month as alimony and the husband appeals from the order, the court is authorized in determining the amount of the supersedeas bond required by said section 942 to take into consideration the amount of the monthly allowance and the probable duration of the appeal in fixing the amount of the bond, which, under the provisions of said section 942, the appellants must give to stay execution upon said order. Sharon v. Sharon, 67 Cal. 199, 7 P. 456, 635, 8 P. 709; Schallman v. Haas, 33 Cal. App. 28, 164 P. 336; Smith v. Smith (Cal. Sup.) 256 P. 419.

In the instant case the court estimated the duration of the appeal at 17 months, which would have placed the amount of the judgment at $5,100, after deducting the $300 that was paid by appellants, and fixed the amount of the bond at $10,200.

[3, 4] Appellant claims that if he and his cosurety were liable on this bond at all, that upon the affirmance of the judgment their liability would be for the sum of $5,100 with interest and costs, which would be $600 less than the amount of the judgment rendered against them. The appeal bond which appellant and his cosurety executed sets forth that the order appealed from was an order entered against the defendant and in favor of the plaintiff for the sum of $300 per month, and it further recited that if said order was affirmed that appellant and his cosurety would pay to the plaintiff the amount directed to be paid by the said William Locke Paddon. The length of time that elapsed from the date of the making of said order to the date of the affirmance of the order by the Supreme Court was 19 months, making the amount which William Locke Paddon was directed to pay to his said wife by virtue of said order and affirmance thereof on appeal the sum of $5,700, exclusive of interest and costs.

In the case of Hammond v. United States F. & G. Co., supra, the court said: "The sureties are bound by the statements in their contract, and cannot question the truth of such recitals." While sureties in an instrument may stand on the letter of their bond or undertaking, still, like all other obligations an appeal bond is subject to be so construed as to carry out the obvious intention of the parties. Gerrior v. Superior Court, 69 Cal. App. 186, 230 P. 967.

When the sureties to the undertaking on appeal agreed that in case of the affirmance of the judgment by the appellate court, and of its nonpayment by the judgment debtor, judgment might be entered against them in the court from whose judgment the appeal was taken, they, in effect, voluntarily made themselves parties to the action and submitted themselves to the jurisdiction of the court. Meredith v. S. C. M. A. of Baltimore, 60 Cal. 617.

The position of a surety on an undertaking on appeal is therefore similar to that of an ordinary surety on an obligation who has been regularly joined as a party defendant. La Fleur v. M. A. Burns Lumber Co., 188 Cal. 321, 205 P. 102. It is apparent that by the terms of this appeal bond appellant and his cosurety bound themselves to pay the amount, upon the affirmance of said order, that William Locke Paddon could legally be directed to pay, which was the sum of $5,700 with interest and costs. By signing the undertaking on appeal the surety consented that judgment should be entered against him on motion for the amount as to which the judgment appealed from was affirmed. Gray v. Cotton et al., 174 Cal. 256, 162 P. 1019.

[5] Another claim for reversal of the judgment is that after the entry of the summary judgment against him and his cosurety for said sum of $6,595.38, respondent caused an execution to be issued for the sum of $73 and placed in the hands of the sheriff of the city and county of San Francisco, under which the said sheriff levied upon certain lands belonging to appellant, and that by causing said execution to be issued for the sum of $73, respondent released all of the judgment in excess of that sum. It appears from the evidence that the execution was issued for the full amount of the judgment and that respondent caused the same to be placed in the hands of the sheriff with copies of said execution having blank spaces thereon for amount of judgment and costs. The sheriff, through error or mistake, neglected to fill in on said copies the sum of the judgment, filling in the blank for costs to the amount of $73 only. He levied said execution upon certain real estate owned by appellant and sold the same for $40, making said sale, giving and recording notices of levy and sale in accordance with said erroneous amount of the judgment, as set forth in said copies of the execution. However, in making his motion upon said execution, he made the return upon the original execution, which showed the full amount of the judgment, his return thereon showing satisfaction of said execution in the amount of some $38.

There is authority to the effect that if the judgment creditor issues an execution and directs a levy for an amount less than that to which he was entitled under the judgment he cannot subsequently issue another execution for the balance. Ransom v. Onondaga C. P., 3 Wend. (N. Y.) 331. No evidence was offered in this case that the judgment creditor directed the sheriff to levy for any sum less than the full amount of the judgment. We think that the finding of the court that the execution was issued for the full amount of the judgment and not for the sum of $73 is fully supported by the evidence.

The order of November 3, 1922, requiring William Locke Paddon to pay to his wife alimony in the sum of $300 per month, continued in force up to the time appellant brought this action and was in force at the trial thereof.

[6, 7] After the affirmance by the Supreme Court of this order, and on September 5, 1924, respondent Una Margaret Locke Paddon filed two affidavits for an order to show cause why said William Locke Paddon should not be adjudged in contempt of court for failure to comply with said order of November 3, 1922, and on said last-named date the court made an order citing the said William Locke Paddon to appear before it on September 12, 1924, to show cause why he should not be punished for contempt. On September 12th the hearing of said last-named order was continued for one week, and thereafter the hearing of said last-named order was continued many times up to about April, 1926.

It appears that on a number of occasions, commencing in September, 1924, and continuing until the fore part of 1926, the injunction issued against William Locke Paddon and the corporations therein named, which injunction had been granted upon the application of Una Margaret Locke Paddon in her action for divorce against William Locke Paddon, was by order of the court modified, and through said modification certain lands against which said injunction was operative were released from said injunction, and by reason thereof sums of money were realized, a portion of which by stipulation of the attorneys representing all the parties named in said injunction were placed to the credit of William Locke Paddon and by him paid over to his said wife to apply on said monthly alimony. The exact amount that was so paid over to said Una Margaret Locke Paddon by William Locke Paddon, accruing from said releases, is not shown, but it was stipulated that it was over $1,500.

It further appears that the total amount paid over to respondent Una Margaret Locke Paddon by William Locke Paddon from September 12, 1924, to the last of March, 1926, was $4,624.82. Appellant claims that this amount should have been credited on the judgment against him and his cosurety. This money was paid to Una Margaret Locke Paddon, or her attorney, by William Locke Paddon, or upon his order, to apply on the monthly alimony ordered by the court. The evidence shows that it was applied on the alimony accruing after the affirmance of the order by the Supreme Court on the appeal of appellant and his cosurety, and that it was paid after Una Margaret Locke Paddon had assigned to John W. Preston all moneys due her by virtue of said judgment against the appellant and his cosurety on the appeal bond.

Appellant cites section 1479 of the Civil Code as authority for his claim that the said sum of $4,624.82 should have been credited on the judgment aforesaid, but subdivision 2 of that section authorizes the creditor to place it upon any obligation due him from the debtor, unless the debtor had specified the particular obligation upon which he desired it applied. No direct specification was made by the debtor in this case, and upon receipt of the money Una Margaret Locke Paddon applied it on the monthly alimony accruing after the said affirmance of the order, and this way of applying said sum of money appears to the court to have been the application intended by the debtor, William Locke Paddon.

As a general proposition, where a principal makes payment from funds which are his own, and which are free from any equity in favor of the surety to have the money applied to the debt for which the surety is liable, the surety has no power to direct that the payment shall be applied to any particular debt. Bross v. McNicholas, 66 Or. 42, 133 P. 782, Ann. Cas. 1915B, 1272; Merchants' Ins. Co. v. Herber, 68 Minn. 420, 71 N. W. 624; Crane Co. v. Pac. Heat & Power Co., 36 Wash. 95, 78 P. 460; vol. 21, R. C. L. p. 1128. And in this connection appellant contends that he was released as said surety by reason of said releases upon the theory that the release of the property of the judgment debtor, without the consent of the surety, released the surety to the extent that the judgment creditor was thereby benefited. This contention has nothing to support it. There is no evidence that at the date said releases were made that William Locke Paddon was the owner of any of the property described in said releases. On the contrary, the evidence tends to show that at the date of said releases he did not own any of the property included in them. The moneys secured through some of the releases were paid to him or placed to his account. Just why this was done is not disclosed. Regardless of how that came about, he paid it or caused it to be paid to his said wife or to her attorney, to apply on said monthly alimony.

It does not appear that appellant had, as surety as foresaid, any equity in the funds realized by the aforesaid releases or any right to have them applied on the debt for which he is surety.

[8] The court is of the opinion that the bond on appeal executed by appellant and his cosurety is a statutory bond, and that the court was authorized to render judgment thereon without notice to said sureties, although the judgment recites that appellant was personally present in court at the hearing of said motion.

We deem it unnecessary to pass upon the question as to whether or not the issues in this case are moot.

The judgment is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

204 Cal. 191

WUTCHUMNA WATER CO. v. STEVENSON.

(Sac. 3994).

Supreme Court of California. May 15, 1928.

Dismissal and nonsuit 🔑60(2)—Filing cross-complaint held not to excuse prompt prosecution of action which was properly dismissed, where not prosecuted for over four years (Code Civ. Proc. § 583).

Where plaintiff failed to prosecute action for four years and ten months after defendant's answer had been filed, fact that defendant had also appeared, seeking affirmative relief by way of cross-complaint and counterclaim, did not relieve plaintiff of duty to promptly prosecute its action or of duty of offering, on hearing of defendant's motion to dismiss for want of prosecution under Code Civ. Proc. § 583, some adequate reason or excuse for delay, and, in absence of any showing excusing delay, trial court did not abuse discretion in dismissing action.

Department 2.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action for specific performance by the Wutchumna Water Company against Gilbert F. Stevenson, in which defendant filed a cross-action and counterclaim. From a judgment of dismissal, plaintiff appeals. Affirmed.

W. R. Bailey, of Visalia, and Everts, Ewing, Wild & Everts, Guy Knapp, Dan F. Conway, and L. W. Young, all of Fresno, for appellant.

Farnsworth, Burke & Maddox, and Power & McFadzean, all of Visalia, for respondent.

RICHARDS, J. This appeal is from a judgment of dismissal of this action given and made under section 583 of the Code of Civil Procedure for want of prosecution. The action was commenced on August 5, 1921, and was an action for the specific performance of an agreement in writing entered into between the parties on September 6, 1913, by the terms of which the defendant herein agreed to build and construct a levee about and around a certain artificial lake in the county of Tulare known as Woodlake or Bravo lake, such work to be commenced immediately, and to be completed within five years; or, if specific performance was not available, then for damages for the breach of said contract. The defendant, on September 2, 1921, filed his demurrer and answer, and also filed and served a cross-complaint and counterclaim, to which the plaintiff demurred. Nothing further was done in the action until July 20, 1926, when plaintiff, in the meantime having procured a new set of attorneys, gave notice of motion that on July 26, 1926, it would call up said demurrers for hearing and determination. Thereupon the defendant moved for an order dismissing the action for want of prosecution. The plaintiff thereupon filed an answer to defendant's cross-complaint, and the whole matter came on for hearing on August 2, 1926, when the defendant's motion to dismiss was argued and submitted. The trial court, on August 9, 1926, granted said motion, and from the judgment or order dismissing the action this appeal has been taken.

The sole contention of the appellant is that the fact that the defendant had filed in connection with his answer a cross-complaint and counterclaim took this case out of the operation of the provisions of section 583 of the Code of Civil Procedure, and that the court therefore abused its discretion in granting the defendant's motion made under said section for a dismissal of this action. We can see no merit in this contention. This cause had been allowed to slumber for four years and ten months or over, after the defendant's answer had been filed, without any apparent effort on the part of the plaintiff to bring the matter on for hearing. The fact that the defendant had also appeared, seeking affirmative relief by way of cross-complaint and counterclaim, did not serve to relieve the plaintiff of the duty cast upon it to promptly prosecute its action, and certainly did not relieve it of the duty of offering upon the hearing of the defendant's motion to dismiss some adequate reason or excuse for the delay. The case of Hickman v. Lynch, 27 Cal. App. 354, 149 P. 997, upon which the appellant chiefly relies, was decided on the authority of Jacot v. Marks, 26 Misc. Rep. 670, 57 N. Y. S. 904, which latter case was reversed on appeal, and has been otherwise disapproved in other jurisdictions, and the case of Hickman v. Lynch, supra, if not actually disapproved, has been substantially so in the cases of Larkin v. Superior Court, 171 Cal. 719, 154 P. 841, Ann. Cas. 1917D, 670, and Miller & Lux, Inc., v. Superior Court, 192 Cal. 332, 219 P. 1006. The trial court in the instant case evidently considered that the defendant by his motion to dismiss the action had waived or abandoned any affirmative relief which he might have sought under his cross-complaint and counterclaim. In the absence of any showing on the part of the plaintiff other than that above stated, excusing its delay, we are unable to hold that the trial court abused its discretion in its order dismissing this action.

The judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.

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204 Cal. 180

MINNIS v. EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES. (L. A. 8384.)

Supreme Court of California. May 15, 1928.

1. Judgment 🔑713(2)—Judgment held conclusive in subsequent action on matters belonging to controversy and within issues which might have been raised.

Judgment is conclusive in all subsequent actions involving same questions, not only as to matters actually decided in former controversy, but as to all matters belonging to subject of controversy property within scope of issues which also might have been raised and decided.

2. Death 🔑2(2)—Presumption of death from seven years' absence does not arise until expiration of seven years, unless circumstances quicken time.

Presumption of death arising after seven years' absence does not arise until end of seven-year period, unless circumstances quicken time.

3. Judgment 🔑725(2)—Circumstances fixing insured's death held not to quicken time of presumption of death from seven years' absence, where previous judgment adjudicated insured was then alive.

Where insured disappeared November 2, 1915, circumstances fixing such date as date of insured's death *held* of no avail to plaintiff suing on policy in quickening time of presumption of death arising from absence for seven years, where former judgment adjudicated that insured was alive on that date.

4. Judgment 🔑725(2)—Judgment that insured did not die on certain date held res judicata, in subsequent action based on seven years' disappearance.

Judgment, in action on life policy, adjudicating that insured did not die on November 2, 1915, as alleged, or any time prior to commencement of action, *held* res judicata in subsequent action on policy, based on presumption of death by seven years' disappearance from November 2, 1915, and was bar to legal determination that insured died at any time prior to commencement of prior action.

5. Insurance 🔑179½—Cause of action on policy, based on seven years' absence, afforded no ground for recovery, where seven-year period terminated subsequent to foreclosure of lien on policy.

Where life policy lapsed for nonpayment of premiums, and insurer foreclosed lien on policy for loan after judicial determination that insured was not dead, cause of action under complaint on policy, based on seven-years' disappearance, if considered as new cause of action, could not have arisen prior to termination of seven-year period, which was subsequent to foreclosure of policy, and hence did not afford ground for recovery of insurance, since policy was not then in force.

In Bank.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action upon a policy of life insurance by Hannah Minnis, administratrix of the estate of Emil Lesser, deceased, against the Equitable Life Assurance Society of the United States, a corporation. From a judgment of the superior court for plaintiff, defendant appeals. Reversed.

Superseding opinion of District Court of Appeal in 253 P. 341.

Newlin & Ashburn, W. C. Mathes, and A. W. Ashburn, all of Los Angeles, for appellant.

Clark & Law, of Los Angeles, for respondent.

LANGDON, J. This action was brought to recover on a life insurance policy issued by defendant to Emil Lesser, plaintiff's intestate. From a judgment entered on a verdict in plaintiff's favor for the sum of $1,950.40, defendant has appealed.

Defendant issued the life insurance policy on February 12, 1894, upon the life of Emil Lesser in the sum of $3,000. Lesser paid the annual premium up to and including the premium due on February 9, 1915, and no payments of premiums were made since that date. On January 30, 1914, Lesser borrowed from the defendant the sum of $987, to be repaid on February 9, 1915, with interest at 5 per cent., and assigned the policy as collateral security for the loan. On February 9, 1916, defendant declared the policy lapsed for nonpayment of premium, and, pursuant to its terms, converted it into a paid-up policy of $1,764. On April 5, 1919, defendant foreclosed the policy for nonpayment of the principal and interest of the loan; the amount of the principal sum of the loan and accrued interest totaling at that time a sum slightly in excess of the paid-up value of the policy.

In 1915, Emil Lesser disappeared, having been seen last at Venice, Cal., on November 2, 1915. On that day he went down to the ocean with the expressed intention of going in bathing. He was seen last dressed in his street clothes, within a few feet of the bathing house, talking and laughing with another man. On that evening his clothing and jewelry were found in the bathhouse. The body was never recovered, and inquiries made in this and other states revealed no trace of him.

On April 10, 1916, defendant was notified that Emil Lesser was dead, and was offered proofs of death in the form of affidavits as to the facts surrounding the disappearance of insured.

On August 31, 1916, the defendant having refused to pay the claim, an action was brought in the superior court of Los Angeles county by Alice Lesser, the surviving wife, as administratrix of the estate of Emil Lesser, deceased, against defendant to recover the sum of $3,000 upon the policy. The complaint alleged that Emil Lesser had been drowned while bathing in the ocean at Venice, Cal., on November 2, 1915, and the answer denied that Lesser was dead. After a trial lasting for five days, in which proof of death was sought to be made by circumstantial evidence, the trial court made a finding:

> "That it is not true that on the 2d day of November, 1915, or at all, the said Emil Lesser was accidentally, or at all, drowned; * * * that the plaintiff has failed to prove by a preponderance of the evidence that said Emil Lesser is dead, and the court therefore finds that the said Emil Lesser is not dead. * * *"

Judgment was entered in accordance with this finding, and no appeal therefrom was taken.

On April 12, 1923, after the expiration of seven years from the date of Lesser's disappearance, the present action was commenced by Hannah Minnis, who succeeded Alice Lesser as administratrix, against defendant for the face value of the policy. The complaint alleged the facts with reference to the disappearance, and then stated, on information and belief, that Lesser died upon the 2d day of November, 1915. The answer denied these allegations, and pleaded the former judgment as a bar to a recovery in this action. The trial court ruled against the defendant upon its plea of res judicata, and the jury returned a verdict for the plaintiff for the face value of the policy, less the amount of the loan thereon with accrued interest.

The important contentions made upon appeal are: That the former judgment was a bar to any future legal determination that Lesser died on November 2, 1915, or at any other date prior to the commencement of that action, and that a finding that Lesser died some time between the date of the first judgment—February, 1919—and the date of the second judgment would be unavailing, because the policy had lapsed for nonpayment of premiums on February 9, 1916, and thereafter became a paid-up policy for $1,764, subject to a lien for the amount of the loan made upon it by the company, and that even this small balance could not be recovered, unless it could be specifically found that the death occurred between February, 1919, and April, 1919, when the lien upon the policy was foreclosed by the company. At the time of the foreclosure of said lien, the surrender value of the policy was slightly less than the amount of the lien, leaving no equity in the plaintiff.

We are of the opinion that these contentions are well founded, and that the judgment is conclusive upon the parties with reference to the period of time upon which it speaks. That judgment decided that Lesser did not die on November 2, 1915, nor at any time prior to the filing of the complaint therein, which was in August, 1916.

[1] The rule is well established that a former final judgment between the same parties to an action is conclusive in all subsequent actions involving the same questions, not only as to matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy and properly within the scope of the issues, which also might have been raised and decided. Bingham v. Kearney, 136 Cal. 175, 68 P. 597; Rucker v. Langford, 138 Cal. 611, 71 P. 1123; Lamb v. Wahlenmaier, 144 Cal. 91, 77 P. 765, 103 Am. St. Rep. 66; Southern Pacific Co. v. Edmunds, 168 Cal. 415, 143 P. 597; Erving v. James H. Goodman & Co. Bank, 171 Cal. 559, 153 P. 945; Whittier v. Visscher, 189 Cal. 454, 209 P. 23; Estate of Clark, 190 Cal. 360, 212 P. 622.

[2-5] Conceding that plaintiff was not barred from establishing, if she could, that Lesser died at any date between August, 1919, and April, 1923, when the second action was brought, we are met with two difficulties: The presumption of death arising after seven years' absence does not arise until the end of the seven-year period. Ashbury v. Sanders, 8 Cal. 62, 68 Am. Dec. 300; Solomon v. Redona,

52 Cal. App. 300, 198 P. 643; Rogers v. Manhattan Life Ins. Co., 138 Cal. 285, 71 P. 348; Benjamin v. District Grand Lodge, 171 Cal. 260, 152 P. 731; Western Grain Co. v. Pillsbury, 173 Cal. 135, 159 P. 423; Lesser v. New York Life Ins. Co., 53 Cal. App. 236, 200 P. 22; McCormick v. Woodmen of the World, 57 Cal. App. 568, 207 P. 943. The rule would be otherwise, if there were circumstances in evidence to "quicken" the time; but the only circumstances in evidence in the case at bar that might be said to "quicken" the time are those with reference to the date of November 2, 1915, but such circumstances are of no avail to plaintiff in this action, for, as we have seen, the former judgment adjudicates that Emil Lesser was alive on that date. The presumption of law arising from the seven years' absence, therefore, can have no other effect than as evidence that Lesser was not dead at the expiration of the seven years, to wit, November 2, 1922. Therefore, if the complaint in the present action be considered as stating a new cause of action, arising since the commencement of the former action, such new cause of action could not have arisen prior to November 2, 1922, and on that date the said policy of insurance was not in force. The policy had lapsed on February 9, 1916, because of nonpayment of premiums; was never thereafter revived by payment of any premium whatever, and was foreclosed by defendant on April 5, 1919, and the proceeds applied to the payment of the principal and interest due upon the loan made to Emil Lesser.

The judgment is reversed.

We concur: SEAWELL, J.; RICHARDS, J.; CURTIS, J.; CONREY, Justice pro tem.; HOUSER, Justice pro tem.; WORKS, Justice pro tem.

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204 Cal. 197

MITCHELL v. SMITH et al. (S. F. 12355.)

Supreme Court of California. May 17, 1928.

Brokers ⚷4—Surety on bond required by securities act held not liable for principal's conversion of stock, which was not violation of act, but of general laws (Corporate Securities Act [St. 1917, p. 673], and amendment of 1923 [St. 1923, p. 87]).

In action on surety bond given by dealers in stock, under provisions of Corporate Securities Act (St. 1917, p. 673) with amendment of 1923 (St. 1923, p. 87), prior to amendment of 1925 (St. 1925, p. 962) for conversion of stock, *held*, that surety was liable only for failure to comply with act, and not for failure to comply with general laws; hence there was no liability on bond for conversion of stock.

Department 2.

Appeal from Superior Court, Alameda County; J. A. Smith, Judge.

Action by J. T. Mitchell against Earl Lysle Smith and others on a surety bond. Judgment for plaintiff, and defendant Maryland Casualty Company appeals. Reversed.

John Ralph Wilson, of San Francisco, for appellant.

H. Raymond Hall, of Oakland (George M. Naus, of San Francisco, of counsel), for respondent.

LANGDON, J. This is an appeal by the defendant Maryland Casualty Company from a judgment for $5,434 against it upon a surety bond. The appeal is upon the judgment roll alone and the contentions made are that the complaint does not state a cause of action and the findings do not support the judgment.

The facts, as disclosed by the findings, are briefly: That prior to December 17, 1924, defendant E. L. Smith was the owner of the stock of the Foss-Smith Company and was an officer thereof, and also the general manager and in direct control of the entire business of said corporation; that during all the times mentioned in the findings the defendants John C. Platt and E. L. Smith were agents of the Foss-Smith Company, a corporation, acting in the full scope of their employment and the regular course of business of said corporation. The appellant was authorized to engage in doing a general surety business in the state of California and did, on or about the 30th day of October, 1924, execute and deliver to the commissioner of corporations of the state of California a bond in the form prescribed by him and as required by the Corporate Securities Act of the state of California (St. 1917, p. 673), and amendments thereto (St. 1923, p. 87; St. 1925, p. 962); that said bond was for the sum of $5,000, defendant E. L. Smith being the principal therein and the Maryland Casualty Company being the surety therein; that said bond and the said surety guaranteed the faithful compliance with, and observance of, all the provisions of law on the part of the said E. L. Smith and his agents, and provided that, upon failure to comply with the provisions of law in so far as the same may apply to any and all transactions carried on by said principal as such broker, the said principal and surety should be liable to any and all persons who may suffer loss by reason thereof; that said bond was canceled on November 18, 1924, being wholly superseded for all purposes for which it had been executed and delivered by a bond executed and delivered on said 18th day of November, 1924, to the commissioner of corporations of the state of California, which said bond was for the sum of $5,000, which latter bond contained substantially the

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

same provisions as the prior one. Said bond, executed and delivered on the 18th day of November, 1924, remained in full force and effect during all of the month of December, 1924, and was thereafter continued in full force and effect by a continuation certificate executed by said Maryland Casualty Company and filed with the commissioner of corporations of the state of California.

During the year 1924 the defendants Foss-Smith Company, E. L. Smith, and John C. Platt entered into a conspiracy to obtain possession of and convert to their own use certain personal property then in the possession of and belonging to plaintiff; that said personal property consisted of 1,400 shares of preferred stock in the Union Mortgage Company of California and 1,200 shares of common stock in said company, for which stock plaintiff had paid, on or about the 27th day of May, 1924, the sum of $20,000; that pursuant to said conspiracy the defendants E. L. Smith and John C. Platt went to the home of plaintiff in Oakland, Alameda county, Cal., on or about the 24th day of December, 1924, and then and there represented to plaintiff that his stock hereinabove described had greatly depreciated in value, and that, if he were to sell it in the open market, he would loss $11,000 on it, but that, if he would allow them and the said Foss-Smith Company to sell the said stock for him, they could and would, and they promise to get back for him all the money which he had paid for said stock, to wit, $20,000, and that he would not be out even a commission for their services in making such sale; that none of said defendants had any intention of fulfilling said promises or of ever returning to plaintiff any of his said stock or anything of value received by said defendants, or any of them, from the sale or transfer thereof; that plaintiff, who is an old and infirm man past 70, and with practically no experience in such matters, fully believed all of said representations, and that said Foss-Smith Company was a reliable and responsible firm engaged in the stock and bond business, and that the defendants E. L. Smith and John C. Platt were reputable, honest, and responsible men, and placing full trust and confidence in said defendants and the Foss-Smith Company, and solely by reason thereof, and of their representations aforesaid, and their agreement to sell the said stock for him and get him all his money back out of the stock, he deposited with said defendant Foss-Smith Company, at its office in the First National Bank building, Oakland, Cal., on or about December 24, 1924, all of his said stock and the certificates therefor; that all of the representations and acts of the defendants Foss-Smith Company, E. L. Smith and John C. Platt as aforesaid, were made and performed pursuant to and as a part of the conspiracy entered into between said defendants as aforesaid, and were all done with the full knowledge and consent of said defendants and with the sole intention on the part of said defendants of deceiving and defrauding said plaintiff and of depriving him of his said stocks and of embezzling and converting the same and the proceeds thereof to their own use; that the said defendants Foss-Smith Company, E. L. Smith and John C. Platt, after obtaining possession of said personal property as aforesaid, did then and there, at said city of Oakland, county of Alameda, state of California, on or about the 24th day of December, 1924, willfully, unlawfully, and fraudulently embezzle, convert, and appropriate the same to their own use contrary to their trust as such agents of said plaintiff, to plaintiff's great damage; that prior to the 1st day of January, 1925, the said defendants Foss-Smith Company, E. L. Smith and John C. Platt, pretending to be the owners of said stock, fraudulently and with intent to embezzle and convert the proceeds thereof, sold and transferred said stock, which had been intrusted to them by plaintiff, and converted and embezzled the proceeds thereof; that shortly thereafter the defendants John C. Platt and E. L. Smith disappeared and their whereabouts is still unknown; that concurrently with their disappearance the office of Foss-Smith Company closed; that thereafter, and on or about the 19th day of January, 1925, and also prior to the commencement of this action, said plaintiff demanded of the defendants Foss-Smith Company, E. L. Smith and John C. Platt, the return of the personal property hereinbefore described, but that the said defendants, and each of them, failed and refused to return same or any part thereof; that no part of said stock, or the proceeds thereof, or anything of value, has been paid or turned over to plaintiff by the defendants herein, or any of them, and that said defendants have failed and refused to make any accounting to plaintiff of said stocks or the proceeds of the sale or transfer thereof.

The conversion of the stock occurred while the Corporate Securities Act (St. 1917, p. 673) with the amendments of 1923 (St. 1923, p. 87) was in force and effect. Therefore the provision of said law applicable here is:

> "Said bond shall be conditioned upon the faithful compliance with the provisions of law by said applicant and by all agents representing the said applicant and shall provide that upon failure to so comply the applicant shall be liable to any and all persons who may suffer loss by reason thereof."

That provision has been construed in the recent case of Blumenthal v. Larson (Cal. App.) 251 P. 241, to mean that a surety is liable for a failure on the part of the broker to comply with the provisions of law set out in the Corporate Securities Act of 1923, and not upon his failure to comply with all the general laws.

The case presented by the record is certainly one to appeal to the sympathies; and the need for protection to one in plaintiff's situation was evidently brought to the attention of the Legislature which enacted, in 1925 (St. 1925, p. 962), an amendment to the Corporate Securities Act (St. 1917, p. 673) which added to the liabilities of the surety, upon a bond given thereunder, that of guaranteeing the honest and faithful application of all funds received and the faithful and honest performance of all obligations and undertakings in the purchase or sale of securities by said broker, etc. Unfortunately, for plaintiff, this provision of the Corporate Securities Act was not in force and effect at the time the wrong was committed against him.

The decision of Blumenthal v. Larson, supra, is conclusive against plaintiff's right to recover under the facts pleaded and found, and the judgment must be reversed.

It is so ordered.

We concur: SHENK, J.; RICHARDS, J.

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204 Cal. 185

NEWTON v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.

(S. F. No. 12864.)

Supreme Court of California. May 15, 1928.

1. Master and servant 🔑372—Compensation is not allowable for injury resulting from inherent bodily defect or not superinduced by extraordinary movement or action.

Where physical injury results from inherent bodily defect, and not an outside cause, or is not superinduced by some extraordinary movement or action, compensation is not allowable.

2. Master and servant 🔑417(7)—Review of Industrial Accident Commission's decision extends only to ascertainment of whether there is testimony supporting findings.

Appellate court, on review of decision by Industrial Accident Commission, cannot draw its own inferences from testimony set forth in record and conclude therefrom whether or not petitioner is entitled to compensation, since jurisdiction extends only to ascertainment of whether there is testimony supporting the findings of the commission.

3. Master and servant 🔑405(4)—Finding that knee injury, while running to catch truck, did not arise in course of employment, held sustained.

Evidence *held* sufficient to support finding of Industrial Accident Commission that injury to knee of employee, while running to catch truck on highway, was not caused by injury arising out of or occurring in course of his employment.

In Bank.

Application by Dudley Newton, Jr., a minor, by his guardian ad litem, Mrs. Dudley Newton, against the State Industrial Accident Commission and others, for a writ of certiorari to review and annul a decision of the Commission denying compensation for injuries. Affirmed.

For opinion of District Court of Appeals, see 262 P. 805.

Bronson, Bronson & Slaven, of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondent.

R. P. Wisecarver, of San Francisco, for respondent Eagle Indemnity Co.

WASTE, C. J. On further consideration, we are of the view that, notwithstanding the rather persuasive arguments of the petitioner, the decision of the District Court of Appeal, affirming the action of the respondent commission denying an award, should stand. Although we might disagree with the commission as to the weight of the evidence before it, as an appellate tribunal we may not overturn a finding of fact it has made if there is some evidence to support it. The opinion of Mr. Justice Plummer, concurred in by Mr. Justice Hart and Mr. Presiding Justice Finch, is adopted as the opinion of this court:

This cause is before us upon the application of the petitioner for a writ of certiorari to review and annul the decision of the Industrial Accident Commission denying compensation to the above-named petitioner. The facts in this matter are uncontradicted. The record shows the following: Dudley Newton, a boy 20 years of age, was in the employ as a general roustabout of H. Brown, a highway contractor, on or about October 6, 1926, and had been in such employment for some months. On the 6th day of October, 1926, while working in the county of Yolo, on a public highway, he was sent by his employer to a point about one mile distant on the highway to get a truck. He went to a point on the highway where he knew the truck would pass, and waited for it. As he was waiting, the truck came along, but at about the same instant of time another automobile passed between the truck and the boy, so, being afraid, as the boy testified, that the truck driver did not see him, he halloed to the truck driver, and ran down the highway after the truck. The truck slowed down, and, as the boy was running along the dirt portion of the highway, he heard or felt his knee snap. He did not fall, although he felt his leg crumple under him. He recovered without falling, and continued to the truck, got on the truck, and rode on the truck for about one hour. His knee started to ache and swell, and his employer sent him to Dr. Harris. Hospitalization and treatment thereafter followed. On December 19, 1926, a refracture occurred when the boy stepped into a hole or depression while walking. The testimony shows that the boy did not stumble, trip over anything, or step into any depression while running after the truck. The only inference that can be drawn from the testimony is that the ground on which the boy was running did not have anything to do with the injury, and that the troubles of the kneecap simply occurred as the boy was running after the truck. The opinion testimony of the attending physician and surgeon, Dr. Harris, is as follows:

> "From this man's history, and from the fact that there was no bruise, excoriation, or contusion at or about the knee joint, I would be led to believe that the fracture of the patella was caused spontaneously while the boy was running to catch a truck. I do not believe there was any extraordinary strain or trauma or exaggerated movement, but that the fracture occurred as a result of the normal motion of the leg in running. The recurrence, in my opinion, was not caused by an extraordinary movement, but simply by a misstep. Operative findings at the second setting showed the fracture to have recurred through previous fracture lines. I do not believe there was any period of partial disability following either fracture."

The testimony of Dr. Harbagh is as follows:

> "A fracture of the patella could occur in the manner described in the record, without any particular accidental feature."

Upon these facts the commission found as follows: (1) Dudley Newton, Jr., aged 20, was employed as a roustabout on October 5, 1926, at Sacramento, Cal., by H. Brown, whose insurance carrier was Eagle Indemnity Company, a corporation; (2) on said date, while running, the employee sustained spontaneous fracture of the patella of the left knee; (3) the evidence does not establish that said fracture was caused by injury or strain arising out of or occurring in the course of his employment.

[1] Compensation was accordingly denied. A petition for a rehearing being denied, application was made to [the District Court of Appeal] for a writ of certiorari. By finding that the injury to petitioner's patella was spontaneous, the commission found, in effect, that the injury was the result of some internal impulse, energy, or natural law without external force, that being one of the definitions of the term used by witnesses. In other words, the finding of the commission is that the injury to the minor resulted from an inherent defect in the patella, although the record does not show any previous diseased condition of the patella, or that the petitioner had experienced any previous trouble therewith. The finding can only be interpreted in the light that the injury resulted from an inherent defect, and not through any extraneous, accidental, or inducing cause, and therefore did not arise out of the course of the minor's employment, or by reason of his employment, but simply occurred during the course of, or time of, employment. It would appear that the theory of the commission was and is that the injury complained of is a matter which would come, probably, under health insurance, and not under the provisions of "the Workmen's Compensation, Insurance and Safety Laws." That the injury occurred during the time of employment or during the course of employment is unquestioned. The testimony of the petitioner shows that the injury to the patella of his left leg occurred while he was on a mission to obtain a truck for his employer. The testimony of the petitioner likewise shows that there was no extraneous or outside force or accidental means present to induce or produce injury to the patella. While the layman would naturally infer that the running of the petitioner caused the patella to snap, there is no testimony to that effect. The testimony only is that it occurred while the petitioner was running. The medical or expert testimony is to the effect that there was no extra strain upon the kneecap, but "that the fracture occurred as a result of the normal motion of the leg in running." While the word "accident" has been eliminated from section 6 of "The Workmen's Compensation Act" (St. 1917, p. 834) the phrase "arising out of, and in the course of the employment" has been interpreted to mean that the injury must result by reason of the employment in which the employee is engaged, and not by reason of some inherent natural defect which simply culminates during the time of employment. In other words, if the agency which culminates in a physical injury is an inherent defect, and not an outside cause, or if the injury is not superinduced by some extraordinary movement or action, compensation is not allowable. Again, as stated in William Simpson Construction Co. et al. v. Industrial Accident Commission, 74 Cal. App. 239, 240 P. 58:

> "In the first place, the burden of proof is upon the applicant to prove that the injury received was one which would sustain an award. 'It must be conceded that the burden is upon the applicant for compensation to show that the injury arose out of as well as in the course of the employment; and there is no presumption, as contended by respondents, that because an injury occurs in the course of the employment it arises out of or because of that employment.'" Eastman Co. v. Industrial Accident Commission, 186 Cal. 587, 200 P. 17.

[2, 3] Likewise, in the Simpson Case, it is also held:

> "Whenever the subject under consideration is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue."

Again [the District Court of Appeal], is not in a position to draw its own inferences from the testimony set forth in the record and conclude therefrom that the petitioner is or is not entitled to compensation. Our jurisdiction extends only to the ascertainment of whether there is testimony in the record, and was testimony before the commission supporting its findings. As said in Dearborn v. Industrial Accident Commission, 187 Cal. 591, 203 P. 112, quoting from the case of Southern Pacific Co. v. Industrial Accident Commission, 177 Cal. 378, 170 P. 822:

> "This court, in reviewing awards of the commission, is not acting as the court of appeal. It has no power to waive the effect of positive evidence. It must assume that the commission believed all the evidence given which tends to sustain the award made. * * * The findings are not subject to review except in so far as they may have been made without any evidence whatever in support thereof."

The opinion of the medical experts in this case is of the same binding force and effect after the commission has acted thereon as any other portion of the testimony set forth in the record. Neither layman nor expert has testified that the injury was not "spontaneous." The opinion of the experts that it was such is admissible testimony, and, when the commission has acted thereon and so found, the law seems to be well settled that appellate courts are bound thereby. This statement of the rule appears in the case of Tartar v. Industrial Accident Commission, 191 Cal. 703, 218 P. 39, to wit:

> "It is well settled that the findings of the Industrial Accident Commission upon questions of fact are conclusive, and are not subject to review where there is any substantial evidence to support them"—citing a number of California cases.

Further, to the same effect, and also as to the definition of the term "arising out of and in the course of the employment," we may cite the case of Storm v. Industrial Accident Commission, 191 Cal. 4, 214 P. 874, where it is said:

> "An injury, in order to be compensable under the terms of the Compensation Act, * * * must have been sustained by the employee 'arising out of and in the course of the employment,' and must have been 'proximately caused by the employment.'"

The opinion in the Storm Case then cites the following, which is supported by a number of authorities:

> "The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employer's work, or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment." "But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause."

If the expert testimony in this case had been to the effect that the injury to the petitioner's left patella resulted from some extraordinary strain or accidental stumbling or striking against some protruding object on the highway, then and in that case a finding that compensation was allowable could readily have been upheld under the ruling of [the District Court of Appeal] in the case of Elk Grove District v. Industrial Accident Commission, 34 Cal. App. 589, 168 P. 392, where the petitioner suffered an injury by reason of an extraordinary strain in the course of her employment in endeavoring to remove heavy benches or seats from in front of a bookcase in order to obtain a desired book to be used in connection with her duties as a teacher. The finding in this case is based upon testimony of medical experts exactly contrary to that in the case just cited, and whether correct or incorrect, supports the finding of the commission, and by that finding we are bound. It being a question of fact as to whether the injury to the petitioner arose out of or in the course of his employment, or was simply spontaneous, and occurred during the time of his employment, and that fact, being found adversely to the petitioner's contention, and being based upon the expert testimony to which we have referred, supports the findings of the commission, and, being a question of fact determined by the commission, cannot be disturbed upon appeal. The only question of law involved herein is as to whether there is any testimony supporting the finding of the commission, and, having found such testimony, our inquiry there stops.

The decision of the commission is affirmed.

We concur: RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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204 Cal. 244

GABRIEL v. BANK OF ITALY. (Sac. 4009.)

Supreme Court of California. May 25, 1928.

Negligence ⚷32(1)—Bank held not liable to customer slipping on floor of recessed entrance within its property line used by public as sidewalk.

Where floor of recess constituting entrance of bank building, though within bank's property line, was outside outer doors of bank, and was used by general public for sidewalk purposes, *held* that bank was not liable for injuries sustained by depositor who slipped on some substance lying unobserved on floor of recess when about to enter bank as customer and invitee, in absence of showing that bank had actual or inferable knowledge of condition of recess.

Department 2.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by D. Gabriel against the Bank of Italy. From a judgment for defendant on an

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

order of nonsuit granted at close of plaintiff's case, plaintiff appeals. Affirmed.

W. E. Davies, of Marysville, for appellant.
James W. Scott, of San Francisco, for respondent.

RICHARDS, J. This appeal is by the plaintiff from a judgment in defendant's favor upon an order of the court granting a nonsuit at the close of the plaintiff's case. The action was one to recover damages for personal injuries sustained by the plaintiff from a fall which occurred as he was about to enter the defendant's branch bank in the city of Marysville between the hours of 10 and 11 o'clock a. m. on March 10, 1925, and while the said bank was open for business, and while the plaintiff, who was a depositor and customer of said bank, was about to enter the same on business. The building in which the business of said bank was being conducted at the time stands flush with the sidewalk, with the exception that at the point where the main doorway constituting the entrance to the bank is located there is a recession about two and one-half feet in depth and about ten feet in width, and within which the doors of the bank are placed. This recess, while within the property line of the bank, is in reality but an extension of the sidewalk to the point therein where the doors are placed, and, while employed by those who are entering or leaving the bank on business is also open to access by the general public passing or repassing along the sidewalk in front of the bank. The plaintiff just prior to his accident had approached the bank, and was in the act of entering the same on business, but, while still within said recess, and before opening the bank doors, he slipped upon some substance, supposed to be a piece of banana or orange peel, which was lying unobserved upon the floor of said recess, and fell heavily, suffering injuries which rendered him unconscious, and sustaining a fracture of the right femur bone, from the effects of which he was confined to a hospital and to his home for many weeks, with the probability that his injuries will be permanent.

Upon the trial of the cause, plaintiff proved that he was a depositor and customer of said bank, and that hence, as an invitee thereof, he was about to enter it upon business, and that, without any fault or negligence on his part he had slipped upon whatever substance was lying at the indicated place, and had thereby sustained his aforesaid injuries. He also introduced evidence tending to show that, while the defendant bank employed a janitor to clean and care for its premises before or after business hours, the duties of such caretaker ended at about 6 o'clock in the morning of each business day, and that during the regular business hours of the bank no one was specially charged with the duty of seeing that its floors or premises were kept in condition. At the close of plaintiff's case, the defendant moved the court for a nonsuit upon the ground that there was no sufficient showing of negligence on the part of the defendant. The court granted the motion, and, having done so, rendered and entered its judgment in the defendant's favor, and it is from such judgment that this appeal has been taken. We are unable to say that the trial court was in error in granting a motion for nonsuit under the circumstances of this particular case. Had the plaintiff at the time he sustained his said injuries been within the actual precincts of the defendant's bank wherein its business was being conducted, into which only that portion of the public which had business to transact with said institution was supposed to enter, a different question might be presented; but in the case at bar the plaintiff, while doubtless intending to open the doors of said bank and enter within its inner precincts as a customer and invitee thereof, had not in fact actually done so, but, on the contrary, at the moment of his injuries was outside the doors of the bank, and, while within the line of the bank property, was standing or walking upon that portion thereof which, while forming the said recess, also constituted a space used and usable by the general public for sidewalk purposes. To hold that the rule requiring of such an institution the exercise of reasonable care for the protection and safety of its customers or invitees should be so far extended as to be applicable to those portions of its premises which lie outside of the precincts wherein its actual business with its customers and invitees is being conducted, and which form in fact a portion of the public sidewalk, would, we think, amount to an undue extension of said rule, and one which should not be given application, in the absence of any showing of either actual or inferable knowledge on the part of those in charge of the affairs of said institution that said outer portion of its premises, accessible to the general public, was in such a condition as to render possible the accident and injuries of which the plaintiff in the instant case complains.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.

204 Cal. 228

McMAHON v. HAMILTON. (S. F. 12354.)

Supreme Court of California. May 24, 1928.

1. Appeal and error ⟹1067—Failure to instruct on measure of damages in personal injury action held harmless error.

In personal injury action, court's failure to instruct the jury as to the measure of damages *held* harmless error, where there was no occasion, under the facts, for application of the statutory rule.

2. Automobiles ⟹213—Boy injured by collision with automobile while riding with another on motorcycle, and having nothing to hold onto, held contributorily negligent.

Fourteen year old boy injured in collision with defendant's automobile while plaintiff was riding, on city street, on the seat of motorcycle, having nothing to hold onto and driver thereof was sitting on the small gas tank, *held* contributorily negligent, and to have assumed responsibility for injury, precluding recovery.

Department 2.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Joseph T. McMahon, by Rose Surryhne, guardian ad litem, against Fred Hamilton. Judgment for defendant, and plaintiff appeals. Affirmed.

J. A. Tracy, William Steers, and Charles Reagh, all of San Francisco, for appellant.

Louis V. Crowley, and Cooley, Crowley & Gallagher, all of San Francisco, for respondent.

SHENK, J. This appeal is from a judgment for defendant in an action for damages for personal injuries. The plaintiff, Joseph T. McMahon, was at the time of the accident about fourteen years of age. On the evening of September 3, 1925, on Mission street, in San Francisco, he hailed Charles Raleigh, who was at the time passing on a motorcycle, and asked him for a ride. When the two had proceeded for about six or eight blocks along Mission street they collided with a Ford automobile which the defendant was driving. The jury returned a verdict for the defendant, and the judgment appealed from was entered. After plaintiff had filed his notice of appeal, he submitted to the trial court his proposed bill of exceptions. Defendant submitted proposed amendments thereto. After some delay, and through inadvertence, the trial judge signed the plaintiff's proposed bill of exceptions, although he had allowed the defendant's proposed amendments. On October 24, 1927, this court denied appellant's motion to vacate its prior order of July 11, 1927, made on motion of respondent, to require the plaintiff to file with his transcript the proposed amendments which had been allowed. McMahon v. Hamilton, 260 P. 793. The proposed amendments have not been filed. We must therefore decide the merits of this appeal on the record and briefs before us.

[1] The plaintiff assigns as error numerous instructions given by the trial court and the refusal to give certain instructions requested by the plaintiff. The charge to the jury has been examined. As a whole, it may be said that it fairly presented to the jury the law applicable to the facts in the case, and no substantial right of the plaintiff was invaded by the refusal to give any instruction requested by him. It would serve no useful purpose to comment on each assignment of error. They are sufficiently met by the defendant in his brief. It may be said, however, that the court should have instructed the jury as to the measure of damages. But, as there was no occasion under the facts for the application of the statutory rule, the omission to charge thereon was not prejudicial.

[2] The record would support a finding of the jury absolving the defendant from any negligence, and at all events the plaintiff was clearly guilty of contributory negligence. He himself testified that the "motorcycle had but one seat, and the driver moved forward near the handle bars, sitting on the small gas tank, and I got onto the seat; I had nothing to hold onto except to put my hands underneath me and try to hold onto the seat; I had no other hold, and did not hold onto the driver or the driver's seat; the place where I got onto the motorcycle would be about six or eight city blocks from the place where the accident happened; we were going pretty fast; we were going a good deal faster than the Ford automobile; we had no light on the motorcycle, and the driver of the motorcycle did not sound any horn or warning of any kind; the motorcycle struck and collided with the Ford automobile; the Ford automobile was going very slowly; it was facing toward San Francisco and was about two feet from the east curb of Mission street when it was struck." By thus voluntarily assuming a position on the one-seated motorcycle, which was hazardous to himself even in the ordinary operations of the vehicle, he must be deemed likewise to have assumed the responsibility for any injury to which, as here, his dangerous position would presumably contribute. It was undisputed that the motorcycle did not fall from the force of the impact. The driver, Raleigh, did not lose his seat, but righted his vehicle and brought it to a stop. We find no prejudicial error in the record.

The judgment is affirmed.

We concur: LANGDON, J.; RICHARDS, J.

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91 Cal. App. 735

WITHERS v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 6030.)

District Court of Appeal, Second District, Division 2, California. May 14, 1928.

Marriage 🔑67—Judgment annulling marriage held to terminate court's authority to enforce payment of alimony under divorce decree previously entered.

Judgment annulling marriage *held* to terminate court's authority to enforce payment of alimony under previously entered divorce decree, since judgment annulling marriage rendered the divorce decree null and void.

Application by Granville G. Withers for a writ of prohibition to be directed to the Superior Court of Los Angeles County, Hon. Daniel Beecher, Judge, to restrain the enforcement of an order to show cause in a divorce proceeding. Writ granted.

William DeF. Mann, of Los Angeles, for petitioner.

CRAIG, J. On June 18, 1925, Granville Withers and Inez Withers intermarried. On August 13, 1925, Inez Withers brought suit for divorce. An order pendente lite was made awarding the plaintiff alimony, counsel fees, and court costs. On August 17th following, Nona Withers, the mother of Granville Withers, filed suit against Inez Withers to annul the marriage, and a judgment of annulment was entered on September 22, 1925. The judgment required Granville Withers to pay to Inez $60 per month for alimony and support of their minor child, whose custody was also awarded to her.

Thereafter, in the divorce action, Inez Withers filed an affidavit alleging that Granville became delinquent in the payment of alimony as required by the order pendente lite above mentioned, which delinquency began on April 15, 1927. An order was made, based upon this affidavit, requiring Granville Withers to show cause why he should not be punished for contempt for having failed to comply with the terms of said order pendente lite. At the time fixed for the hearing of the order to show cause, petitioner herein appeared and urged that, since the marriage of the parties had been annulled, the court had lost jurisdiction to enforce the order made in the divorce action.

However, it is averred in the petition that the superior court disregarded this objection, and announced that petitioner was in contempt, but continued the hearing until March 13, 1928, to take further testimony as to the ability of petitioner to make the required payments, and to "determine the punishment to be inflicted" on the petitioner.

Thereupon Granville Withers sought a writ of prohibition against the superior court proceeding further in the divorce action, and particularly from taking further steps in the hearing on the order to show cause.

The judgment of annulment terminated the court's authority to enforce payment of alimony accruing thereafter. Having decided that the marriage was a nullity, the status of the parties after the entry of that judgment was not such that they could be divorced any more than as though they had never been married. This view is supported by Millar v. Millar, 175 Cal. 797, 167 P. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184. Both actions were in the same court, and it was only necessary upon the hearing of the order to show cause for the defendant in the divorce action to call attention to the judgment of annulment, which terminated the subject-matter of the divorce action from the date of the entry of such judgment.

Let the writ issue as prayed.

We concur: WORKS, P. J.; THOMPSON, J.

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91 Cal. App. 757

ARTEL v. RIBOLI. (Civ. 5114.)

District Court of Appeal, Second District, Division 1, California. May 15, 1928.

Mechanics' liens 🔑281(1)—Evidence that plaintiff furnished materials to subcontractor without proof of contract with defendant owner or use on premises held insufficient to warrant foreclosure of lien.

In action by materialman against owner of property to foreclose lien under contract, not accompanied by bond as provided by Code Civ. Proc. § 1183, evidence which merely showed that plaintiff furnished subcontractor building materials for use in building six houses, and which failed to show that materials were ever actually used on defendant's premises or that defendant had any agreement with the contractor, was insufficient to warrant foreclosure of lien.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action by John G. Artel against Maddalena Riboli and others. From an adverse judgment, defendant named appeals. Reversed.

Alfred W. Allen and Fred W. Heatherly, both of Los Angeles, for appellant.

Garner White and Clyde Woodworth, both of Inglewood, for respondent.

CONREY, P. J. This action was commenced by complaint against appellant and several other defendants, but at the trial was dismissed as to all defendants except appellant Riboli. Plaintiff alleged that one Cambianico, as owner, entered into a contract with one Randolph, subcontractor, and Frank Pece, general contractor, for the construction of "a building" upon certain described real property of Cambianico; that the contract was in writing, but was not filed with the county recorder, and was not accompanied by any bond as provided under section 1183, Code of Civil Procedure; that thereafter the plaintiff, at the request of Randolph acting for himself and as agent for the owner, and upon their promise to pay the reasonable value thereof, furnished certain plumbing materials to be used and which were used in said building; that plaintiff duly filed his claim of lien, etc. Plaintiff demanded judgment for the balance alleged to be due, together with the usual remedy for the enforcement of his lien.

Answer having been made by appellant and other defendants denying the principal allegations of the complaint, the case went to trial. There was no evidence offered to show that Cambianico owned the property or made any contract in relation thereto. On the contrary, it was stipulated that appellant Riboli "is the owner of the property and was at all times." The only reference to any contract with the owner is found in the testimony of Frank Pece that he was the general contractor on the job. It further appears from his testimony that the contract was for the building of six houses on said premises and not merely one house; that Pece signed a contract with Randolph under which Randolph was to furnish the plumbing; that Randolph brought plumbing materials to the premises and did the plumbing work. "He roughed in the plumbing work for six houses. He brought the materials just little by little every morning and took out the material pretty near every night. He supplied his own materials that went on the job. He had the contract on the six houses."

From the plaintiff's own testimony it appears that he did not deliver any of said plumbing materials on appellant's premises, but delivered them to Randolph personally without ever knowing anything about their actual delivery or use. Randolph gave to plaintiff a wrong description of the premises where he was to do the work, and plaintiff never found or saw appellant's premises until long afterwards. For aught that appears, the materials furnished by Randolph at defendant's premises may never have come from the plaintiff. It is true that, as testified by plaintiff, Randolph paid to plaintiff the sum of $200 on account by delivering to plaintiff a check for that amount, and the witness Frank Pece testified that he gave Randolph a check for $200 payable to the plaintiff. This proves only that the contractor Frank Pece relied upon Randolph's declaration that the materials were coming from Artel, the plaintiff. The amount of materials furnished by the plaintiff to Randolph, measured by their reasonable value as testified to by plaintiff, amounted to a sum substantially greater than the entire contract price which Randolph was to receive under his contract with Frank Pece. Apparently Randolph disappeared before this case was tried, for he was not a witness at the trial.

It is unnecessary to discuss other grounds of appeal urged by appellant. The evidence is clearly not sufficient to justify any finding that the materials furnished by plaintiff to Randolph were used on the premises of appellant, or that the appellant entered into any agreement with Randolph. So far as the record shows, the provisions of the Mechanic's Lien Law may have been fully complied with in any contract between appellant and the contractor. Nevertheless the court, without having before it any party other than the owner of the premises, has rendered personal judgment against the owner and in favor of the subcontractor, and has by its decree attempted to establish and to foreclose a lien against appellant's property for the amount of that judgment.

The judgment is reversed.

We concur: HOUSER, J.; YORK, J.

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91 Cal. App. 705

FIRST NAT. BANK OF REDONDO v. STANDARD OIL CO. OF CALIFORNIA et al. (Civ. 3514.)

District Court of Appeal, Third District, California. May 10, 1928.

1. Mines and minerals 🔑79(1)—Right to royalties of one of landowners pooling his interest for share of profits, in oil lease held not defeated by lessee's surrender of nonproductive areas.

In suit in equity for declaratory relief under Code Civ. Proc. § 1060, where landowners agreed to pool their interest in lease of property to oil company, with provision that each owner should share in all profits accruing to the whole lease in ratio of acreage, and the lease provided for lessee's surrender and termination of lease on premises, except as to ten-acre tract surrounding each producing well, surrender by oil company of portions of land pursuant to the lease *held* not to affect method of distribution of royalties or to defeat right thereto of lessor, all of whose land was included within the surrendered area.

2. Mines and minerals 🔑77—Lessee's surrender of nonproductive areas pursuant to provisions of oil lease held not to terminate lease.

Where oil and gas lease gave lessee right to surrender and terminate the lease as to all parts of premises, except ten acres surrounding each producing or drilling well, lessee's notice of election to cease drilling and surrender non-

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productive areas *held* not to constitute termination of entire lease in suit by one of lessors for declaratory relief, under Code Civ. Proc. § 1060, where lease expressly provided that benefits were to be apportioned, notwithstanding surrender of parts of land.

Appeal from Superior Court, Los Angeles County; John F. Pullen, Judge.

Action for declaratory relief by the First National Bank of Redondo against the Standard Oil Company of California, J. Atherton, and others, in which defendant last named and others, excepting first named defendant, appeal, and in which some of defendants intervened as respondents. Affirmed.

Frank Bryant, of Los Angeles, for appellants.

Frank L. Perry, of Redondo Beach, for respondent First Nat. Bank of Redondo.

Lawler & Degnan, of Los Angeles, for respondent Standard Oil Co. of California.

M. D. Andrews, of Los Angeles, for intervening respondents.

TUTTLE, Justice pro tem. This is a suit in equity for declaratory relief, under the provisions of section 1060 of the Code of Civil Procedure. A decree was entered declaring the rights of the parties under the provisions of a certain lease between them. Certain parties to said lease now prosecute this appeal from the judgment.

The appeal is taken by the so-called "alternative method," and there is no controversy as to the facts, which are all agreed upon in a stipulation filed in the cause.

It appears from the briefs of respondents that on October 26, 1921, a number of landowners in the vicinity of Redondo, Cal., entered into a certain lease with Standard Oil Company of California, hereinafter referred to as the "oil company." The lands were separately owned, but they formed a compact area of some 75 acres. Certain rents and royalties, accruing under this lease, were to be paid by the oil company to the First National Bank of Redondo, as depositary. Only two paragraphs of said lease contain matter which give rise to this controversy, and they are:

"12. After the completion of the first or any subsequent well herein provided for, whether oil is found therein in such paying quantities or not, the lessee may, at its election, at any time cease further drilling, and if said full number of wells shall not have been drilled, the lessee shall thereupon surrender the lease and this lease shall thereupon terminate as to all said premises except ten (10) acres surrounding each producing or drilling well, which the lessee may hold free of further drilling obligations as long as oil or gas is produced therefrom, with rights of way for pipe lines upon all of the herein demised premises, and for passage over and upon and across, and ingress and egress to and from said premises. Such ten (10) acres shall in each instance be in the form of a square or rectangle, the longer sides of which shall not exceed twice the length of the shorter sides. At the expiration of the period of twenty years from the date hereof, no further wells shall be drilled on said premises by said lessee except with the written consent of the lessor owning the parcel of land upon which said well is desired to be drilled."

"37. Said lessors agree to, and they do hereby pool their interest in this lease, and agree that during the continuance of this lease each owner of land subject thereto shall share in all benefits accruing to the whole lease in the ratio which the acreage owned by said lessors bears to the entire acreage hereby leased. This provision as to apportionment of benefits to be operative, notwithstanding the surrender by the lessee of any land described herein."

Pursuant to the provisions of said paragraph 12, the oil company duly gave written notice to all the lessors that it elected to cease drilling upon, and to surrender, all the leased premises except ten acres surrounding each producing well. The area surrendered was owned by respondents. The ten-acre tracts thus retained (surrounding the producing wells) included all the acreage owned by appellants.

Upon the giving of this notice of surrender, appellants servéd notice upon the depositary bank that no more payments should be made to the respondents, and that they (respondents) should be denied thereafter any participation in the rents and royalties paid by the oil company under said lease.

The trial court held that the surrender of a portion of the land covered by said lease, as hereinbefore detailed, had no effect upon the method of distribution of royalties by the bank, or upon the proportions into which said royalties should be divided, and did not and could not operate to divest any of the lessors of their interests in royalties, and could not and did not change the interests of the parties as lessors under said lease. Judgment was entered accordingly.

We cannot definitely define appellant's position. In one breath they contend that the whole lease was canceled by the oil company, while in another they contend apparently that the lease is in full force and effect, but that they are entitled to *all* royalties accruing after the surrender of the acreage mentioned.

[1] By the portion of the lease quoted supra, the lessors (appellants and respondents) agree to "pool their interest in this lease." The term "pool" means a surrender of certain individual rights and powers for the benefit of all, on the theory that the accruing benefits gained by the joint venture outweigh the individual rights surrendered. Burley Tobacco Soc. v. Monroe, 148 Ky. 289, 146 S. W. 725. In the instant case, the parties surrendered their individual rights. If all the revenue was produced by wells entirely upon the lands of any one of them, all would participate, nevertheless, in the proceeds from said

wells. It was simply a case of collective bargaining for the common good.

[2] It is contended by appellants that the notice of surrender was a termination of the whole lease. We see no merit in this position. The lease expressly provided that the benefits were to be apportioned as therein stated, *notwithstanding the surrender by the lessee of any land described therein.* The act of the oil company in surrendering certain acreage was strictly in accordance with the provisions of the lease, and permission to take this step was not required of appellants, nor did said notice terminate the entire lease. There is no uncertainty or ambiguity in the language of the lease.

Appellants' only authorities are upon rescission and specific performance, but the application of these cases to the questions raised is not clearly explained.

After agreeing in writing to "pool" their interest, appellants, when they find that all the oil is coming from their own lands, now want to exclude their colessors from any of the benefits of the lease. Their contentions border upon the frivolous, in their obvious lack of any real or substantial merit.

The appeal is without any real or substantial merit, and the judgment is therefore affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

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91 Cal. App. 677

DEMPSEY-KEARNS THEATRICAL & MOTION PICTURE ENTERPRISES, Inc., v. PANTAGES. (Civ. 5807.)★

District Court of Appeal, Second District, Division 1, California. May 9, 1928.

Hearing Denied by Supreme Court July 5, 1928.

1. Partnership 🔑20—Contract to furnish services of artists for certain period, in consideration of named sum and commissions, did not create copartnership.

Contract to furnish and secure services of artists for a specified period, in consideration of agreed sum and commissions on all sums in excess of certain amount specified therein without right of party furnishing services of artists to fix price of admission or employ other players or fix their compensation, *held* not to constitute a copartnership as bearing on right to recover commission on sums stolen from box office.

2. Partnership 🔑3, 5—"Copartnership" requires joint ownership of property, with proportionate sharing in profits and losses.

An essential element in a copartnership is the joint ownership of the property, a proportionate sharing in the profits, and a like proportionate sharing in the losses.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Copartnership.]

3. Partnership 🔑9(1)—That compensation of parties to contract for furnishing artists in theatrical enterprise was dependent on profit did not constitute arrangement a copartnership.

Mere fact that compensation to one or all of parties to contract for furnishing services of artists in theatrical enterprise was dependent on enterprise producing a profit, and that such profit was shared in proportions, did not in itself constitute the arrangement a copartnership.

4. Joint adventures 🔑1—Partnership 🔑1—"Joint enterprise" characterizes a single joint venture, while "copartnership" characterizes a general and continuing joint venture.

The term "joint enterprise" is commonly used to characterize a single joint venture, while the term "copartnership" generally characterizes a general and continuing joint venture, but, to bring a contract within legal designation of copartnership or joint enterprise, it must appear that parties thereto are associated together for joint benefit of all, that they are joint owners of property belonging to association, and share jointly in profits as well as in the same proportion bear the losses that might result from the enterprise.

5. Joint adventures 🔑1—Contract to furnish artists for theatrical enterprise in consideration of salary and commissions did not constitute "joint enterprise."

Contract to furnish services of artists in theatrical enterprise in consideration of named sum, with commissions on amount taken in over certain specified sum, *held* not to constitute a joint enterprise as bearing on right to recover percentage of box office receipts that were stolen, since contract did not provide for joint ownership of box office receipts nor joint division of profits or joint sharing of losses.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by the Dempsey-Kearns Theatrical & Motion Picture Enterprises, Inc., against Alexander Pantages, wherein defendant filed a cross-complaint. Judgment for defendant, and plaintiff appeals. Reversed in part, and in part affirmed.

Mott & Vallee and Kenneth E. Grant, all of Los Angeles, for appellant.

W. I. Gilbert and W. H. Sheldon, both of Los Angeles, for respondent.

HAHN, Justice pro tem. Plaintiff prosecutes this appeal from a judgment rendered in favor of the defendant in an action seeking to recover $2,356.76, claimed due and owing from defendant, arising out of a contract entered into between the parties. The evidence was presented to the court either by stipulation or by testimony which was not disputed.

In October, 1921, a written contract was entered into wherein the defendant herein was the party of the first part, and designat-

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★Hearing denied by Supreme Court.

ed as "manager"; the plaintiff herein was the party of the second part, and designated as "producer"; and Jack Dempsey and Jack Kearns were the parties of the third part and designated as "artists." The contract in question is an extended one, and we will quote only such paragraphs as we deem material for our consideration. They will be referred to as numbered in the written agreement:

"First. The manager agrees to engage and employ, and the producer engages to furnish and secure the services of the said artists during the period of this contract.

"The producer agrees that said artists will render their exclusive services to the manager, as herein provided, during the term of this agreement.

"Second. The said manager agrees to organize, assemble and put together the vaudeville show around Jack Dempsey as champion heavyweight pugilist of the world, in which show the said Dempsey and Kearns shall render their services as herein provided.

"Fourth. The said manager guarantees to the said producer twenty (20) weeks' employment, and the term of this contract shall be for twenty (20) or more weeks.

"Fifth. * * * Whenever a week is lost by travel, as hereinbefore provided, the producer shall receive no pay for said week, nor shall the said week be considered as one of the weeks of the term of this contract or of the guarantee of employment given to the said producer.

"Sixth. The artists shall not be required to appear in more than three (3) shows a day, except on Saturdays and Sundays, when four (4) shows may be given.

"Seventh. Out of the gross receipts at the box office of the theatre or theatres in which the artists appear, there shall first be paid to the producer by the manager the sum of four thousand dollars ($4,000) per week, after which there shall be paid from such receipts the cost of the show in which said artists are appearing, said cost to include transportation, salaries of artists and expenses of an advance man, but the aggregate cost of said show, aside and apart from the four thousand dollars ($4,000) paid to the producer as herein provided, shall not in any event exceed the sum of twenty-three hundred and seventy-five dollars ($2,375).

"After the aforesaid payment of four thousand dollars ($4,000) shall have been made to the producer and the cost of the show, as provided in the preceding paragraph, then there shall be paid to the manager the sum of four thousand dollars ($4,000) or as much thereof as the gross receipts will permit. Thereafter any surplus remaining, after the payment of the war tax, shall be divided fifty per cent. (50%) to the producer and fifty per cent. (50%) to the manager.

"The payment of the four thousand dollars ($4,000) to the producer shall be as follows:

"Two thousand dollars ($2,000) in American currency and two thousand dollars ($2,000) in Canadian currency in the cities of Winnipeg and Vancouver;

"The payment of the producer in all other Canadian cities shall be in American currency;

"Any moneys due to the producer under the splitting arrangement shall be paid in Canadian currency;

"Otherwise, all other payments shall be in American currency.

"Ninth. The manager guarantees to the producer that the minimum receipts of the producer for each week that the services may be rendered by the artists as herein provided shall be not less than the sum of four thousand dollars ($4,000)."

Attached to and made a part of the contract is what is termed therein as a "printed form of contract." This printed form contains extended provisions specifying the authority of respondent "as manager" to determine the place, time, and manner of giving the vaudeville shows, and also establishes with considerable detail the duties and obligations of the players who are therein designated as "artists." The form contract makes use of the terms "salaries" and "employment," as also other terms commonly used in declaring the relation of employer and employee.

The controversy here involved arose out of the fact that the box office receipts for a Sunday night performance given in Kansas City were stolen from respondent's safe in the office of the theater, where the money had been placed by respondent's agent for safe-keeping. It was stipulated in open court that the loss of the money was in nowise due to any negligence or carelessness on the part of respondent or his agent.

Subsequent to the theft, respondent refused to make settlement with appellant on the basis of the box office receipts taken in at the Sunday night performance, contending that this money was partnership funds, and that, inasmuch as the loss was not due to any negligence on his part, he was not accountable to appellant for any of the proceeds from that performance. It seems to have been conceded by respondent at the trial that, had the money not been stolen, plaintiff would have been entitled to payment, by reason of the Sunday night performance at Kansas City, in substantially the amount set forth in the complaint.

The case was tried by both sides upon the theory that the determination of any liability on the part of the respondent to the plaintiff would depend upon whether or not the contract in question constituted a copartnership. Plaintiff contended vigorously that there was no copartnership, but rather an agreement between independent parties. Defendant resisted plaintiff's claim on the ground that the contract did constitute a copartnership. Briefs filed by both parties on the appeal are largely occupied with a discussion of the question as to whether or not there was a copartnership.

[1] It appears from the contract and the evidence presented at the trial, that appellant had no part in fixing the price of admis-

sion to be charged for the shows, nor any authority in employing the help or players, or in fixing their compensation. The box office receipts were in the possession and charge of respondent's agents, and were by them deposited in the separate accounts of the respondent carried in the name of the different theaters. Respondent and his agents alone had the right to check on these funds, and all payments were made during the life of the contract to appellant by checks drawn upon respondent's bank accounts and signed by him or his agents.

Looking to the provisions of the contract for the distribution of the funds derived from the shows, it appears that the first $4,000 was paid to appellant, and, if the box office receipts in any week did not amount to $4,000, respondent was obligated to make up the deficit out of his own pocket. After the first payment of $4,000 to respondent, the salaries of the artists and traveling expenses were to be paid not exceeding the sum of $2,375. These salaries and all expenses were a liability assumed by respondent, and, if in any week the gross box receipts did not amount to enough to pay the $4,000 to appellant and the salaries and traveling expenses of the troupe, respondent was legally liable to pay such deficit. Unquestionably, respondent was also liable to the government to see that the admission tax was paid.

In fact, when one carefully examines the contract, which, it must be admitted, is far from clear in declaring the legal relations between the parties, it appears that appellant had no obligations under the contract other than to furnish or induce Dempsey and Kearns to enter into the contract which at its outset declares that the respondent, as manager, agrees to engage and employ them as artists. Unquestionably, under the contract, Dempsey and Kearns, as individuals, assumed certain obligations toward the respondent, but otherwise the entire burden of carrying out the enterprise so far as the appellant is concerned was assumed by the respondent. Appellant's share in the profits of the venture was not dependent, except as to certain excess income, upon whether the enterprise was a success or not, nor, on the other hand, could the appellant be held liable under the contract for any portion of the loss that might be incurred in the enterprise.

[2] It is too well settled to require discussion that an essential element in a copartnership is the joint ownership of the property, a proportionate sharing in the profits, and a like proportionate sharing in the losses. Wheeler v. Farmer, 38 Cal. 203. The essential element of the copartnership is clearly lacking in the contract.

[3] However, the mere fact that compensation to one or all of the parties is dependent upon the enterprise producing a profit, and that such profit is shared in proportions, does not constitute the arrangement a copartnership. Lyden v. Spohn-Patrick Co., 155 Cal. 177, 100 P. 236; Coward v. Clanton, 122 Cal. 451, 55 P. 147.

We are satisfied that the contract in question does not meet the requirements of the provisions of the Civil Code relating to copartnerships so as to constitute it a copartnership.

[4, 5] But, respondent urges, even if his contention of a copartnership cannot be sustained, the contract constitutes a joint enterprise, and upon that theory the money stolen was the joint property of appellant and respondent, and therefore he cannot be held liable to appellant for a share of the funds taken.

The line of demarcation between a "copartnership" and a "joint enterprise" is not clearly drawn, either by statutory enactment or judicial interpretation. The term "joint enterprise" is commonly recognized in judicial discussion as a term used to characterize a single joint venture, while the term "copartnership" is more generally used to characterize a general and continuing joint venture. It is, however, held without dispute that, in order to bring a contract within the legal designation of a copartnership or a joint enterprise, it must appear that the parties thereto are associated together for the joint benefit of all; that they are joint owners of the property belonging to the association, and share jointly in the profits as well as in the same proportion bear the losses that might result from the enterprise. It has been held that certain requisites of a copartnership do not pertain to a joint enterprise, but we do not deem a discussion of those differences as necessary to this decision.

As already pointed out in our discussion, the contract does not provide for joint ownership of the box office receipts, nor for a joint division of the profits; nor does it provide anywhere for a joint sharing of the losses. Furthermore, it appears that the box office receipts which respondent claims were the joint property of respondent and appellant were never dealt with by the parties as joint funds. Indeed, the treatment of the box office receipts, particularly by respondent, would justify but one conclusion, and that is that the parties considered this money was the property of respondent, and that he was obligated to make certain payments to appellant. We are of the opinion that the funds stolen did not constitute the joint property of respondent and appellant, but, rather, the property of respondent, and that under the admissions made during the trial respondent would be liable to appellant for substantially the sum claimed in its complaint.

The record discloses that during the trial the parties showed a disposition to agree upon the amount which would be payable to the appellant by the respondent if it was determined that appellant was entitled to recover in this action. Under these circumstances, it would seem unnecessary to have a retrial of the case, in view of our conclusion on the legal question that seems determinative of the matter. If, therefore, the parties will file a written stipulation as to the amount of money that appellant would be entitled to under the views as herein expressed, then the lower court is directed to prepare findings of fact in accordance with this opinion and conclusion of law that plaintiff is entitled to recover the amount from the defendant agreed to in such stipulation, and to enter judgment accordingly; provided that in such findings and judgment defendant shall be awarded judgment against the plaintiff for the sum of $312.70, being the amount claimed by defendant in his cross-complaint, and for which sum judgment was entered by the court in the judgment appealed from. If, however, such stipulation is not filed within such time as the trial court may determine that will enable the court to make the findings, and enter the judgment as here indicated, then a new trial will be necessary only as to the amount claimed owing by the plaintiff in his complaint from the defendant. The claim of the defendant in his cross-complaint against the plaintiff has been determined, and will require no retrial.

That part of the judgment which declares that the plaintiff is entitled to nothing from the defendant on its claim as set forth in its complaint is reversed. The judgment in favor of the defendant on his cross-complaint against the plaintiff is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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91 Cal. App. 636

CONTINENTAL RUBBER WORKS v. BERNSON. (Civ. 5267.)

District Court of Appeal, Second District, Division 2, California. May 7, 1928.

Interest ⚿18(2)—**Interest on open account for reasonable value of goods sold held not allowable prior to judgment, claim being unliquidated (Civ. Code, § 3287).**

Plaintiff in action on open account for reasonable "value" of goods sold is, under Civ. Code, § 3287, not entitled to interest prior to judgment, though there was testimony that statement of account showing a claimed balance was served on defendant and payment thereof requested; the demand being unliquidated, and it not being alleged or shown that defendant knew the "market value" or price prior to the time the court made its findings, or that the goods had a well-established market value of which he could have been charged with knowledge, and no demand for payment being pleaded or found.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by the Continental Rubber Works against Benjamin Bernson. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Paul F. Garber and Alfred Siemon, both of Bakersfield, for appellant.

T. F. Allen and G. W. Hurley, both of Bakersfield, for respondent.

HAZLETT, Justice pro tem. Plaintiff sued upon an open account for the reasonable value of certain automobile tires and accessories bought by defendant and his partner, Morris Berncovich. Plaintiff was given judgment against defendant, Bernson, for $564.83 as the reasonable value of the tires and accessories, and $182.50 interest thereon from July 31, 1920, to the time of judgment on March 23, 1925.

Defendant, Bernson, appeals, contending that the demand sued upon was wholly unliquidated and for that reason the allowance of interest accruing prior to judgment was erroneous, and for the additional reason that plaintiff did not allege and the court did not find that plaintiff made any demand for payment prior to the commencement of the action.

Appellant filed no reply brief.

It appears that the account covered deliveries of goods from time to time during a period of several months at values which were determined for the first time at the trial, and that the market values fluctuated six or seven times during the period covered by the deliveries. It does not appear that the market values or prices were well established. Defendant, Bernson, made payments from time to time upon the account during the course of the deliveries.

In his answer defendant, Bernson, denied having purchased or received the goods and denied that they were of the reasonable value alleged in the complaint.

The question arises whether interest should have been allowed for any period before judgment.

Section 3287 of the Civil Code provides that:

> "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day. * * *"

This section has been held to apply to actions upon open accounts. Robinson v. Amer-

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ican Fish & Oyster Co., 17 Cal. App. 212, 220, 119 P. 388; Niles Sand, etc., Co., v. Muir, 55 Cal. App. 539, 540, 203 P. 1009; Haun v. Rosenmayer, 46 Cal. App. 353, 358, 189 P. 117; Hanlon Dry Dock, etc., Co. v. McNear, 70 Cal. App. 204, 222, 232 P. 1002; and Williams v. Flinn & Treacy, 61 Cal. App. 352, 357, 214 P. 1024. Interest may be allowed as damages incidental to a debt. Conner v. Bank of Bakersfield, 183 Cal. 199, 205, 190 P. 801.

Plaintiff alleged the reasonable value of the goods and produced witnesses who testified to their market price, and the court found that the reasonable value of the goods was $564.83. Bouvier in his Law Dictionary defines the term "value," when referring to property, as "the price which it will command in the market"; and "market value" as "a price established by public sales, or sales in the way of ordinary business, as merchandise," and the "price at which such articles are sold and purchased." The findings have support in the proof.

When damages are capable of ascertainment by calculation, or by reference to well-established market values, together with computation, interest is allowable from the time the damages fall due. Section 3302, Civ. Code; Cox v. McLaughlin, 76 Cal. 60, 69, 18 P. 100, 9 Am. St. Rep. 164; Gray v. Bekins, 186 Cal. 389, 399, 199 P. 767; Hind v. Uchida Trading Co., 55 Cal. App. 260, 263, 203 P. 1028; Niles Sand, etc., Co., v. Muir, supra; California Bean Growers Ass'n v. Rindge Land, etc., Co., 199 Cal. 168, 248 P. 658, 47 A. L. R. 904.

In general, interest is not allowable on unliquidated demands for any period prior to judgment. This applies in cases found in quantum meruit and quantum valebat. The reason is that the person liable does not know what sum he owes until determined by the court upon the presentation of the evidence, and therefore he can be in no default for not paying. Cox v. McLaughlin, supra; American-Hawaiian, etc., Co. v. Butler, 17 Cal. App. 764, 768, 121 P. 709; Hanlon Dry Dock, etc., Co. v. McNear, supra, p. 221 (232 P. 1002); Williams v. Flinn & Treacy, supra; Curtin v. State of California, 61 Cal. App. 377, 392, 214 P. 1030; Edwards v. Arp, 173 Cal. 472, 476, 160 P. 551. "Interest has relation to an ascertained principal sum." Morris v. Standard Oil Co., 192 Cal. 343, 356, 219 P. 998, 1003 (30 A. L. R. 1103).

However, in the case of Gray v. Bekins, supra, which was an action founded upon the reasonable value of labor and materials used in repairing a bridge, the court announced that:

> "The general rule is that interest is allowable from the time the sum in suit becomes due if the same is certain or can be made certain by mere calculation. * * * Civ. Code, § 3302; Fairchild v. Bay Point, etc., R. R. Co., 22 Cal. App. 328, 134 Pac. 338."

In the Gray Case the answer was tantamount to an ascertainment of the balance found due, and interest was allowed from the date of filing the answer.

In this case plaintiff's claim was an unliquidated demand founded upon the reasonable value of the goods. Although testimony was received to the effect that in the fore part of 1921 plaintiff caused to be delivered to defendant, Bernson, a statement of account showing as the balance claimed of him by plaintiff the sum of $564 and that payment thereof was requested, it was not alleged or shown that defendant, Bernson, knew the market value or price of the goods prior to the time when the court made the findings, or that the goods had a well-established market value of which he could have been charged with knowledge.

Appellant also contends that the provisions of section 1 of the Usury Law (Stats. 1919, Act 3757, Deering's General Laws), relating to interest on accounts, do not apply in this case for the reason that plaintiff did not allege, nor did the court find, that any demand for payment was made by plaintiff. Section 1 of the act provides that:

> "The rate of interest * * * on accounts after demand or judgments rendered in any court of this state, shall be seven dollars upon the one hundred dollars for one year. * * *"

Should we here attempt to solve the proposition whether the Usury Law modifies or changes in any respect the principles announced in the decisions referred to in this opinion and laid down in sections 3287 and 3302 of the Civil Code, relating to the time when interest commences to run on accounts, we would be going outside of the questions involved in this appeal—no demand for payment having been pleaded or found.

Plaintiff is not entitled to interest prior to judgment.

The judgment is modified by striking therefrom the allowance of $182.50 interest, and, as so modified, is affirmed in the amount of $564.83.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

91 Cal. App. 692

KUSHNER v. HOME SERVICE CO.★
(Civ. 6161.)

District Court of Appeal, First District, Division 2, California. May 10, 1928.

Hearing Denied by Supreme Court July 9, 1928.

1. Landlord and tenant 🔑130(1)—Assigned lease carried with it implied covenant for quiet enjoyment binding on assignor's lessor (Civ. Code, § 1927).

Under Civ. Code, § 1927, lease assigned to plaintiff carried with it, even in absence of special covenant for quiet enjoyment, an implied one binding on assignor's lessor who had sublet to assignor.

2. Evidence 🔑467—In action for breach of implied covenant of lease for quiet enjoyment, parol evidence was admissible on question of waiver by plaintiff of such covenant (Civ. Code, §§ 1637–1639, 3268).

In action for breach of implied covenant of lease for quiet enjoyment, parol evidence was admissible on question as to waiver of plaintiff of implied covenant for quiet enjoyment under Civ. Code, § 3268, notwithstanding sections 1637–1639 relating to ascertaining intent of parties.

3. Landlord and tenant 🔑130(½)—Assignee taking assignment of sublease with knowledge owner could terminate to build new building waived implied covenant for quiet enjoyment (Civ. Code, §§ 1927, 3268).

Plaintiff who took assignment of sublease containing no provision regarding termination, but with knowledge that owner could terminate lease when he desired to erect new building, *held* to have waived implied covenant for quiet enjoyment under Civ. Code, § 1927, which must be read and construed in conjunction with section 3268, relating to waiver of such provisions.

4. Landlord and tenant 🔑130(3)—Evidence supported finding that plaintiff's assignor took sublease knowing lease could be terminated by owner to build new building.

Evidence *held* sufficient to support finding that plaintiff's assignor, taking sublease, knew that lease was subject to cancellation by owner, on five months' notice, to build new building, and that plaintiff's assignor agreed to such provision and to cancellation of sublease, in event lease was canceled by owner.

5. Landlord and tenant 🔑130(3)—Evidence supported finding that assignee of sublease knew lease could be terminated to build new building, and accepted assignment subject to such provision in lease.

In action for damages for breach of implied covenant of lease for quiet enjoyment, evidence *held* sufficient to support finding that plaintiff, taking assignment of sublease, was informed of provision in original lease for cancellation thereof when owner desired to build new building, and also of assignor's consent to cancellation as provided, and that plaintiff accepted assignment subject thereto.

6. Appeal and error 🔑843(3)—Where evidence showed plaintiff waived benefit of implied covenant for quiet enjoyment, findings on question of eviction and damage were immaterial.

Where evidence in action for breach of implied covenant of lease for quiet enjoyment showed that plaintiff had waived benefit of implied covenant for quiet enjoyment, findings on question of eviction and damage were immaterial, and it was unnecessary to determine whether evidence supported such findings.

7. Landlord and tenant 🔑130(3)—In action for breach of implied covenant of sublease for quiet enjoyment, evidence by plaintiff's assignor regarding knowledge of conditions of original lease regarding termination to construct building held competent.

In action for damages for breach of implied covenant of sublease for quiet enjoyment by assignee of sublease after owner of land terminated lease to construct new building, evidence by plaintiff's assignor regarding his knowledge that lease from owner to his lessor would be terminated whenever owner desired to build new building *held* competent on issue whether such knowledge was communicated to plaintiff before latter accepted assignment of lease and as bearing on conduct of plaintiff on question of waiver of implied covenant.

Appeal from Superior Court, Los Angeles County; William C Doran, Judge.

Action for damages for breach of implied covenant of lease for quiet enjoyment by Hyman Kushner against the Home Service Company. From the judgment, plaintiff appeals. Affirmed.

Murphy & Cohen, of Los Angeles, for appellant.

Ingall W. Bull and Harold Larson, both of Los Angeles, for respondent.

PER CURIAM. The following opinion was written by Burroughs, justice pro tempore, and is adopted as the opinion of the court:

This is an action for damages claimed to have been suffered by plaintiff by reason of the alleged violation of an implied covenant of a lease for quiet enjoyment.

The court found against the allegations of the complaint, and denied plaintiff any relief.

It appears from the evidence that the defendant was the owner of a lease of the store property at 601½ South Grand avenue, in the city of Los Angeles. The lease provided that it was subject to cancellation upon five months' notice to the lessee, in the event the owner desired to erect a new building on said property. During the term of said lease the defendant sublet a portion of said premises to one S. Yamanobe for the term commencing July 1, 1921, and ending December 31, 1925. The sublease contained no reference to the building clause above referred to. An officer of the defendant company and the sublessee Yamanobe testified that the latter knew of

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★Hearing denied by Supreme Court.

the building clause, and took the lease with full knowledge and understanding that said lease could be terminated by the owner of the property as provided in the defendant's lease. May 10, 1922, the said Yamanobe, by an instrument in writing, and with the consent of the defendant, assigned said lease to this plaintiff for the remainder of the term, and the plaintiff entered into possession of the premises under and by virtue thereof. On or about January 10, 1924, the lessor of the defendant served on defendant a notice that the latter's lease would terminate on the 30th day of June, 1924. Said notice gave as a reason for the cancellation "the landlord of the undersigned desires the premises for the purpose of erecting a new building." On or about April 15, 1924, defendant served notice on plaintiff that the plaintiff's lease would terminate on the 30th day of June, 1924, and gave as a reason for the termination of the leases "the owner's desire to erect a new building on the present ground."

The above facts are established without conflict.

S. Yamanobe testified that before assigning the lease to plaintiff he told him that the lease would be terminated whenever the owner wanted to tear down the building. He also testified that the negotiations for the sale and assignment of the lease to plaintiff were carried on over a period of several days, and that the last time the plaintiff came to see him he brought with him another man, and during the conversation one of them said: "Well, better you sell out, because any time it be torn down." The witness further testified that plaintiff asked how long a lease he had, and he replied four years, but it would expire any time when the building would be torn down.

Mr. Scott, agent of defendant corporation, testified that the plaintiff and Yamanobe came to his office asking permission to assign the lease, and told him the new occupancy would be for a key and lock store, and he told them it would be agreeable to the defendant company, provided it would be satisfactory to the owners, and that he would find out, and notify them. Thereafter he obtained such permission, and notified the plaintiff and said Yamanobe. Thereafter the witness had many talks with the plaintiff, and about November, 1923, the plaintiff told him of rumors in the neighborhood that the building was going to be torn down, and asked if he would have to get out. "I told him we had received no notice whatever—not to worry until we did."

After notice had been given him, we had another conversation and discussed another location. "I told him, we will take you right along with us wherever we go, and he seemed perfectly agreeable."

Mr. Scott further testified that he later located a room in the 600 block on Sixth street, between Grand and Hope streets, and that he told the plaintiff, "I could get him a space with us there, and went so far as to tell him I could save him money on it. I told him we could get him a space in there for $50, the space he would need, and whether or not he said yes or no I can't testify to, but the inference was that yes, we will do what we can and I says, 'You leave it to me, and we will get something for you.'"

The witness further testified that, after the foregoing conversation, he took the matter up with the agent for the building on Sixth street, and then saw the plaintiff again, and "he said at that time that he had been advised not to go with us, that he had a good air-tight lease where he was, to stay right there. Then I went and made another deal for just a small laundry space, and they divided the room and gave us the use."

This witness also told plaintiff that his rent in the new quarters would be $50 instead of $75 per month, as in the old quarters.

The evidence further discloses that at the signing of the lease between the defendant and Yamanobe the rent for the last month was paid; that plaintiff, upon the assignment of the lease, paid Yamanobe the $75 above referred to, and that payment was credited by the defendant to the plaintiff for the June, 1925, rent. Plaintiff tendered to defendant $75 for the rent of June, 1925, but his check therefor was returned to him. The plaintiff continued to occupy the premises until August, 1925, when the landlord, in tearing down the old building, took out the windows.

As against this testimony, the plaintiff denied that he had any knowledge of the building clause in the defendant's lease; denied he had any knowledge that his sublease could be terminated until he received notice that it was terminated by reason of the owner's desire to build; denied that he had ever been informed by Yamanobe that the lease would expire if the owner desired to tear down the building.

The court found that, at the time of entering into said lease with plaintiff's assignor, said plaintiff's assignor well knew that the defendant was leasing said premises under a lease which provided that said lease would be subject to cancellation upon five months' notice to the defendant, in the event the owner of said property desired to construct a building thereon, and said plaintiff's assignor at said time agreed to said provision and to the cancellation of his lease, in the event the defendant's lease thereon was canceled by said owners. The court further found that, at the time of the assignment of the lease to plaintiff of plaintiff's assignor S. Yamanobe's interest in and to said lease, plaintiff was fully informed of the provision in the defendant's lease for the cancellation thereof, and also of his assignor's consent to the cancellation as provided in the last-named lease, and that plaintiff accepted said assignment subject thereto. The court further found that plaintiff had waived any benefit he might have been entitled to under section 1927 of the Civil Code.

Under the title "Grounds Urged for Reversal," the appellant says:

> "(1) Admitting for argument's sake that the plaintiff was chargeable with constructive notice of the over-lease, that it might be canceled on six months' notice, his rights were not concluded, and he was entitled to damages from his immediate lessor.
>
> "(2) Appellant did not waive the benefit of section 1927 of the Civil Code.
>
> "(3) The findings, almost in their entirety, are contrary to the evidence.
>
> "(4) The trial court erred in overruling objections to questions calling for hearsay evidence."

We will first consider the objection that the court erred in holding that appellant had waived the benefit of the implied covenant of quiet enjoyment, under the provisions of section 1927 of the Civil Code. Said section provides:

> "An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same."

[1-3] There can be no question under the above section that the lease assigned to the plaintiff carried with it, even in the absence of a special covenant for quiet enjoyment, an implied one binding upon the defendant. Pedro v. Potter, 197 Cal. 751, 242 P. 926, 42 A. L. R. 1165; Baranov v. Scudder, 177 Cal. 458, 170 P. 1122. The foregoing section of the Code must, however, be read and construed in conjunction with section 3268 of the Civil Code, which provides:

> "Except where it is otherwise declared, the provisions of the foregoing fifteen titles of this part, in respect to the rights and obligations of parties to contracts, are subordinate to the intention of the parties, when ascertained in the manner prescribed by the chapter on the interpretation of contracts; and the benefit thereof may be waived by any party entitled thereto, unless such waiver would be against public policy."

Chapter one of title 5, of which section 1927, supra, forms a part, is embraced within the fifteen titles designated in said section 3268 of the Civil Code.

Viewing the instant case in the light of the foregoing section of the Code, the court found that plaintiff waived the benefit of section 1927 of the Civil Code. The evidence in support of this finding, although not without conflict, is substantially as follows: The lease held by the defendant contained a provision for cancellation in case the owner desired to tear down the old building and erect a new one. This clause was not contained in the sublease which the defendant gave to the plaintiff's assignor, but said assignor was fully informed of this provision, and entered into possession, with the agreement and understanding that his sublease terminated whenever the owner desired to enforce the building clause. When the sublessee was negotiating with the plaintiff for a sale of the sublease, the plaintiff was informed of the building clause, and that his lease would terminate whenever the owner wanted to build. With this knowledge and agreement, the plaintiff took the assignment of the lease. That by taking the assignment with such knowledge he intended to waive the implied covenant for quiet enjoyment would appear to be the only logical construction that could be placed upon such conduct.

It is claimed by appellant that, under the title relating to the interpretation of contracts referred to in section 3268 of the Civil Code, parol evidence was not admissible, as it varied the terms of the written lease, and he cites in support of this claim sections 1637, 1638, and 1639 of the Civil Code. But in the case at bar the evidence was received, not for the purpose of varying the terms of the written contract, but solely upon the question as to a waiver by the plaintiff of the implied covenant for quiet enjoyment. In 27 Ruling Case Law, § 7, p. 912, it is held that waiver is a question of fact, and the sufficiency of the evidence relating thereto is for the jury. Again, in the same volume, section 6, p. 910, it is said:

> "Waiver must be clearly proved, but this may be effected by various species of evidence. Thus it may be proved by express declaration or agreement, or by acts and conduct manifesting an intent and purpose not to claim the supposed advantage. * * *"

California S. H. Co. v. Callender, 94 Cal. 120, 29 P. 859, 28 Am. St. Rep. 99, was an action upon a stock subscription. The defense was interposed that the conditions of the stock agreement had not been complied with, and it was held that this defense had been waived by the conduct of the defendant. The Supreme Court says:

> "The waiver may be express, or it may be by implication from the acts and declarations of the subscriber."

Appellant relies upon the case of Baranov v. Scudder, supra, but as we read that case it differs in many material aspects from the case at bar. In the Baranov Case, Scudder was a tenant of certain real property under a lease from the Western Union Telegraph Company. The lease contained a provision against subletting and a forfeiture of the lease for a violation of said provisions. In violation of that provision, Scudder sublet the premises to the respondent Baranov. The Western Union Telegraph Company exercised its option, and evicted Baranov because of this breach of the lease. Baranov then commenced this action against Scudder, and obtained judgment for damage suffered by reason of his eviction by the telegraph company. In upholding the decision of the trial court, the Supreme Court held that it appeared without conflict that Baranov knew that Scudder was a lessee merely, and, knowing that fact, he took with notice of the contents of the overlease as to the forfeiture clause. But, notwithstanding such knowledge, he had a right to assume that his immediate lessor had or would make such arrangements as would protect him in the quiet enjoyment of his term, and that, in the absence of such an arrangement, the sublessee had an action for any damage suffered by reason of an eviction. However, in the instant case the plaintiff was informed that the lease would expire whenever the overlord wanted to tear down the old building and erect the new one. Plaintiff knew from this that no arrangement for an extension of the term had been or would be made. He entered into the assignment with full knowledge of this fact, and, either by himself or a party present during the negotiations with Yamanobe, that fact was used in argument to Yamanobe as a reason why he should assign for a lesser figure. We are satisfied that the plaintiff waived the implied provision for quiet enjoyment, and the judgment of the trial court upon this question was correct.

[4, 5] Under the third assignment of error it is contended that the findings of the trial court are nearly all contrary to the evidence. From the foregoing review of the evidence upon the subject of waiver, it is apparent that the findings thereon are amply supported by the evidence.

[6] The court also found that the plaintiff had not been evicted from the premises. Also that he had not been damaged by reason of any act or acts of the defendant. Having reached the conclusion that the plaintiff had waived the benefit of the implied covenant for quiet enjoyment, the findings on the question of eviction and damage become immaterial, and no useful purpose would be served by an examination of the evidence upon those issues.

In Smith v. Smith, 173 Cal. 725, 161 P. 495, it is held that a judgment will not be reversed on appeal because of failure to make findings which would not necessitate a different judgment, even if they were made and entered in the appellant's favor.

In Dalton v. Pacific Electric Ry. Co., 7 Cal. App. 510, 94 P. 868, it is held that, if the findings as made support the judgment, it is immaterial whether other material findings are or are not supported by the evidence, as it could not affect the result. To the same effect are Brison v. Brison, 90 Cal. 323, 27 P. 186; Coyle v. Lamb, 123 Cal. 264, 55 P. 901.

[7] The final alleged error is that the court erred in overruling appellant's objection to the following question propounded to the appellant's assignor:

> "Q. Now at that time, did you know the conditions of the lease, the Home Service Company had with the owners?
>
> "Mr. Cohen: Object to that as incompetent, irrelevant, and immaterial, and varying the terms of a written lease now in evidence.
>
> "The Court: Overruled."

An examination of the transcript reveals that the question was not answered. However, later in his examination, the plaintiff's assignor testified without objection that he knew respondent's lease would be terminated whenever the owner desired to build a new building. This evidence, when considered in connection with the later testimony of said assignor, shows that this knowledge was communicated to the plaintiff before the latter accepted the assignment of the lease, and was material as bearing upon the conduct of plaintiff on the question of waiver of the implied covenant of his lease.

There are no other questions presented by appellant, and, as none of those already considered require a reversal of the judgment, it is ordered that said judgment be, and it is hereby, affirmed.

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91 Cal. App. 689

HOLMES v. SCHMITT et al. (Civ. 6144.)

District Court of Appeal, First District, Division 2, California. May 10, 1928.

1. Bankruptcy ⚿302(1)—Complaint by trustee in bankruptcy, framed on common count for money had and received, need not allege leave to sue by bankruptcy court.

Complaint by trustee in bankruptcy, framed on a common count for money had and received, need not allege that trustee had leave to sue from bankruptcy court, since in such case capacity of plaintiff to sue is not a matter which he is required to plead, and point must be raised by defendant by special plea.

2. Appeal and error ⚿766—On failure of appellants claiming insufficiency of evidence to print evidence, findings, or judgment as required by statute, judgment must be affirmed (Code Civ. Proc. § 953c).

Where appellants claiming that evidence is insufficient to support findings and that judgment was contrary to evidence failed to print evidence, findings, or judgment, or to otherwise comply with provisions of Code Civ. Proc. § 953c, the judgment must be affirmed.

3. Bankruptcy ⚿303(3)—Evidence held to sustain finding that certain money belonging to bankrupt corporation was received and held by corporate manager and another.

In action by trustee in bankruptcy to recover money alleged to have been received by corporate manager and another on behalf of bankrupt, evidence *held* to sustain finding that certain money received and held by defendants belonged to bankrupt corporation.

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Action by Charles M. Holmes, trustee of the estate of the Fox Bros. Sporting Goods Company, a bankrupt, against Henry M. Schmitt and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Minor Blythe, of Los Angeles, for appellants.

A. L. Rowland and Dunham & Thompson, all of Pasadena, for respondent.

NOURSE, J. Plaintiff sued as trustee in bankruptcy of Fox Bros. Sporting Goods Company (a corporation) to recover $9,000 alleged to have been received by defendants on behalf of the bankrupt. Plaintiff had judgment for $8,390.85 against both defendants, from which they appeal on a typewritten record.

Two grounds are urged for a reversal of the judgment: That the plaintiff was not authorized by the United States District Court to prosecute the action; and that the evidence is insufficient to support the findings and judgment. The defendant Fox was the sole owner and directing head of the corporation, which was engaged in the sporting goods business in Grand Junction, Colo., on June 4, 1923, when the stock and fixtures of the concern were damaged by fire. Fox obtained from the insurance companies, as compensation for the damages, $4,615, and received, by way of salvage from damaged goods, $3,775.85. For some time following the fire he conducted a fire sale to dispose of these goods, and on December 20, 1923, paid to his mother $3,500 and to his sister $1,200, which, he claimed, had been loaned him for use in the business. On December 24, 1923, he claimed to have received from his codefendant, who was his nephew, the sum of $9,000 for the purpose of investing it in California. This sum, he testified, was received by him in cash and carried upon his person until April, 1924, at which time he purchased three cashier's checks in St. Louis for the sum of $3,000 each, which he carried with him until June, 1924, when he deposited them in a bank in Los Angeles. This deposit was made in the name of Henry M. Schmitt, but the defendant Fox procured from Schmitt a power of attorney which authorized him to draw the money from the bank. On February 29, 1924, defendant Fox was adjudicated a bankrupt, and at the trial of this action he testified that at the time of this adjudication he had no assets of any kind or no property belonging to the corporation. The judgment in this action represents the sum of the value of the salvaged stock which the defendant Fox disposed of after the fire and the amount paid to him by the insurance companies for the loss. It is the theory of the plaintiff and respondent that these sums were obtained by Fox as assets of the corporation, and that the purported repayment of loans to his mother and sister was made to cover up the misappropriation by him of corporate funds, and that the purported transaction with his nephew whereby Fox claimed to have received the sum of $9,000 for purposes of investment was merely a paper transaction for the same purpose.

[1] As to the first point raised by the appellants, that the trustee did not have leave to sue from the bankruptcy court, the point is not in issue. The complaint was framed upon a common count for money had and received, and the capacity of the plaintiff to sue is not a matter which he was required to plead. This point could be raised by the defendants by special plea of want of capacity to sue. The appellant Fox did not attempt to raise it, while the appellant Schmitt pleaded merely want of information and belief and made no effort to prove the defense.

[2, 3] The second point raised is that the evidence is insufficient to support the findings and that the judgment is contrary to the evidence. The appellants, however, have not printed the evidence, the findings, or the judgment, and in fact have made no effort to comply with the provisions of section 953c, Code of Civil Procedure. For this reason alone the judgment must be affirmed. Estate of Berry, 195 Cal. 354, 359, 233 P. 330. We have, however, examined the record, and are satisfied that the trial court properly found that the money represented in the judgment belonged to the bankrupt corporation and that it was received and held by the appellants for the use and benefit of that corporation. Some of the testimony of the appellants is printed in their brief tending to show that this sum of $9,000 was given to appellant Fox by Schmitt to enable the former to invest it for Schmitt in Los Angeles. This, however, only serves to create a conflict with the undisputed evidence of the circumstances under which the appellant Fox obtained the money of the corporation following the fire and of the suspicious circumstances under which he claimed to have paid from these moneys the sum of $4,700 in satisfaction of purported loans from his mother and sister. In addition to this, it appears that throughout the trial the testimony of the appellants was so contradictory and improbable in itself that the trial court was justified in rejecting it is unreliable. Thus the allegation in the complaint of the receipt of the corporate funds is admitted, while the defense of disbursement for corporate purposes is not proved.

Judgment affirmed.

I concur: KOFORD, P. J.

91 Cal. App. 768

GEORGE v. SECURITY TRUST & SAVINGS BANK. (Civ. 5016.)

District Court of Appeal, Second District, Division 2, California. April 11, 1928.

1. **Banks and banking ⟹148(2)—Bank paying check on forged indorsement and collecting from drawee bank held liable to payee's assignee.**

Assignee of payee of check, accepted and certified by drawee bank on presentation by one without authority to receive or indorse it, who thereupon forged payee's name and passed check to another who collected amount from another bank, which, in turn, collected from drawee bank, *held* entitled to recover amount from collecting bank on theory of ratification of collection by payee.

2. **Pleading ⟹8(2)—Allegation of payee's ratification of collection of check by bank paying it on forged indorsement would be improper as conclusion.**

In action against collecting bank on check presented with forged indorsement after acceptance and certification by drawee bank, allegation of payee's ratification of collection would have been improper as mere conclusion; ratification being fact to be drawn from proof adduced on allegations of facts.

Appeal from Superior Court, Los Angeles County; Frederick C. Valentine, Judge.

Action by L. B. George against the Security Trust & Savings Bank. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Edgar K. Brown and L. B. George, both of Los Angeles, for appellant.

Jennings & Belcher, of Los Angeles, for respondent.

STEPHENS, Justice pro tem. A demurrer to the original complaint was sustained, and plaintiff filed an amended complaint. To this pleading a demurrer was likewise interposed. It was sustained by the court without leave to amend, and judgment went for defendant. Plaintiff appeals from the judgment.

There is no contention that plaintiff desired further to amend, and the briefs respond to the one question only: Does the complaint state a cause of action? This is the sole question to be considered here.

[1] The facts as alleged in the complaint are concisely put in appellant's opening brief, as follows:

"The complaint alleges that Lynch drew his check to the order of Vanderbilt and gave it to Allen, who had no authority to receive or indorse the same; that the drawee bank accepted and certified the check; that Allen thereupon forged the payee's name and passed the check to Cohen; that Cohen collected the amount thereof from the defendant bank; and defendant in turn collected the amount from the drawee bank; that the payee has demanded the amount from defendant, who refuses to pay."

Plaintiff is the assignee of the payee.

It seems that the exact point here presented has never been presented to the reviewing courts of this state, but it has been very thoroughly presented to the courts of last resort of several sister states, and the great weight of authority unquestionably is that the facts alleged in this case do state a cause of action.

The Supreme Court of Colorado had a case before it in all essentials the same as the instant one, and the opinion so well expresses the prevailing view that we shall quote therefrom extensively:

"In this case the payee in the checks seeks to recover from another bank who accepted and paid these checks upon forged indorsements, and thereafter collected the amounts upon the checks from the bank upon which they were drawn. In such case the rule in Tennessee, New Jersey, Ohio, New York, and Indiana is that the payee can recover from a bank which accepted them from the forger and collected them from the drawee bank, as for moneys had and received, even though it has fully paid over and accounted for the same to the forger without knowledge or suspicion of the forgery. Farmer v. People's Bank, 100 Tenn. 187, 47 S. W. 234; Knoxville Water Co. v. East Tennessee Nat. Bank, 123 Tenn. 364, 131 S. W. 447; Buckley v. Second Nat. Bank, 35 N. J. Law, 400, 10 Am. Rep. 249; Shaffer v. McKee, 19 Ohio St. 526; Talbot v. Bank of Rochester, 1 Hill [N. Y.] 295; Johnson v. First Nat. Bank, 6 Hun [N. Y.] 124; Graves v. American Exch. Bank, 17 N. Y. 205; Indiana Nat. Bank v. Holtschaw [Holtsclaw] 98 Ind. 85. This same principle is laid down in volume 1 (4th Ed.) of Morse on Banks and Banking, wherein, at page 483, the author states: 'If a negotiable instrument having a forged indorsement come to the hands of a bank and is collected by it, the proceeds are held for the rightful owners of the paper, and may be recovered by them, although the bank gave value for the paper, or has paid over the proceeds to the party depositing the instrument for collection.' These cases are based upon the theory of ratification by the payee of the collection of the check from the drawee, and that the collecting bank can then be held as for moneys had and received, and that the payment by the drawee bank to the collecting bank with the forged indorsement thereon is evidence that the check was accepted and paid by the drawee bank, which acts the payee ratifies." United States Portland Cement Co. v. United States National Bank of Denver, 61 Colo. 334, 157 P. 202, L. R. A. 1917A, 145.

The leading case taking the opposite view is Tibby, etc., v. Farmers', etc., Bank, 220 Pa. 1, 69 A. 280, 15 L. R. A. (N. S.) 519. This case states the rule prevailing in some jurisdictions that the payee of a check cannot maintain an action against a drawee bank until the check has been accepted by it, because there is no privity of contract or other relation existing between the payee and the bank which establishes an obligation to pay or from which an assumption to pay arises. It then declares flatly that:

> "The plaintiff's right of action against the defendant [paying] bank is not superior to its right of action against the drawee banks. The money paid the defendant on the several checks was the money of the drawee banks, in which neither the drawers of the checks nor the plaintiff had any interest, and, having been paid on forged indorsements, it may be recovered from the defendant by the paying banks. The defendant, therefore, has received no money for or on account of the plaintiff company, and for which, in good conscience, it should account to the plaintiff."

The court, in this decision, did not adopt the theory of ratification of the check so clearly expounded in United States Portland Cement Co. v. United States National Bank, supra. A very useful note to the Tibby Case may be found in 15 L. R. A. (N. S.) 519, closing with this statement:

> "It is apparent from this review of the reported cases that the holding of Tibby Bros. Glass Co. v. Farmers' & M. Bank is contrary to the weight of authority."

A comprehensive note following the Portland Cement Company Case at page 148 of L. R. A. 1917A, refers to the Tibby Case and says, "But it is the only case in which this position is taken."

Respondent claims that the decisions cited by appellant were all prior to the adoption of the Uniform Negotiable Instruments Laws and comments upon the old case of Talbot v. Bank of Rochester, 1 Hill (N. Y.) 295, referred to and quoted from in several of the later decisions. He then proceeds to argue that the weight of authority, and particularly since the adoption of the Uniform Negotiable Instruments Laws is that the holder of a check cannot maintain an action against the drawee bank unless and until the check has been accepted by the drawee bank. For the sake of argument this may be conceded, but we do not appreciate the relevancy of this statement to the instant set of facts, nor do we see any applied importance in the statement in the brief immediately following this argument: "And that the acts of an intermediary bank do not constitute an acceptance." We confess we do not see that any great importance should be given to the fact that the drawee bank certified the check. Appellant in his reply brief asserts that the Portland Cement Company Case and the cases cited therein were decided since the adoption of the Uniform Negotiable Instrument Laws in those jurisdictions. Whether this is so or not, we do not believe the doctrine in those cases is contrary to any section thereof. We think the better reasoning is with the theory of ratification as stated in the Portland Cement Company Case, and, the great weight of authority being that way, we adopt it in this case.

[2] Respondent further contends that the matter of ratification should be alleged, but that would be alleging a conclusion. There are allegations in the complaint as to the facts, and whether or not there was a ratification is to be drawn from the proof adduced upon these allegations.

The judgment is reversed, with directions to the trial court to overrule the demurrer to the amended complaint.

We concur: WORKS, P. J.; CRAIG, J.

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91 Cal. App. 712

FERNEL v. STATE BOARD OF MEDICAL EXAMINERS et al. (Civ. 5886.)

District Court of Appeal, Second District, Division 2, California. May 11, 1928.

1. Physicians and surgeons 🔑5(2)—Applicant for reciprocity certificate to practice medicine must satisfy board of good moral character (Medical Practice Act, §§ 8, 9).

An applicant under Medical Practice Act (St. 1913, p. 722) § 9, for a reciprocity certificate to practice medicine, as provided by section 8 of the act, must, in view of section 13, satisfy the board of medical examiners of his good moral character; the general language of section 9 relative to requirement of good moral character applying to every applicant under every section of the act.

2. Statutes 🔑181(1)—Courts read statutes in light of their common sense meaning and intention.

Courts read statutes in the light of their common sense meaning and intention.

3. Physicians and surgeons 🔑5(2)—Proceeding required by statute in case of accusation of applicant or practitioner of unprofessional conduct held not applicable on application for license; applicant being required to show good moral character (Medical Practice Act, §§ 9, 14).

Proceedings by the board of medical examiners, under the Medical Practice Act (St. 1913, p. 722), § 14, relative to the accusation of a practitioner or applicant of unprofessional conduct *held* not applicable to section 9 of said act relative to requiring applicants for licenses to show good moral character, so that such a proceeding under section 14 is not required in proceeding under section 9.

4. Physicians and surgeons 🔑4—"Moral character" in physician of any school contemplates broader sphere of conduct than that relating specifically to his profession (Medical Practice Act, § 9).

Moral character in a physician of any school, as used in Medical Practice Act (St. 1913, p. 722) § 9, relative to the board of medical examiners requiring applicants for licenses to

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

show good moral character, contemplates broader sphere of conduct than that relating specifically to his profession.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Petition by John Paul Fernel for a writ of mandate prayed to be directed to the State Board of Medical Examiners and others, compelling them to issue a license to petitioner to practice medicine. From the judgment denying the writ, petitioner appeals. Affirmed.

Harry Lyons, of Los Angeles, for appellant.

Otto J. Emme, of Los Angeles, for respondents.

STEPHENS, Justice pro tem. Petitioner applied to the board of medical examiners of the state of California for a certificate to practice medicine in this state under the Medical Practice Act, chapter 354, Statutes 1913. The board denied the application, and petitioner secured an alternative writ of mandate from the superior court. Upon a hearing, the court entered judgment "that the petitioner is not entitled to a writ of mandate, and that his petition be and the same is denied." Petitioner appeals therefrom.

Reduced to its simplest form, the question here to be considered is whether or not the board had a right to reject petitioner's application because it was not satisfied of the good moral character of the applicant. Section 8 of the Medical Practice Act, hereinafter referred to as "the act," provides among other things for the issuance of a "physician and surgeon certificate," a "drugless practitioner certificate," and a "reciprocity certificate." A reciprocity certificate does not refer to another class of the healing science, but refers to the manner of granting either a physician and surgeon certificate or a drugless practitioner certificate to an applicant who has practiced his profession in a sister state. The petitioner below, appellant here, claims that the act does not authorize the board to decline to grant the certificate because it is not satisfied that the applicant is possessed of a good moral character. He contends that the board has no jurisdiction to consider this subject at all in connection with an application for a reciprocity certificate, but argumentatively admits that the board may consider the subject when passing on an application for any other certificate.

[1, 2] Section 9 of the act states: "Every applicant must file with the board * * * satisfactory testimonials of good moral character." Following this section the details of requirements for the granting of certificates to practice the two schools of healing are set out, and then logically (section 13) follow the detailed requirements for the granting of a "reciprocity certificate." It should here be recollected that a reciprocity certificate is exactly like any other certificate in its class, and is a badge authorizing exactly the same acts. Every person appearing before the board for permission to practice his profession must file an application, and is throughout the act denominated an *applicant*. The act is not designed as a series of independent acts, but is one act designed to enforce its requirements for the protection of the people of the state. The general language of section 9, referring to the requirement of "satisfactory testimonials of good moral character," applies, of course, to every applicant under every section of the act. If this were not so, it would apply to none. This is so obvious that the mere statement of it is a conclusive argument as to its truth. Courts read statutes in the light of their common sense meaning and intention. The expressed meaning and intention of this portion of section 9 is plain and absolutely free from ambiguity. If it be required that one shall show reasonable evidence that he is an ordinarily decent fellow before he shall have the privilege of submitting himself to the examination provided before he may emerge from the status of a student to that of a licensed practitioner in our state, what reason could be advanced to excuse this showing in a recent comer in our midst, whose history is unknown to us, and who may have found it convenient to seek pastures new for reasons not comfortable to disclose? The plain expression of the act, its evident intent, and its sound reasonableness as protective legislation appeal to us, as it evidently did to the trial court. It must be borne in mind in this connection that no question as to abuse of discretion on behalf of the board is here presented. We are not shown the record upon which the board acted, and no intimation is made anywhere in the proceedings that it acted in any other than a reasonable and proper manner. The jurisdiction of the board alone is challenged.

[3, 4] Appellant points out that no proceeding has been taken by the board under section 14 of the act, but, when it is understood that this section applies to the accusation of a practitioner or applicant of "unprofessional conduct," and that the phrase is defined in this section as covering a number of specific acts connected with the practice of the profession, it will readily be seen that it is not intended to cover or apply to the requirement of section 9 as to "good moral character," although some of the acts designated are in close relation to good morals, and a person of good moral character would not resort to such acts. Moral character in a physician of any school contemplates a broader sphere of conduct than that relating specifically to his profession.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

91 Cal. App. 700

MELLUS v. POTTER. (Civ. 3511.)

District Court of Appeal, Third District, California. May 10, 1928.

1. Appeal and error 🔑1001(1)—Reviewing court cannot disturb verdict supported by substantial evidence.

The reviewing court cannot disturb a verdict which is supported by substantial evidence.

2. Release 🔑58(1)—Whether, when broker signed receipt in full, he knew or suspected he had additional claim for commissions, so as to preclude recovery of additional compensation, held for jury (Civ. Code, § 1542).

In an action for commission by one broker against defendant with whom he was working in consummating lease, whether plaintiff in signing a receipt in full for all commission on all deals up to date of receipt knew or suspected that he had any other claim against defendant arising out of commissions defendant had agreed to divide with plaintiff, so as to make the receipt in full such a release as to preclude plaintiff's action for such commissions because of Civ. Code, § 1542, *held* for jury.

3. Appeal and error 🔑996—Where evidence permitted inferences, court reviewing evidence on ground of insufficiency must hold that inference favorable to verdict was drawn.

Where the evidence in the trial court was such as to give the jury the undoubted right to draw inferences from testimony before them, court reviewing the evidence on ground of insufficiency must hold that inference favorable to respondent and in support of the verdict was drawn.

4. Release 🔑33—Receipt reciting payment in full to date did not cover "claim" for commissions not existing when receipt was given (Civ. Code, § 1542).

Receipt "in payment for all deals to date" *held* not to cover claim for broker's commissions in absence of proof that the claim existed when receipt was given; "claim" mentioned in Civ. Code, § 1542, referring to an existing right in favor of creditor, and not to rights which have not yet accrued.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Claim.]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by J. J. Mellus against W. A. Potter. Judgment for plaintiff, and defendant appeals. Affirmed.

Hunsaker, Britt & Cosgrove and Robert B. Murphey, all of Los Angeles, for appellant.

Carroll Allen and A. E. McManus, both of Los Angeles, for respondent.

TUTTLE, Justice pro tem. This is an action brought to recover the sum of $6,000 upon a contract between appellant and respondent for one-half of certain commissions derived through the negotiation of a lease. The trial was had before a jury, and a verdict was returned for the sum of $4,478.74 in favor of plaintiff. This appeal is taken from the judgment entered upon said verdict.

As to the facts involved, it appears that during the month of March, 1922, respondent endeavored, as a broker, to procure an oil lease from Gardena Syndicate to the Burhnam Company. He was approached by appellant, who convinced him that he (appellant) was in a position to procure the lease from the said syndicate, and appellant also stated that he could get a good commission from the said syndicate, and this commission would be divided equally between them. Respondent told him it was all right, and for him to go ahead. The parties also agreed to divide equally any commission received from the Burhnam Company. Both the proposed lessor and lessee knew of the arrangement in respect to the said commissions.

The lease was consummated, and the Burhnam Company paid appellant the sum of $3,500 as a commission. The syndicate also paid appellant a commission, amounting to $8,957.49.

Appellant admits the contract for commissions was made, and admits the receipt by him of the said commissions. He relies upon the insufficiency of the evidence as his principal ground for reversal. At the trial a receipt in the following words, and admittedly signed by respondent, was admitted in evidence:

> "June 14, 1922.
>
> "Received of Potter & Smith five hundred ($500.00) dollars payment in full for all deals up to date. J. J. Mellus."

And it is contended by appellant that this release "is an insuperable bar to recovery on the part of plaintiff," and that the jury could have drawn but one conclusion from the evidence, to wit, that respondent had released all claim to the commissions mentioned, in consideration of the receipt of the said sum of $500.

It is admitted by respondent that as to the commission of $3,500 he makes no claim. His position is, however, that the receipt does not cover or apply to the commissions received from the lessor syndicate. Unquestionably the jury so found, for their verdict was for one-half of the commissions received by appellant from the syndicate.

Section 1542 of the Civil Code reads as follows:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

[1] Appellant argues that, under the evidence introduced at the trial, the only conclusion the jury could have reasonably drawn was that respondent *knew or suspected* the

the existence of a claim in his favor arising out of commissions to be received from the syndicate. Therefore, appellant contends, the only possible verdict the jury could have rendered was one in his favor, as the evidence was insufficient to support a verdict for respondent. The only inquiry to be made by this court is whether or not there was substantial evidence to support the verdict. If the record contains such evidence, we cannot disturb the verdict. Taylor v. U. S. Fid. & Guar. Co. (Cal. App.) 260 P. 898.

[2] Respondent testified that, at the time the receipt was given, nothing except the commission for $3.500 was discussed; that there was no understanding at that time to the effect that the receipt would cover any commissions received by appellant from the syndicate; that nothing was said about a contract between appellant and the syndicate for the giving of a commission; that he did not learn of the commission contract between the syndicate and appellant until informed of the fact afterward by Mr. Wright (connected by the syndicate); that if appellant had notified him (respondent) that he had a contract, it would have been a different proposition, but he never did.

[3] We are satisfied that from the foregoing evidence the jury was justified in finding that respondent did not know or suspect, at the time he signed the said receipt, that he had any *claim* against appellant arising out of the commissions received from the syndicate. Furthermore, the contract between appellant and the syndicate, covering said commissions, was not signed until five days after the execution of said receipt. It is earnestly contended by appellant that while respondent did not *know* of any claim he may have had against appellant at the time of the execution of said receipt, the evidence shows without contradiction that he *suspected* a claim to exist. To adopt this rule of construing the evidence would be, in effect, taking away from the jury their undoubted right to draw inferences from the testimony before them. That the jury might well have drawn the inference, from the evidence, as to want of suspicion on the part of respondent, there is no question, and upon this review of the evidence we are bound to hold that such inference, favorable to respondent and in support of the verdict, was made. Cooley v. Brunswig Drug Co., 30 Cal. App. 58, 157 P. 13; 24 Cor. Jur. § 230.

[4] There is also another reason why section 1542 has no application here. There is no proof, at the time said receipt was signed, that any *claim* existed in favor of respondent in respect to the syndicate commissions. "Claim," in its primary meaning, is used to indicate the assertion of an *existing right.* In its secondary meaning, it may be used to indicate the right itself. Appeal of Beach, 76 Conn. 118, 55 A. 596, 599. At the time of the execution of the said receipt no contract for the commissions in question had been executed by appellant and the syndicate, nor had appellant then received said commissions. The *claim* mentioned in the Code refers to an *existing* right in favor of the creditor, and not to rights which have not yet accrued.

The action of the trial court in denying the motion for a nonsuit was proper. Our discussion with reference to the sufficiency of the evidence to support the verdict applies also to that motion, as the testimony summarized was all a part of plaintiff's case.

The judgment is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

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92 Cal. App. 42

PEOPLE v. GATLIN. (Cr. 1601.)

District Court of Appeal, Second District, Division 2, California. May 18, 1928.

Intoxicating liquors 🔑240—Verdict finding defendant guilty "of possession of intoxicating liquor," omitting word "unlawful" before "possession," held sufficient to support judgment of conviction.

Verdict reading. "We, the jury, find the defendant guilty of the possession of intoxicating liquor," omitting word "unlawful" before word "possession," *held* sufficient to support judgment of conviction, where jury was carefully instructed that mere possession of liquor was not a crime, and no point was made that evidence was insufficient to support verdict of guilty.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Joice Gatlin was convicted of possessing intoxicating liquor, and he appeals. Affirmed.

John R. Stowe, of San Luis Obispo, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

WORKS, P. J. Defendant was charged by information with the unlawful possession of intoxicating liquor. He appeals from the judgment, from an order of the trial court denying his motion for a new trial, and from an order of the trial court denying a motion for his release.

The verdict rendered in the cause reads: "We, the jury, find the defendant guilty of the possession of intoxicating liquor." It will be observed that the verdict omits the word "unlawful" before the word "possession." The sole contention made by appellant is that the verdict fails to support the judgment of conviction.

The charge made by the information was properly phrased; it notified appellant of the exact nature of the charge against him, and he makes no objection to it. The jury was carefully instructed that the mere possession of intoxicating liquor is not a crime, and other instructions were given which informed the jury as to the elements of the crime with which appellant was charged. Moreover, no point is made that the evidence was insufficient to prove the charge or to support a verdict of guilty. Under all these circumstances we think the verdict was sufficient. See People v. Holmes, 118 Cal. 444, 50 P. 675; People v. Cornell, 29 Cal. App. 430, 155 P. 1026; People v. Mercado, 59 Cal. App. 69, 209 P. 1035. The fact that the jury declared appellant "guilty," after hearing the information, the plea of not guilty, and the instructions of the court, is alone a circumstance of great weight.

Judgment and orders affirmed.

We concur: CRAIG, J.; THOMPSON, J.

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91 Cal. App. 621

LAW et al. v. TITLE GUARANTEE & TRUST CO. et al. (Civ. 6165.)★

District Court of Appeal, First District, Division 2, California. May 7, 1928.

Hearing Denied by Supreme Court July 5, 1928.

1. Deeds 🔑211(1)—Proof of occasional lapse of memory or belief in spiritualism is not proof of grantor's mental incapacity.

Neither the proof of an occasional lapse of memory nor the belief in spiritualism is proof of grantor's mental incapacity to execute deed.

2. Time 🔑10(10)—Generally, final day to perform contract is excluded if it falls on Sunday or holiday.

General rule for computing time within which a contract may be performed is to exclude the final day when it chances to fall on a Sunday or holiday and include the succeeding business day.

3. Time 🔑10(10)—Time to pay part of purchase price for realty having expired on Sunday, November 11, Armistice Day, following Monday was holiday and payment on Tuesday, November 13, was timely (Pol. Code, § 10; Civ. Code, § 11).

Where last of 30 days to pay half of purchase price expired on Sunday, November 11, 1923, which was also Armistice Day, a statutory holiday, *held* that, under Pol. Code, § 10, providing that when November 11 falls on Sunday, the Monday following is a holiday, and Civ. Code, § 11, providing that contract to be performed on a particular day falling on a holiday may be performed on next business day, Monday, November 12, was a legal holiday, and payment on Tuesday, November 13, by purchasers was timely.

4. Escrows 🔑10—Allegation of purchasers' complaint that price agreed to be paid for land was just, fair, and adequate held sufficient allegation of value, in absence of demurrer (Civ. Code, § 3380).

In purchasers' action, under Civ. Code, § 3380, to obtain delivery of deed wrongfully withheld by depositary after termination of escrow, allegation of complaint that purchase price agreed to be paid for property was just, fair, and adequate consideration *held* sufficient allegation of value of land, in absence of demurrer, if any allegation of value was necessary.

5. Escrows 🔑10—Findings that allegations of purchasers' complaint were true and that defendants' denials thereof were untrue held sufficient findings of value and adequacy of consideration (Civ. Code, § 3380).

In purchasers' action, under Civ. Code, § 3380, to obtain delivery of deed wrongfully withheld by depositary after termination of escrow, finding that allegations of complaint were true and that defendants' denials thereof were untrue *held* sufficient findings of fact as to value and adequacy of consideration.

6. Specific performance 🔑49(2)—Requirement of allegation and proof of adequate consideration in specific performance action merely means that consideration is substantially just and fair under circumstances.

Requirement of allegation and proof of an adequate consideration in an action for specific performance does not mean that contract price shall necessarily measure up to the highest market value of the property, but merely that it is a substantially just and fair valuation under all the circumstances of the case.

7. Vendor and purchaser 🔑13—Contract price of $16,500 for realty which real estate broker testified was worth $18,700 held not unjust or inadequate as matter of law (Civ. Code, § 3380).

Contract price of $16,500 for realty which real estate broker testified was worth $18,700 *held* not unjust or inadequate as matter of law, even if purchasers' right to obtain delivery of deed, under Civ. Code, § 3380, depended on adequacy of consideration.

8. Escrows 🔑10—Purchasers suing to compel delivery of deed by depositary need not allege or prove value or adequacy of consideration (Civ. Code, § 3380).

In purchasers' action, under Civ. Code, § 3380, to obtain delivery of deed wrongfully withheld by depositary after termination of an escrow, purchasers need not allege or prove the value of the property or the adequacy of consideration.

9. Escrows 🔑10—Grantee may sue third person to whom escrow holder wrongfully delivers property without joining latter or grantor.

If escrow holder wrongfully delivers property to third person, grantee may bring action against him without joining escrow holder or grantor.

★Hearing denied by Supreme Court.

10. Escrows ⇨10—If grantor and depositary wrongfully convert property of grantee, they may be joined as defendants.

If grantor and depositary wrongfully convert property of grantee, they may be joined as defendants.

11. Escrows ⇨9—On performance of escrow conditions, depositary holds instrument as trustee for party entitled thereto (Civ. Code, § 1057).

Under Civ. Code, § 1057, defining escrow, when conditions on which deposit of instrument have been fully performed, relationship of interested parties automatically changes and depositary is then deemed to hold instrument as trustee for party entitled thereto and not in escrow.

12. Escrows ⇨8(2)—Depositary's failure to indorse accumulated interest as paid on note, to prorate rent and taxes and furnish guaranty certificates of title held not to authorize rescission of escrow by grantor or his heirs.

Any failure of depositary to fulfill escrow instructions as to indorsing on note accumulated interest to close of escrow, grantor intending to waive interest, and as to apportioning rent and taxes or furnishing guaranty certificates of title, *held* matters of which purchasers alone had right to complain, and did not harm grantor, so as to authorize grantor or his heirs to rescind escrow.

13. Escrows ⇨10—Evidence held to support findings that purchasers had fully performed conditions of escrow, entitling them to delivery of deed (Civ. Code, § 3380).

In purchasers' action, under Civ. Code, § 3380, to obtain delivery of deed wrongfully withheld by depositary after termination of escrow, evidence *held* to support findings that purchasers had fully performed every requirement of escrow contract on their part and that escrow was terminated, thus entitling them to delivery of deed of conveyance from depositary.

14. Escrows ⇨8(2)—Grantor's death after purchasers fully performed escrow conditions before manual delivery of deed held not to defeat purchasers' right to deed.

Where purchasers had fully performed every requirement of escrow contract, fact that grantor subsequently died before actual manual delivery of deed by depositary did not defeat their right to possession of deed.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Suit by F. M. Law and another against the Title Guarantee & Trust Company and Leo H. Nolte, individually and as administrator with will annexed of the estate of C. A. Nolte, deceased. Judgment for plaintiffs, and last-named defendant appeals. Affirmed as modified.

William M. Hiatt, of Los Angeles, for appellant Leo H. Nolte individually.

William M. Hiatt and Frederick Baker, both of Los Angeles, for appellant Leo H. Nolte, as administrator, etc.

Cunningham & Blackburn and Porter C. Blackburn, all of Los Angeles, for respondents.

THOMPSON, Justice pro tem. This is an appeal from a judgment rendered in favor of plaintiffs in an equitable action decreeing delivery of an escrow deed to a portion of a certain Los Angeles lot to the grantees thereof, and quieting title thereto.

The appellant contends that (1) the grantor was of unsound mind; that (2) the deposit of the deed did not constitute an escrow; that (3) the conditions of the escrow were not performed; that (4) the escrow was revoked by the heirs of the grantor; that (5) the decree quieting title to the lot in question disregarded the validity of an existing mortgage lien; and that (6) the record is devoid of evidence of the value of the property or the adequacy of consideration for the purchase thereof.

The appellant's intestate, C. A. Nolte, was 89 years of age, and resided in Los Angeles. He was the owner of that portion of lot 6 of the Amey tract of Los Angeles, which is involved in this action. October 12, 1923, the grantor procured Kells & Grant, his real estate agents, to prepare a written contract of sale of said lot to the respondents for the sum of $16,500, by the terms of which agreement the agents receipted for $500 to be applied upon the purchase price. It was provided that the purchasers should pay the sum of $8,250 in cash, and execute and deliver to the seller a note secured by mortgage on said lot for the further sum of $8,250. This note and mortgage were to be deposited upon the delivery of a deed of conveyance of said premises free of incumbrance, together with a certificate of title to be issued by an acceptable company. This agreement was duly signed by the agents, by the owner, C. A. Nolte, and was assented to by F. M. Law, representing the purchasers. By the terms of this contract the owner agreed to pay the agent $825 as commissions for consummating the sale, which sum was to be retained from the purchase price. Pursuant to this agreement, a note and mortgage for $8,250 were executed by the respondents and acknowledged October 23, 1923, at the office of Kells & Grant. A deed to the lot in question was duly executed by the owner and acknowledged in the office of said agents October 18th. These instruments, together with written escrow instructions signed by C. A. Nolte, were, at his instance, delivered to the defendant Title Guarantee & Trust Company, a corporation, at Los Angeles. With this title company the respondents deposited the balance of the purchase price, to wit, $7,762, on November 13, 1923. These instruments were indorsed by Mr. Baker, the escrow clerk of the trust company, as follows: "Baker—No. 504,561." The escrow instructions read:

"Los Angeles, Cal., October 12, 1923. Title Guarantee & Trust Company. I hand you herewith grant deed executed by C. A. Nolte to F. M. Law and Vera B. Law, on the following described property, * * * which you are authorized to use upon payment to you within 30 days from the date hereof for my account, the sum of $8,250, and a mortgage executed by [the grantees] in favor of C. A. Nolte [reciting the terms of the note and mortgage]. * * * Indorse interest on back of note to date of close of escrow. Said mortgage shall be first lien on the above-described property. * * * Prorate rents as of date of close of escrow. Prorate taxes for the fiscal year 1923–1924. Pay your escrow charges, also charges for your guaranty of title and recording mortgage. Pay all incumbrances of record necessary to show title as above. Pay Kells & Grant $825 as commissions. Mail your check for the balance to me. In the event that the conditions of this escrow have not been complied with at the expiration of the time provided for herein, you are instructed to complete the same at the earliest possible date thereafter, unless I shall have made written demand upon you for the return of all the instruments deposited by me. [Signed] C. A. Nolte. [Indorsed] Baker—No. 504,561."

C. A. Nolte died November 16, 1923. Upon demand the trust company delivered the deed to this property to the appellant C. A. Nolte. The deed was offered in evidence at the trial, and is now in the custody of the clerk of court.

[1] We are of the opinion that the evidence in the present case supports the findings of the court to the effect that the grantor was of sound mind and capable of executing the deed in question. Evidently the appellant does not rely upon his charge of mental unsoundness of the grantor as a ground for reversal. This subject is not mentioned in his briefs, except by way of a recital of the facts wherein it is said that the grantor was a man of nearly 90 years of age, and was suffering from infirmities of body and mind which naturally resulted from extreme age. The alleged incompetency of the grantor seems not to have been made an issue at the trial. The evidence of mental incompetency is meager indeed. One witness gave his opinion, without having been qualified as an intimate acquaintance, that for four or five months prior to his death, the grantor's mental condition seemed to be failing; that he had lapses of memory; was inclined to talk about spiritualism; and lacked business ability. Upon the contrary, there was evidence that he always attended to his own business affairs, which were usually profitable to him. Neither the proof of an occasional lapse of memory nor the belief in spiritualism is proof of mental incapacity. Many intellectual persons devoutly believe in spiritualism as a religion. This is evidence of neither insanity nor incompetency. 14 Cal. Jur. 367; In re Spencer, 96 Cal. 448, 31 P. 453. In the absence of proof of undue influence, importunity, or gross advantage secured, neither the lapse of memory, nor extreme age, which is not shown to have affected the understanding or ability to transact business, will suffice to avoid a deed which otherwise appears to have been duly executed and valid. 1 Alexander on Wills, 458, §§ 340–342; Rogers v. Scott, 28 Cal. App. 93, 151 P. 379; Johnson v. Studley, 80 Cal. App. 538, 252 P. 638.

[2, 3] The respondents were neither in default for failure to pay the full contract price for the real property, nor for failure to pay it within the 30-day limit of time prescribed by the contract. The purchase price of the property was $16,500, one-half of which was represented by the note and mortgage, which were duly executed and delivered pursuant to contract. The balance was to be paid in cash to the trust company within 30 days from October 12th. The contract which was signed and accepted by the grantor acknowledged the deposit of $500 upon the purchase price, which was credited by agreement as a part of the broker's commissions. The balance of the purchase price, to wit, $7,762, was paid to the trust company by the respondents on November 13th. By the terms of this agreement the purchasers were given 30 full days in which to complete the contract. The thirtieth day fell upon Sunday, November 11, 1923, which was also Armistice Day, a statutory holiday. Section 10 of the Political Code provides:

> "If * * * the 11th day of November falls upon Sunday, the Monday following is a holiday."

It follows that since Armstice Day chanced to fall upon Sunday in the year 1923, the following Monday, November 12th, became a holiday. The respondents therefore were entitled to the following day in which to fulfill their contract. The general rule for computing time within which a contract may be performed is to exclude the final day when it chances to fall upon a Sunday or a holiday, and include the succeeding business day. 26 R. C. L. 749, § 23. Section 11 of the Civil Code provides:

> "Whenever any act * * * is appointed by law *or contract* to be performed upon a particular day, which day falls upon a holiday, it may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed." Mox, Inc., v. Leventhal (Cal. App.) 264 P. 562.

It follows that since the performance of the agreement by the respondents was completed on November 13th, which was within the time specified in the contract, the heirs of the deceased had no authority to rescind the contract, as they attempted to do November 17th, by notifying the title company to that effect.

[4, 5] The appellant contends that the complaint fails to allege, and that the evidence and findings fail to support, a necessary

showing of the value of the property or the adequacy of the consideration for the conveyance. Paragraph IV of the complaint, however, did allege:

> "That the said sum of $16,500 mentioned in said agreement for the purchase of said land is a just, fair, and adequate consideration and price for the land herein described."

In the absence of a demurrer, this was a sufficient allegation of the value of the land, if indeed any allegation of value was necessary at all. The first finding of fact adopted by the court was:

> "That all the allegations of the plaintiff's complaint are true."

The fourth finding of fact was:

> "That the denials contained in said defendant's answer in paragraph 4 are untrue."

The court thus determined by the foregoing general finding that $16,500 was a just, fair, and adequate consideration for the purchase of the land. It is also specifically found that defendants' denial of these facts was untrue. This was a sufficient finding of facts as to the value and the adequacy of consideration. In 24 California Jurisprudence, 973, § 206, the author says:

> "Unless prejudice results from a failure to find more specifically, a general finding of the ultimate facts is all that is required, as such a finding is equivalent to a specific finding as to each material allegation to which it refers. Thus it is ordinarily sufficient to find that all of the allegations of a pleading are or are not true."

See, also, 24 Cal. Jur. 986, § 214, and cases there cited.

[6, 7] The record discloses evidence of the value of the land which is not disproportionate to the contract price. Mr. Kelliher, a real estate broker, testified that it was worth $275 per front foot, or $18,700 for the entire tract. The requirement of an allegation and proof of adequate consideration in an action for specific performance does not mean that the contract price shall necessarily measure up to the highest market value of the property, but merely that it is a substantially just and fair valuation under all the circumstances of the case. 23 Cal. Jur. 442. It cannot be said that the contract price of $16,500, as a matter of law, was unjust or inadequate.

[8-10] It was, however, unnecessary in the present case to allege or prove the value of the property or the adequacy of consideration. This is an action under section 3380 of the Civil Code, to obtain the delivery of a deed wrongfully withheld by the depositary after the termination of an escrow, and is not an action for specific performance. In 10 California Jurisprudence, at p. 594, it is said:

> "* * * If the depositary refuses to deliver the instruments after performance of the conditions, the grantee may bring an action for specific delivery of personal property, which technically is neither an action in claim and delivery nor for specific performance."

See section 3380, Civ. Code; Harrison v. Woodward, 11 Cal. App. 15, 103 P. 933; Danziger v. Benson, 175 Cal. 565, 166 P. 313. If the escrow holder wrongfully delivers the property to a third person, the grantee may bring the action against him without joining the escrow holder or the grantor. Feisthamel v. Campbell, 55 Cal. App. 774, 205 P. 25. If the grantor and the depositary wrongfully convert the property of the plaintiff, they may be joined as defendants. 10 Cal. Jur. 595; Trask v. Garza, 51 Cal. App. 739, 197 P. 807.

[11] Section 1057, Civil Code, defines an escrow as follows:

> "A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and, on delivery by the depositary, it will take effect. While in the possession of the third person, and subject to condition, it is called an escrow."

It will be observed that it is only while the instrument is subject to the conditions imposed that the deposit will be deemed to be an escrow. When the conditions upon which the deposit of the instrument have been fully performed, the relationship of the interested parties automatically changes and the depositary is then deemed to hold the instrument as a trustee for the party entitled thereto. In the case of Shreeves v. Pearson, 194 Cal. 699, 707, 230 P. 448, 451, it is said:

> "* * * Whenever the conditions attending the escrow have been so far performed that the transaction which has called the escrow into being becomes complete the nature of this dual agency changes to an agency not for both, but for each of the parties to said transaction in respect to those things placed in escrow to which each has thus become completely entitled."

So, also, in the case of Feisthamel v. Campbell, supra, at p. 781 (205 P. 28), the court quotes with approval from 10 Ruling Case Law, at p. 640, the following:

> "* * * Upon the happening of the event or the performance of the condition upon which manual delivery should be made by the depositary to the grantee, although not in fact physically delivered to him, a deed theretofore in escrow becomes ipso facto the deed of the grantee in whom the title vests, and that thenceforth the depositary or holder is regarded as the mere agent or trustee of the grantee."

[12, 13] In the present case it becomes necessary to determine from the escrow instructions and from the evidence what specific acts were necessary to fulfill the escrow trust and entitle the grantees to the delivery of their deed. Was the depositary the trustee for both parties to this transaction, including the acts of indorsing upon the note the accumulated interest to the time of the close of the escrow, to apportion the taxes and the rent, and to furnish the guaranty certificate of title, or was the depositary the agent for both parties merely for the acceptance of the purchase price of the land together with the note and mortgage and the holding and delivery of the grantor's deed of conveyance? It seems reasonable to assume that for the performance of those acts by the depositary in which the grantor alone was interested, the depositary was his agent only, and not a trustee for the benefit of the purchasers. It is evident from the escrow instructions that the grantor intended to waive interest on the note from the date of its execution to the time of the termination of the escrow, and he therefore directed the depositary to indorse upon the note, as paid, all interest to that date. A failure to perform this clerical act does not harm the grantor, but entitles the purchasers to a claim against him for this small amount. So, also, the instructions directed the prorating of rent, with the evident intent of crediting the purchasers with the rent due or paid after the closing of the escrow. Assuming that the escrow was closed upon the depositing of the note and mortgage and the payment of the balance of the purchase price on November 13th, the purchasers would be entitled to a credit of one-half of $40 rent which was paid for the month of November. But the evidence does not show that any rent was deposited with the holder of the escrow for distribution. It seems absurd to hold that a grantor could defeat an escrow by his failure to deliver or account for rental which he had agreed to pay the purchaser. This, also, is a matter of which none but the purchasers could complain. The taxes for the fiscal year were also to be prorated. But these taxes became a lien upon the property and were chargeable to the purchasers, who would have a valid claim against the grantor for the proportion thereof which accrued before the completion of the escrow. This obligation was due from the grantor, and he may not complain because his depositary failed to perform the clerical duty of apportioning the taxes. No tax money was deposited, and none was to be distributed between the parties. The grantor merely owed the purchasers the amount of taxes which would have accrued to the time of the completion of the escrow. So far as the furnishing of a guaranty certificate of title is concerned, that, also, is a matter of which the purchasers alone could complain. In truth, the escrow instructions were not conditioned upon the actual furnishing of such a certificate. However, the record seems to indicate that the certificate was in fact prepared and ready to deliver. Mr. Cate, an employee of the Title Guarantee & Trust Company, testified that the company was engaged in the business of furnishing guaranty certificates of title in connection with which business they maintained an escrow department for handling transactions for the sales of properties. He also said that all of the documents involved in this transaction were deposited with his company. It appears that the respondent F. M. Law, about October 26, 1923, received a letter from the trust company regarding some flaw which had been discovered in the title to the property, and he was requested to waive this flaw in writing. Mr. Law testified:

> "I investigated it, and inquired around, and the seller offered to put up a bond to protect me against that defect in the title. * * * After investigating the matter and being assured this title could be protected, I attached my check [for the cash payment on the purchase price of the land] to the waiver [of the defect of title] and the letter that they wrote me, and handed it back to Mr. Baker in the escrow office. * * * The letter stated that the escrow was approximately ready to close [and demanded that I] give them this check to close the escrow. * * * I delivered the check, the waiver, and the letter."

[14] Neither the purchase price, nor the note and mortgage were ever returned or even tendered to the respondents. This appears to furnish substantial evidence to support the findings of the court to the effect that the respondents had fully performed every requirement of the escrow contract on their part, and that the escrow was terminated, thus entitling them to the delivery of their deed of conveyance from the depositary. The fact that the grantor subsequently died before the actual manual delivery of the instrument does not defeat the grantees of their right to the possession of their deed of conveyance. Bostwick v. McEvoy, 62 Cal. 496.

The decree, however, quieted title in the respondents regardless of the mortgage lien for the balance of the purchase price to which the grantor was entitled. Both the contract of sale and the escrow instructions provided for this lien in favor of the grantor. This was erroneously omitted by the trial court. The judgment is therefore modified so as to quiet title in the respondents, subject, however, to a first mortgage lien in favor of the grantor and his heirs and assigns to secure the promissory note for the sum of $8,250 executed by the respondents October 15, 1923, according to the terms and conditions therein contained.

With this amendment, the judgment is affirmed. Respondents will recover their costs.

We concur: KOFORD, P. J.; NOURSE, J.

91 Cal. App. 731

PEOPLE v. MORALES. (Cr. 1616.)

District Court of Appeal, Second District, Division 1, California. May 14, 1928.

Criminal law ⚷369(4)—Conviction for forgery was affirmed as against contention that admission of evidence tending to show other crimes was error.

In prosecution for forgery, conviction was affirmed as against defendant's contention that evidence was erroneously admitted, which tended to show that defendant had committed other similar crimes.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

R. Morales was convicted of forgery, and he appeals. Affirmed.

Frederic H. Vercoe, Public Defender, Franklin Padan, Chief Deputy Public Defender, and John J. Hill, Deputy Public Defender, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

YORK, J. Defendant appeals from an order denying a motion for a new trial and from a judgment of conviction of forgery of a bank check.

Appellant contends that he was convicted on incompetent and immaterial evidence admitted by the court over his objection. It is contended that the evidence complained of led the jury to believe that defendant had committed other similar crimes, and that this evidence was admitted in violation of the well-established rule of evidence that the prosecution cannot prove the commission by the defendant of other offenses committed by him, for the purpose of increasing the likelihood that he has committed the particular crime with which he is charged. There is no doubt about the law in such cases, but, in the application of the law to the instant case, we find that the evidence complained of is not of the class considered by appellant. It is true that, in bringing out evidence material to the issue, circumstances tending to cast suspicion on defendant in the commission of other crimes appeared incidentally, some of which were elicited by the defendant on cross-examination of witnesses produced by the prosecution. The evidence complained of came out in statements extrajudicial made by defendant to witnesses and extrajudicial statements made in his presence by others, which he did not deny, all of which statements were relevant and material in establishing defendant's guilt in the instant case. The court did not err in overruling objections to such evidence offered by the prosecution or in declining to strike out evidence which pertained to defendant's guilt in the instant case. Illustrative of the point made in appellant's brief that there was error in admitting that class of evidence over his objection, Jane H. Uhl, a witness on the part of the prosecution, was asked by the district attorney whether in the conversation which had been referred to between the witness and Morales anything was said by Mr. Morales or Mrs. Fruhling relative to the check in question. She answered: "No; not particularly to that one check." The district attorney said: "Was there anything said about any check?" The defendant objected to the question on the ground that it was incompetent, irrelevant, and immaterial, no foundation laid, and on the ground that there was no proof of other checks. The witness answered: "Not about any one particular check." The district attorney then asked:

> "What was said about any check? A. Well, that he signed them.
>
> "Q. What did he say about signing them? A. In the course of this conversation they brought up Mrs. Zimmerman. * * * Then they commenced to talk about the checks he was accused of, and he admitted that she was very, very ill, and her folks would get all her money anyway, and he would just as well have that money out of her.
>
> "Q. Who said that? A. Ralph. He said that in the presence of Mrs. Fruhling.
>
> "Q. Was that this defendant? A. Yes."

On cross-examination she said:

> "He said he had signed the checks, * * * and that Mrs. Zimmerman was very, very ill, and he didn't expect her to live, and her folks would get all the money, and that he would just as well have some money out of her. * * * He told me that he got the money."

The cases cited by defendant in support of the alleged errors are not in point. The evidence objected to in each of these cases was not inextricably mixed with the evidence which was proper, as in the instant case, and in People v. Canfield, 173 Cal. 309, 159 P. 1046, cited by appellant, the defendant's confession of another and distinct forgery was under consideration. It was not, as in the instant case, a case where an admission of the commission of the crime was linked with, or made only in connection with, the admission of the commission of other crimes. In the Canfield Case the confession did not in any way pertain to the charge upon which the defendant was being tried. The appellant's counsel is mistaken in the statement that the court further held in that case that such an error is not cured by section 4½ of article 6 of the Constitution, but (in view of the fact that the appeal was from an order granting a new trial) the court held that that question was one for the trial court to decide. The case of People v. Baird, 105 Cal. 126, 38 P. 633, was a case where evidence of other and distinct forgeries were received over defendant's objection. It does not appear that the evidence tending to prove other forgeries had any relation to the charge on which trial was had, but was considered with reference to absence of proof establishing the corpus delicti. The same can be said of the other cases cited by appellant on the requirement to prove the other alleged forgeries before the evidence of defendant's admissions of committing them can be received.

But those cases are inapplicable to the instant case, in that in this case the evidence complained of came in in connection with the check alleged in the information to have been forged, and no evidence was introduced for *the purpose* of proving that the defendant had forged other checks. Evidence tending to prove any fact pertinent to proof of the crime charged in the information should not be excluded on the ground that it might have a tendency to prove another crime of the same character and against the same complaining witness and in connection therewith. Such restriction would have a tendency to defeat justice. If the evidence tending to prove other crimes establishes a general scheme to obtain money from the complainant unlawfully, and it establishes one common motive of the defendant to effect his object, it cannot be excluded on the ground that it might create a prejudice against the defendant.

As to the question of venue, as was stated by the trial court, that was solely a question for the jury, by reason of the fact that evidence was introduced from which the jury could determine the fact that the crime was committed in Los Angeles county, and their verdict shows that they did so determine it.

We have reviewed the evidence, and find that it supports the verdict of the jury.

The judgment and order are affirmed.

I concur in the judgment: HOUSER, J.

CONREY, P. J. I concur in the judgment. Appellant was accused of forging a $300 check, drawn against the bank account of I. M. Zimmerman. The check was shown to have been made and uttered. It was made payable "to the order of cash," and purported to be signed by I. M. Zimmerman. In her testimony Mrs. Zimmerman stated that she did not write the check, and did not sign it, and that she did not authorize any other person to write the check or to sign her name thereto. The evidence therefore is sufficient to prove the corpus delicti, or, in plain English, that the forgery was committed by some one.

Also there is testimony tending to prove that the signature "R. Morales," on the back of the check is in the handwriting of the defendant; and that this indorsement and the writings on the face of the check, including the name signed at the bottom of the check, were all written by the same person.

As an incidental fact, in the introduction of testimony to show that the defendant had admitted that he forged People's Exhibit 1, the check particularly in question in this action, it appeared that this check and others were present before the parties to those conversations; that is, the witnesses and the defendant. The conduct and statements of the defendant, as shown by the testimony, did not amount to a direct statement wherein defendant singled out the one check and said that he forged that check. It did tend to show that he obtained the money on several checks, including People's Exhibit 1. But there was no attempt made by the prosecutor to establish the commission by appellant of any forgery other than of the one instrument specified. In a case where a defendant's admission of a fact is to be proved, the testimony proving such admission should not be excluded merely because the statement, as made by the defendant, included other facts which tend toward proof that defendant had also committed another crime.

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91 Cal. App. 737

SAHAKIAN v. CITY OF LOS ANGELES et al.

(Civ. 4384.)

District Court of Appeal, Second District, Division 2, California. May 14, 1928.

Appeal and error 🔑102—No appeal lies from an order sustaining demurrer without leave to amend (Code Civ. Proc. § 963).

An order sustaining a demurrer without leave to amend is not one from which an appeal lies, under Code Civ. Proc. § 963.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by John Sahakian against the City of Los Angeles and others. From an order sustaining a demurrer without leave to amend, plaintiff appeals. Appeal dismissed.

T. C. Gould, of Los Angeles, for appellant.

Jess E. Stephens, City Atty., and Chas. B. MacCoy, Deputy City Atty., both of Los Angeles, for respondents.

HAZLETT, Justice pro tem. Plaintiff states in his opening brief in his appeal herein that defendant city of Los Angeles filed a general demurrer to his complaint, which the trial court sustained without granting him leave to amend, and that "our only alternative is this appeal." From this statement we understand that he attempts to appeal from the order sustaining the demurrer without leave to amend, and his notice of appeal shows that he appeals from the order, and not from the judgment thereon. Such order is not one from which an appeal lies. Section

963, Code Civ. Proc.; People ex rel. Goodell v. Garrett, 72 Cal. App. 452, 237 P. 829; 2 Cal. Jur. 156.

The attorney for appellant in this case was substituted after the appeal was taken, and after the briefs were filed.

The appeal is dismissed.

We concur: WORKS, P. J.; CRAIG, J.

91 Cal. App. 654

CALIFORNIA CANNING PEACH GROWERS v. HARRIS. (Civ. 3442.)

District Court of Appeal, Third District, California. May 8, 1928.

1. Contracts 🔑313(1)—Refusal of performance by party to executory bilateral contract before time of performance may give rise to action for damages by other party for defense to performance (Civ. Code, §§ 1440, 1515, 1511, par. 3).

Party to an executory bilateral contract may avail himself of refusal of performance made by other party in advance of time of performance as basis for action for damages or as defense to own performance under Civ. Code, §§ 1440, 1515, 1511, par. 3.

2. Trial 🔑382—Trial court may pass on witnesses' credibility and weight of their testimony.

Trial court has power to pass on credibility of witnesses and weight of their testimony.

3. Corporations 🔑432(6)—Agent's authority to act for corporation may be shown by evidence of conduct for corporation with knowledge of directors or general manager.

Authority of an agent to act for corporation may be shown by evidence that person does business for corporation and in its behalf as agent with knowledge and acquiescence of its directors or general manager or by their directions.

4. Corporations 🔑425—Corporation holding out as agents persons apparently empowered to transact ordinary business cannot claim authority was not conferred against third parties affected thereby.

Where corporation holds out to world as its agents persons apparently clothed with power to transact ordinary business, third parties will not be permitted to suffer from acts of agents by corporation's attempted defense that ostensible authority was not in fact conferred.

5. Corporations 🔑426(2)—Corporation holding out agent as authorized to act cannot repudiate acts after agent has acted.

When corporation by long course of acquiescence holds out officer or agent as having authority to do certain things, it cannot after he has acted repudiate his acts.

6. Agriculture 🔑6—That person solicited memberships in marketing association or was director thereof held not to empower him to release defendant from marketing agreement.

That person prior to organization of co-operative marketing association solicited subscriptions to membership in association or was director of association did not vest in such person power to release defendant from obligation to deliver his crop to association in accordance with marketing agreement.

7. Agriculture 🔑6—Test of authority of director of marketing association to relieve defendant of contract held not what defendant understood him to say, but what reasonable person would be justified in believing.

In suit by co-operative marketing association to enforce marketing agreement, finding that defendant understood director of association to state without qualification that association would not receive his crop when it ripened cannot be held to be sole test of director's authority to release defendant from obligation under contract, true test being what reasonable man was justified in believing under circumstances from acts and conduct of director.

8. Agriculture 🔑6—Act of assumed agent defeating legislative purpose of marketing association could not be exercised as mere incident to authority, but should be expressly conferred by association.

Any act by assumed agent of co-operative marketing association to defeat legislative purpose of giving association power to control subject-matter of its operations by holding members to agreement to deliver crop to it would be of such vital character that it could not be exercised as a mere incident to agent's authority, but should be conferred by express conduct of association.

9. Principal and agent 🔑48—Agent's mission is to fulfill and not to destroy.

Mission of an agent is to fulfill, but not to destroy.

10. Agriculture 🔑6—Marketing agreement requiring grower to sell all products to association held for benefit of association, members, and public, and entitled to extraordinary protection.

Provision in marketing agreement that grower should sell all his product to association *held* intended for benefit of association and also for benefit of members of association and for public, and entitled to extraordinary protection.

11. Agriculture 🔑6—Evidence held insufficient to show director's agency for marketing association to refuse to accept grower's fruit or to relieve grower of marketing agreement by anticipatory breach of association.

In suit by co-operative marketing association to enforce marketing agreement requiring grower of peaches to sell all its products to association, evidence failing to show assumed agent of association, alleged to have told defendant that association would not accept his peaches, ever exercised such authority with knowledge of directors of association, and that such authority was incidental to or connected with agent's business, or that conduct was ratified, was insufficient to show agency to refuse acceptance of peaches, and did not show marketing association refused to perform conditions of agreement sufficient to relieve defendant of obligation thereunder on ground of anticipatory breach.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by the California Canning Peach Growers against John Harris and another. Judgment for defendant Harris, and plaintiff appeals. Reversed.

Hadsell, Sweet & Ingalls, of San Francisco, and Farnsworth, Burke & Maddox, of Visalia, for appellant.

Power & McFadzean and J. Thos. Crowe, all of Visalia, for respondent.

BUCK, Justice pro tem. Plaintiff is a nonprofit co-operative marketing association, organized in 1921 under the laws of the state of California. From the beginning the defendant, John Harris, was a member of the association, and, with his fellow members, had signed a marketing agreement with the association whereby he sold to the association, to be marketed for the benefit of himself, all of the peaches to be grown by him on a 20-acre orchard for the next 14 years.

During the years 1922 and 1923 defendant's yearly crop was delivered and marketed under the terms of the marketing agreement. But during the season of 1924 the defendant sold his crop to other parties and failed to deliver any part of it to the association. Upon suit being brought by the association to recover the punitory damages provided for in the agreement, the defendant, John Harris, set up as a defense his claim that there was an anticipatory breach of the marketing agreement on the part of the association. Upon the trial of the case before the court, sitting without a jury, the court found, in accordance with the defendant's claim of an anticipatory breach, that "during the summer of 1924, about the month of June, and shortly before any of the peaches mentioned in the marketing agreement were ripe and ready for delivery, the plaintiff association informed the defendant, John Harris, that it would not accept or receive said peaches or any part thereof, and that said plaintiff did then and there fail and refuse, and ever since has failed and refused, to accept said peaches, or any part thereof."

The court, accordingly, after having granted a nonsuit as to the defendant Lizzie Harris, gave judgment in favor of the defendant John Harris, and against the plaintiff. From this judgment in favor of the defendant John Harris the plaintiff appeals, and bases its appeal upon the ground that the evidence is insufficient to sustain the foregoing finding of an anticipatory breach on the part of the plaintiff such as would justify the defendant in failing to deliver his peaches to the association under the terms of the written agreement.

[1] The rule, of course, is well established that a party to an executory bilateral contract may avail himself of a refusal of performance made by the other party in advance of the time of performance either as a basis for an action for damages, or may himself set up such refusal as a defense to his own performance. Civil Code, §§ 1440, 1511, par. 3, § 1515, and 6 Cal. Juris. pp. 457 to 460; Alderson v. Houston, 154 Cal. 1, 12, 96 P. 884; Howard v. Galbraith, 13 Cal. App. 373, 377, 109 P. 889; 13 C. J. 653, 654.

As regards the nature and character of the refusal by one party which will justify nonperformance by the other, the rule is well stated in the case of Rauer v. Harrell, 32 Cal. App. 45, at page 66, 162 P. 125, 133, as follows:

"Before the salt company could avoid performance, defendant's refusal to perform should appear to have been explicit, positive, and unequivocal. The rule stated by Mr. Benjamin is as follows: 'A mere assertion that the party will be unable, or will refuse to perform his contract is not sufficient; it must be a distinct and unequivocal, absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made.' Benjamin on Sales, § 568.

"In 6 Ruling Case Law, p. 1025, the rule is thus stated: 'In order to justify the adverse party in treating the renunciation as a breach, the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute. * * * It may be observed, however, that the renunciation itself does not ipso facto constitute a breach. It is not a breach of the contract unless it is treated as such by the adverse party.' Hanson v. Slaven, 98 Cal. 377, 382, 33 P. 266; Bell v. Bank of California, 153 Cal. 234, 242, 94 P. 889.

"In Smoot's Case, 15 Wall. 36, 21 L. Ed. 107, it was held that mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient to terminate it; it must be distinct and unequivocal absolute refusal to perform, treated and acted on as such by the promisee. Approved in Dingley v. Oler, 117 U. S. 503, 6 S. Ct. 850, 29 L. Ed. 984."

For the purpose of showing an abandonment by the association of its contract by its claimed refusal in June of 1924, to accept future delivery of defendant's peach crop, defendant testified that Ross Denison, one of the directors of the association, came to his place in June, 1924, and stated to him:

"We cannot accept Elberta peaches."

Witness continuing: "I didn't say anything to that. There wasn't particularly so much conversation, only that they cannot receive those Elberta peaches. He said, the first time when he came over in June, that they cannot accept those Elberta peaches. After that my wife took charge of these peaches and says, 'Since they refused I am going to sell them myself;' and I didn't have anything to do with it any more. She sold them to the Kings County Packing Company or cannery."

Also, F. W. Brown, the district representative of the plaintiff, testified that he informed defendant of the contents of the marketing agreement and what would be the result if defendant broke his contract, and asked defendant to go and see the only lawyer that witness knew of in Reedley and to talk to his neighbors before he violated the contract, and that defendant then "said that he could get more money for his freestones and that we would not accept his freestones." The Elberta peaches, it seems, were freestones, and the balance of his crop consisted of clingstone peaches.

Ross Denison, when called as a witness by the defendant, testified that he (Ross Denison) had an agreement with Mr. Pogooto, the manager of the plaintiff, to receive crops of peaches in the vicinity of Reedley. During the year 1923 the plaintiff engaged in co-operative canning. Before that time all members' peaches were sold to commercial canneries; Denison was asked to look after receiving for the Herbert Packing Company, which was canning co-operatively for the association, part of the crop being sold to other canneries in Reedley in a raw state. The witness testified that it was part of his duty to solicit growers to designate the Herbert Packing Company as the receiving point, and in his conversation of June, 1924:

"I asked Mr. Harris to designate the Herbert plant as a receiver for his peaches. * * * As I remember, I asked Mr. Harris for his cling peaches, stating that we could not handle the Elbertas. Now, I can't remember the exact words, but that was the essence of it. * * * I wasn't the only one receiving from the association. The association was delivering to different plants. But I was the only one that received for the Herbert Packing Company for the association.

"Q. The variety of peaches and the tonnage that would be received was left by the association to you, was it not? A. Certain agreements were made with the Herbert Packing Company to can a portion of the tonnage of fruit controlled by the California Canning Peach Growers. This plant was only engaged in canning cling peaches.

"Q. Did you tell Mr. Harris that you didn't see your way clear to take from him any freestones? A. Yes, I wanted to convey to Mr. Harris that it would not be very easy for us to handle them up there and I would only take the clings at the plant.

"Q. Did you tell Mr. Harris in that conversation that he would have to make some other disposition of those freestones? A. By 'disposition' you mean what?

"Q. Sell or get rid of them some way? A. Words to that effect; yes."

Cross-examination:

"Mr. Sweet: Q. You merely asked him if he wanted to deliver them to the Herbert Packing Company his clings? A. I think that is the way I specified it. I can't exactly recall the words.

"Q. Mr. Pogooto didn't tell you to tell any one that the association would refuse to receive any peaches it had contracted for, did he? A. I didn't get any definite instructions from Mr. Pogooto.

"Q. You can answer the question 'yes' or 'no'? A. No.

"Q. The board of directors never told you to reject any peaches that the association had agreed to receive, did they? A. No; decidedly not.

"Q. You never told Mr. Pogooto that you had refused or had told any grower that the association would not taken any peaches that it contracted for, did you? Is that clear? A. Yes; that is clear. No; I didn't tell Mr. Pogooto that.

"Q. And you didn't tell the board of directors that, did you? A. I don't believe we had a board of directors' meeting until after the peaches were being delivered."

[2] For the purpose of this appeal it may be assumed that the trial court, acting within its power to pass upon the credibility of the witnesses and the weight of their testimony, did not entirely accept the testimony of the witness Denison to the effect that the refusal to accept the Elberta peaches was limited to a refusal only to accept them for delivery at the plant of the Herbert Packing Company, which was handling cling peaches alone, but that the court chose rather to accept the testimony of the defendant to the effect that the defendant understood and was justified in understanding from his conversation with Denison that there was an unqualified refusal on the part of the association to accept, for any purpose or at all, defendant's Elberta peaches. But the vital question still remains as to what extent, if any, was Denison authorized to bind the association by the unqualified refusal testified to by the defendant.

It is the contention of learned counsel for defendant "that the preponderance of all the evidence introduced at the trial shows conclusively that Denison was acting in the capacity of agent of the California Canning Peach Growers, and that the rejection of the respondent's Elberta peaches was within the scope of his authority," and in support of his contention cites and quotes from the following authorities: Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 P. 658; Newton v. Johnston Organ Mfg. Co., 180 Cal. 185, 180 P. 7; 6 Cal. Jur. 1099; Stevens v. Selma Fruit Co., 18 Cal. App. 242, 123 P. 212; Nicholson v. Randall Banking Co., 130 Cal. 533, 62 P. 930.

[3-5] These authorities as quoted from by counsel lay down the well-established rules that the authority of an agent to act for a corporation may be shown by evidence that the person does business for the corporation and in its behalf as agent with the knowledge and acquiescence of its directors or general manager or by their directions. And that

where a corporation holds out to the world as its agents persons apparently clothed with power to transact ordinary business, third parties will not be permitted to suffer from the acts of such agents by the corporation's attempted defense that the ostensible authority was not in fact conferred. And that when a corporation, by a long course of acquiescence, holds out an officer or agent as having the authority to do certain things, it cannot, after he has acted, repudiate his acts. But in the case at bar there is no evidence that Denison, with the knowledge and acquiescence of its directors or general manager or by their direction, ever had exercised authority of the kind called in question in this case. In fact, the testimony in the case is directly to the contrary. Furthermore, there is no evidence in the record indicating that the business in question claimed to have been transacted by Denison could be deemed to be incidental to or connected "with power to transact ordinary business." Furthermore, there is no evidence in the record showing any ratification on the part of the corporation of the claimed conduct of the assumed agent in refusing in advance to accept defendant's peaches.

[6, 7] The fact that Denison had, at a time prior to the organization of the corporation, solicited the subscription to membership of the defendant, or the fact that the said Denison was a director of the corporation, did not vest in him the power to release the defendant from his obligation to deliver his crop in accordance with the marketing agreement. The mere fact that the trial court may have found, according to the testimony of the defendant, that the defendant understood Denison to state, without qualification, that the association would not in any event or at any time receive his freestone peaches when they would be ripe and ready for delivery, is not and cannot be held to be the sole test of the authority of Denison in the matter. The test is not what the defendant believed when he availed himself of a better offer and allowed his wife to sell the peaches. But the test is what, under all the surrounding circumstances was he, by the acts and conduct of the plaintiff, justified, as a reasonable man, in believing.

As regards the nature and relative importance of the act of the assumed agent: Without going into any extensive discussion as to the purposes and necessary business methods of co-operative marketing associations, it may be stated that the whole legislative and business scheme of such an association necessarily depends upon the ability of the association to hold and control the subject-matter of its operations. It is only by holding such control that it can give to its members the benefit of such a bulk and quantity handling and increased credit facilities as will, first, diminish the cost of preparing for market and marketing the product in question, and, second, will enable the producers properly to control such a share of the commodity protected as will enable them to set such a stabilized price for the commodity as will at the same time be attractive to the consumer and will afford a living profit to the producer; all of which would be accomplished without detriment to anyone except speculators and intermediate handlers who may seek unduly to reap where they have not sown.

[8] It would therefore seem that any act on the part of any assumed agent tending to defeat such an essential legislative purpose would be of such an extraordinary and vital character that it could not be exercised as a mere incident to the authority of a subagent but should be conferred, if conferred at all, directly by the express act or conduct of the governing body of the association.

[9] The general principle that the mission of an agent is "to fulfil but not to destroy" is clearly stated, with appropriate citations, in the case of Morton v. Albers Bros. Milling Co., 66 Cal. App. 391, at page 398, 226 P. 809, 812, where the court uses the following language:

> "Prenot was not a general officer. He was only an assistant manager for appellant at one of its branch offices. It possibly may be inferred from the evidence that he was authorized to do certain things which were necessarily incident to the performance of the written contract, such, for example, as seeing to it that proper tests were made to determine whether the milo measured up to the requirements of the contract. But authority in an agent to carry out or to perform a contract already made by his principal does not include authority to change the contract or to waive any of its provisions, especially where, as here, the provision is one which was intended for the benefit of the principal. Presumptively, an agent is employed to acquire interests, not to give them up. Gerrish v. Maher, 70 Ill. 470; Hutchings v. Munger, 41 N. Y. 155; Thomas v. Anthony, 30 Cal. App. 217, 157 P. 823. See, also, 2 C. J. pp. 645, 646."

[10] And not only was the provision herein "one which was intended for the benefit of the principal," but it was also one which was intended essentially for the benefit of each of the members of the association, and, even beyond that, was one involving the interests of the public. First, in regard to the association as stated in the case of Anaheim C. F. Ass'n v. Yeoman, 51 Cal. App. 759, at page 763, 197 P. 959, 961:

> "The existence and life of the association itself depended upon its being furnished fruit to dispose of in the public market. A reduction in the amount of fruit so handled would not only tend to increase the overhead cost to the non-transgressing members, but, we may assume, to some extent affect the prestige and standing of the association as a marketing concern. The argument would be the same, regardless of the quantity of fruit which might have been delivered by the defendant, whether it composed but a

small fractional part or one-half or more of the entire product designed to be marketed by the plaintiff agency."

And, second, in regard to the members of the association, including the defendant himself, as stated in the case of California C. P. Growers v. Downey, 76 Cal. App. 1, at page 15, 243 P. 679, 684:

> "All the other members of the association have an interest in the proceeds received from the sale of the respondent's peaches. * * * Every member of the association must, of course, be held to have knowledge of all of these elements which enter into co-operative marketing agreements. They are not simply agreements entered into with an agent, although a few people may be selected to act in the capacity of officers to manage the business of the association. The agreements are essentially to and with all the other members of the co-operative association and the interests of every member rest upon the same foundation, and no member can be advantaged to the detriment of any other member. Of all this each member must also be held to have full knowledge, as the contract sets forth all of these facts in equalizing burdens and advantages."

And, finally, as regards the interests of the general public in the protection of these marketing agreements. In the very recent case of Liberty Warehouse Co. v. Burley, etc., 48 S. Ct. 291, 72 L. Ed. —–, decided February 20, 1928, the Supreme Court of the United States, after a full review of all the authorities, went to the extent of holding that a marketing agreement of a co-operative marketing association of farmers is, by reason of the public interests it subserves, entitled to such extraordinary protection as to render valid and constitutional a state statute declaring any person guilty of a misdemeanor who shall "knowingly induce or attempt to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, or who maliciously and knowingly spreads false reports about the finances or management thereof."

In holding as above, the Supreme Court demonstrated its high capacity to so interpret legal principles and the safeguards of the Constitution as to make our basic laws conform to present economic and social conditions, and be actually, and not merely theoretically, promotive of the general welfare. For, in rendering its decision, the court said:

> "Undoubtedly the statute does prohibit and penalize action not theretofore so restricted and to that extent interferes with freedom. But this is done to protect certain contracts which the Legislature deemed of great importance to the public and peculiarly subject to invasion. * * * It is stated without contradiction that co-operative marketing statutes substantially like the one under review have been enacted by 42 states. * * * These statutes reveal widespread legislative approval of the plan for protecting scattered producers and advancing the public interest."

[11] We are therefore of the opinion that the evidence in this case, being insufficient to show agency on the part of Denison, is insufficient to sustain the finding of the trial court that the plaintiff refused to accept defendant's fruit, or that the plaintiff failed to keep or perform the terms, conditions, and covenants of the marketing agreement.

The judgment therefore is reversed.

We concur: HART, Acting P. J.; PLUMMER, J.

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91 Cal. App. 792

PETERS v. PAUMA SCHOOL DIST. OF SAN DIEGO COUNTY et al. (Civ. 5315.)

District Court of Appeal, Second District, Division 1, California. May 17, 1928.

Indians ⚷5—Lands set apart under Mexican grant as planting grounds and subsequently conveyed to government held not "Indian reservation," so that children residing thereon may attend public schools.

Indians residing on land set apart to them for planting ground under terms of Mexican grant, and subsequently conveyed to United States government for use and benefit of Indians thereafter occupying it, without treaty of any kind, *held* not residing in Indian reservation so as to preclude attendance at public school; "Indian Reservation" constituting part of public domain set aside by proper authority for use and occupation of tribe or tribes of Indians.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Indian Reservation.]

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Mandamus by Wesley W. Peters, an infant, by his guardian ad litem, against the Pauma School District of San Diego County and another. Judgment for petitioner, and defendants appeal. Affirmed.

Turrentine & Wright, of San Diego, for appellants.

Samuel W. McNabb, U. S. Dist. Atty., of Los Angeles, and Ames Peterson, Asst. U. S. Dist. Atty., of Fresno, amici curiæ.

WOOD, Justice pro tem. Defendants appeal upon the judgment roll, claiming that the findings do not support the conclusions reached by the trial court. Wesley W. Peters, a minor Indian child, filed in the superior court a petition for a writ of mandamus, by which he seeks to compel the defendant school district and the teacher thereof to admit him as a pupil. Among the findings of the trial court are the following:

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

"That Max Peters and Wesley W. Peters are Mission Indians, and live upon the Pauma grant, originally a large Spanish grant patented by the Mexican government in 1844, to Jose Sorreno. That the patent excepted from the grant planting ground for the Indians' use and benefit, and said patent was confirmed in 1879, by United States patent, which also excepted planting grounds for the use and benefit of said Indians.

"That in 1899 the Pauma grant had passed to Francis Mora, who entered into an agreement with the United States government in the year 1889, defining boundaries of the Indian lands excepted from both patents above referred to, and title to this land was then quitclaimed to the United States government, for the use and benefit of said Mission Indians.

"That Wesley W. Peters, petitioner in this matter, and Max Peters, his father and guardian ad litem, were both born on land excepted and reserved for the use of the Mission Indians, and lived thereon at the commencement of this action.

"That the Indians living and residing on this excepted and reserved land do not live in tribal relations, that the United States Government has never made treaties of any kind with these Indians, and that said Indians live in the manner of other American citizens in the vicinity.

"That the lands upon which these Indians live is not subject to taxation, and that said lands at all times since 1844 have been and now are vested in the United States government for the use and benefit of the Mission Indians, of which Wesley W. Peters and Max Peters are a part.

"That said lands upon which said Max Peters and Wesley W. Peters live is within the exterior boundaries of the Pauma school district of San Diego county, Cal."

The court concluded:

> "That Wesley W. Peters, petitioner, and his guardian ad litem, Max Peters, are not tribal Indians, and are both citizens of the United States and of the state of California.
>
> "That the property upon which Wesley W. Peters and Max Peters reside is not a part of an Indian reservation, and that Wesley W. Peters is a resident of the Pauma school district of San Diego county, Cal., and entitled to be admitted to the duly established school of Pauma school district, San Diego county, Cal."

Defendants base their appeal upon the sole proposition, as claimed, that the findings disclose that petitioner is a resident of an Indian reservation. They state in their brief:

> "If the court can find, as a conclusion of law, that this is not a reservation, then of course this appeal must fail, for if petitioner is not a resident of an Indian reservation, admittedly he is entitled to be granted admission to the Pauma school under the authority of Piper v. Big Pine School District, 193 Cal. 664, 226 P. 926."

A brief has been filed as amicus curiæ by the United States attorney for the Southern district of California, in which it is contended that petitioner is not a resident of an Indian reservation, and that, regardless of the determination of this question, he is entitled to demand admission to the school.

The facts set forth in the findings do not establish that petitioner resides upon an Indian reservation. The definition of an Indian reservation is given in the Matter of Forty-Three Cases Cognac Brandy (C. C.) 14 F. 539, where the court says:

> "An Indian reservation is a part of the public domain set apart by proper authority for the use and occupation of a tribe or tribes of Indians. It may be set apart by an act of Congress, by treaty, or by executive order; I do not think an Indian reservation can be established by custom or prescription. The fact that a particular tribe or band of Indians have for a long time occupied a particular tract of country does not constitute such tract an Indian reservation."

The foregoing is set forth in 31 Corpus Juris, 499, as the proper definition of an Indian reservation. The author of that work has placed a footnote under the general definition in this language:

> "Another definition: An Indian reservation may be defined to be a certain limited portion of our national domain, assigned by the federal government to a tribe or tribes of Indians, or some part of parts of the same, to be held by them according to the terms of the assignment. U. S. v. Certain Property, 1 Ariz. 31, 25 P. 517."

Counsel for petitioner have not furnished us with any authority showing these definitions are not correct.

Applying the facts as found by the trial court to the foregoing definitions, it is apparent that elements are lacking which are necessary to constitute the land on which plaintiff is residing an Indian reservation. The findings expressly negative any inference that the land is occupied by any tribe or tribes of Indians, or that any treaty was ever made between the Indians and the United States. The findings show only that certain Indians are living on land which, under the terms of the Mexican grant, was set apart to them for planting ground; that in 1889 the government received title to the land from one Mora and holds that title for the use and benefit of the Indians who are now occupying it in the same manner as other citizens.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

91 Cal. App. 664

DVORAK v. LATIMER et al. (Civ. 3508.)

District Court of Appeal, Third District, California. May 8, 1928.

1. Exchange of property 🔑8(4)—In action to rescind land exchange, evidence held to support finding of fraudulent representation of amount of land conveyed.

In action to rescind contract for exchange of real property, evidence *held* to support finding relative to fraudulent representation in respect to amount of land to be conveyed.

2. Vendor and purchaser 🔑65(1)—Generally, phrase "more or less" following given number of acres is one of precaution, but term may be construed as estimate of unknown quantity.

As a general rule, phrase "more or less," when immediately following given number of acres, is one of safety and precaution and intended to cover some slight or unimportant inaccuracy, but term may also be treated and construed as mere estimate of unknown or indefinite quantity which parties have agreed shall be subject-matter of contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, More or Less.]

3. Exchange of property 🔑3(1)—As respects rescinding exchange, where property was described by metes and bounds, disparity held not excused by use of phrase "more or less."

In action to rescind land exchange, where defendants alleged that disparity of 1.32 acres was excusable because of use of phrase "12 acres, more or less," in description in contract, *held* that, since contract described property by metes and bounds and designated it as certain ranch, use of phrase "more or less" was merely an attempt to approximate the acreage, and did not excuse.

4. Exchange of property 🔑3(1)—Phrase "more or less" held not to excuse disparity in tract described and one conveyed, where excluded portion contained improvements.

In action to rescind land exchange, where defendant sought to be excused because of use of phrase "more or less" in contract and excluded portion contained valuable improvements, *held* that phrase was not applicable.

5. Exchange of property 🔑8(4)—In action to rescind land exchange, evidence held to support finding that representation that there was sufficient water for domestic and irrigation purposes was fraudulent.

In action to rescind land exchange, evidence to support finding that representation that water on ranch was sufficient for domestic and irrigation purposes was fraudulent.

6. Fraud 🔑11(1)—While expressions of opinion are not generally considered representations of fact, yet, when stated as fact, may be basis of action for fraudulent misrepresentation.

Mere expressions of opinion are not generally considered as representations of fact, consequently they are insufficient for purpose of maintaining action for fraud or for purpose of rescinding contract, but, where matters which might otherwise be expressions of opinion are stated as accomplished fact by one of parties to contract and accepted and relied on by other as such, they may become basis of action for fraudulent misrepresentation.

7. Exchange of property 🔑3(1)—Representation made to inexperienced woman that there was plenty of water on land for irrigation purposes held representation of fact, not expression of opinion.

In action to rescind land exchange, representation made to inexperienced woman that there was plenty of water on land for domestic and irrigation purposes *held* representation of fact, not expression of opinion.

8. Exchange of property 🔑8(5)—In action to rescind contract for exchange of property, measure of damages held difference between actual value of property and its value had it been as represented.

In action to rescind contract for exchange of ranch for house, measure of plaintiff's damages was difference between actual value of property proffered and passed in exchange by defendants and its value had it been as represented.

9. Exchange of property 🔑8(4)—Evidence held to justify finding of $4,500 damages for plaintiff, in action to rescind land exchange.

In action for rescission of contract for exchange of ranch for house, evidence *held* to justify court in finding plaintiff was damaged to extent of $4,500.

10. Appeal and error 🔑221—In action to rescind land exchange, where defendants made no objection to allowance of rental on trial, held that they were not prejudiced.

In action to rescind land contract for exchange of ranch for house, where rental was allowed to compensate defendants for money paid out by them for payments of taxes and improvements on house, to which no exception was made at trial, *held* that they were not prejudiced by such finding.

11. Pleading 🔑129(1)—Trial 🔑36, 388(4)—Failure to deny averment in complaint is admission of truth, and obviates need of introducing evidence and making finding.

Failure to deny material averment in complaint is admission of truth of fact stated, and obviates need of introducing evidence and making finding upon facts involved.

12. Exchange of property 🔑5—Notice that she would restore property and tender of deed of property received under contract for exchange of lands held compliance with statutory provision for rescission (Civ. Code, § 1691).

In action to rescind land exchange, where plaintiff, in written notice duly served upon defendants, stated that she would restore any and all things of value received as fully and completely as if contract of exchange had never been made, at same time tendering expenses and deed to property which she received in exchange, *held* that such notice and tender were sufficient to comply with Civ. Code, § 1691, providing for rescission.

13. **Exchange of property 🔑8(1)—In action to rescind exchange, judgment that property be reconveyed subject to incumbrance held proper.**

In action to rescind contract for exchange of lands, where defendants had paid off incumbrance which was on property at time they received it, and plaintiff did not tender this sum to them, *held* that judgment expressly providing that property should be reconveyed subject to incumbrance of same amount sufficiently protected defendants.

14. **Exchange of property 🔑5—Plaintiff need not tender sum received under independent agreement in order to rescind land exchange under statute (Civ. Code, § 1691).**

In action to rescind contract for exchange of property, where independent agreement was entered by which sum was paid to agent as commission, *held* that plaintiff was not obliged to offer restoration of sum due under independent agreement as condition precedent to right to maintain action to enforce rescission under Civ. Code, § 1691.

15. **Exchange of property 🔑8(1)—Sum not due under contract sought to be rescinded does not come within scope of statute (Civ. Code, § 1691).**

In action to rescind contract for exchange of land, question of any sum not due under contract calls for adjudication of facts independent of contract itself, and this does not come within scope of Civ. Code, § 1691, providing for rescission.

16. **Exchange of property 🔑8(1)—Defendant could not complain where court directed reconveyance of property after foreclosure, since it had notice of rescission prior to foreclosure.**

In action to rescind contract for exchange of lands, where court directed plaintiff to reconvey ranch subject to incumbrance, which had been foreclosed subsequent to notice of rescission, *held* that defendants could not complain.

17. **Exchange of property 🔑8(1)—In action to rescind exchange, defendant could not complain of judgment which provided for reconveyance or payment of damages.**

In action to rescind contract for exchange of property, where judgment was entered in alternative which gave plaintiff right to reconveyance or to payment to him by other party of value of property, *held* that defendants could not complain.

18. **Exchange of property 🔑8(1)—Defendant could not question ability of plaintiff to restore, where judgment was rendered in alternative.**

In action to rescind contract for exchange of property, where judgment was rendered plaintiff in alternative in event she restored ranch to defendants, *held* that ability of plaintiff to reconvey was not matter of concern to defendant, since, in event she was unable to convey, matter would be at an end.

Appeal from Superior Court of Los Angeles County; Walter Guerin, Judge.

Action by Mary Dvorak against M. R. Latimer and another to rescind a contract for the sale of real property. Judgment for the plaintiff, and the defendants appeal. Affirmed.

Loyd Wright, Charles E. Millikan, and Fred Reed, all of Los Angeles, for appellants.

Sebald L. Cheroske, of Los Angeles, Feemster & Cleary, of Visalia (W. J. Tremeear, of Los Angeles, of counsel), for respondent.

TUTTLE, Justice pro tem. This is an action brought to obtain a rescission of a contract for the sale of real property and for alternative relief in damages, in the event a return of plaintiff's property cannot be had.

From the facts it appears that for more than two years prior to February 20, 1923, defendants (husband and wife) were the owners of certain ranch property situated in the county of Tulare, Cal. The said ranch was improved by a dwelling house, barn, pumping plant, and some orange and peach trees. For some time prior to said date, plaintiff was the owner of a lot in the city of Pasadena, Cal., on which was erected a "double" or "duplex" bungalow.

On February 17th, plaintiff called at said ranch in company with her husband, one Ryman, and F. L. Polansky, a real estate salesman who was interested in promoting a trade of said properties. Prior to said visit plaintiff had not communicated with or seen defendants, nor had defendants inspected said bungalow. Plaintiff is of Czech descent, and spoke very little English. Most of the conversation had on said visit was through the said real estate agent, who acted as interpreter, and who apparently was acting as agent for both parties with their knowledge and consent. Certain conversations were had with reference particularly to the acreage and water supply. Thereafter defendants inspected said bungalow, and on February 20, 1923, a contract was entered into and executed by the parties to said action, providing for the exchange of their respective properties. At that time the said ranch was free of incumbrances, and the bungalow was subject to an incumbrance of $2,000. The said agreement provided that the ranch should be accepted, subject to a lien of $1,275, and that the bungalow should be accepted, subject to the existing lien of $2,000. By a separate agreement between the parties, which does not appear to be in writing, it was agreed that, prior to the exchange of said properties, defendants would mortgage their ranch for the sum of $1,300, and of this sum defendants retained $1,000 and the balance of $300 was paid to plaintiff. After the foregoing details of the transaction had been consummated, deeds to the respective properties were delivered, and on March 7, 1923, plaintiff went into possession of said ranch, and remained there for some seven months. On or about May 24, 1924, an action was started to foreclose the said mortgage upon the ranch, and a sale was had under those proceedings on September 23, 1924; the purchaser being one W. R. Carson, and the price being $1,584.42.

On July 7, 1923, plaintiff commenced an action against defendants, which was entitled "Complaint to Set Aside Deed and for Reconveyance." Said action was dismissed on January 3, 1924, and on January 10, 1924, this action was commenced.

On or about December 4, 1923, and prior to the filing of the complaint herein, plaintiff served upon defendants a notice of rescission, and at the same time tendered to defendants a deed to said ranch, duly executed, and the sum of $43.03, the amount of expenses incurred by defendants in the transaction. This notice offered to restore to defendants all things of value received by plaintiff under the said contract.

The complaint sets forth the facts substantially as we have summarized them, and, in addition, alleges that defendants falsely and fraudulently represented to plaintiff that there was on said ranch water in sufficient quantities for domestic purposes and for the purposes of irrigating the growing trees and whatever crops may be grown upon said ranch; that defendants pointed out to plaintiffs a certain tract of land which did actually contain 12 acres of land, more or less, and represented to plaintiff that the tract so shown to plaintiff was the land which they agreed in said agreement of exchange to exchange for the herein described premises then belonging to plaintiff; that the water on said land was and still is entirely insufficient for domestic purposes or for irrigating the trees on said ranch or for irrigating such crops as might be grown on said ranch; that the tract of land deeded to plaintiff was only a portion of the land defendant agreed to convey to her, and did not contain 12 acres, more or less; that in truth and in fact the representations so made were each and all of them fraudulent and false, as defendants well knew. Allegations in respect to the value of each of said properties then follow, and the service of the notice of rescission is stated. Plaintiff prayed that the agreement of exchange be rescinded; that the conveyance from plaintiff to defendants be canceled; that defendants be adjudged to reconvey the premises conveyed by the plaintiff to defendants to plaintiff, and, in the event that rescission be impracticable, that plaintiff have judgment against defendants in the sum of $7,000. There is also a prayer for general relief.

The answer denies all of said allegations, but admits that plaintiff notified defendants that she elected to rescind said agreement by reason of the fraud and deceit of defendants.

The court found the facts to be substantially as alleged in the complaint, and judgment was entered decreeing a rescission of the said contract, directing defendant to reconvey the San Pedro property to plaintiff, subject to a mortgage of $2,000, and, upon this being done, directing plaintiff to reconvey to defendants the said ranch, subject to the incumbrance which was upon the same at the time of said exchange, and to the foreclosure proceedings and sale as found by the court, and also directing plaintiffs to pay to defendants the sum of $350.52. In the event that it shall be impossible for defendants to reconvey to plaintiff, the judgment provided that the latter shall retain said ranch and have judgment against defendants in the sum of $4,149.48.

This appeal is taken from the judgment, by means of a bill of exceptions, and appellant makes the following points as a ground for reversal:

(1) The insufficiency of the evidence to support certain findings.

(2) That the judgment is uncertain, in that there is no method of resolving the alternative to be followed, or the party by whom an election is to be made.

(3) That the judgment is uncertain in respect to certain ditch water to be transferred thereunder.

(4) That the judgment is uncertain as to the incumbrance to be placed on the property to be reconveyed by defendants.

[1] As to the first ground above stated, defendants contend that the evidence is insufficient to support the finding relative to fraudulent representations made in respect to the amount of land to be conveyed. The court found that defendants did not convey the whole ranch to plaintiff, as agreed, but only a portion thereof.

The agreement for the exchange of the said properties described the property of defendants as "that certain ranch located on Worth road, 2 miles southwest from Porterville, Cal., known as the W. R. Latimer ranch, containing 12 acres, more or less." It is admitted that the property actually conveyed to plaintiff contained 10.677 acres. Defendant W. H. Latimer testified that in the northwest corner of the said ranch there was a tract containing about two-thirds of an acre, which was separated from the remainder of the place by a fence; that said tract was planted with some fig trees, and there was situated thereon two 8-foot square board houses used for sulphuring when drying peaches taken from the orchard on the ranch; that he had told plaintiff that this tract had been conveyed to his son, and it did not belong to the ranch. This tract was omitted from the conveyance to plaintiff. Walter Latimer, son of defendant above mentioned, testified that he was present at the office of the real estate agent when the exchange was discussed and while negotiations leading to its consummation were in progress; that he told the said agent that "we (his father and himself) would trade the clear ranch for the San Pedro property." At no time, prior to the trial of said action, did the said son make any claim to said tract of two-thirds of an acre. No proof of a conveyance from father to son, covering this tract, was made. In addition to this two-thirds of an acre which was omitted from the deed to plaintiff, there was also left out of said deed another tract known as "that portion east of the canal." It is admitted by appellant that the disparity between the amount of land actually conveyed and 12 acres is 1.323 acres.

The testimony of plaintiff on this point brings out very clearly the difficulty confronting an appellate court in an attempt to pass upon a question of this character, where the sufficiency of the evidence is relied upon for a reversal. This witness testified through an interpreter. When it came to the question of just what land was shown her by defendants upon her inspection of the ranch, the court adopted the most obvious method of bringing out her testimony, instructing her to go to the map on the blackboard and point out just what was shown her and where she went. She did this, and, while counsel attempted to fix her migrations by stating the different objects which she appeared to designate, it is impossible for us to say what her testimony was. Only those present in court could tell. Other witnesses who were present and went over the ranch at the same time as plaintiff were her husband, Charles Dvorak, and one Joe Kolar. Neither of these heard defendant make any claim that the omitted acreage was not part of the ranch proper. It is admitted that the sulphur houses on said omitted tract were used to dry peaches raised on the other portion of the ranch deeded to plaintiff. These houses were quite clearly an adjunct of the ranch proper, and were used in connection with operating the same.

[2-4] Appellants, however, insist that a conveyance of the acreage mentioned was a substantial compliance with the contract, and that the disparity of some 1.32 acres is excusable because of the use of the phrase "12 acres, more or less," in the description found in the contract. As a general rule, the phrase "more or less," when immediately following a given number of acres, is one of safety and precaution and intended to cover some slight or unimportant inaccuracy (41 C. J. 214, note 12), but the term may also be treated and construed as a mere estimate of an unknown and indefinite quantity or number which the parties have agreed shall be the subject-matter of the contract. Mosby v. Smith, 194 Mo. App. 20, 28, 186 S. W. 49. In the instant case the contract described the property by metes and bounds, but it was also designated as the "W. H. Latimer ranch," and the use of the phrase "more or less" was merely an attempt to approximate the acreage in the ranch, which was the subject matter of the contract. Furthermore, the phrase mentioned does not meet the situation where the portion omitted contained valuable improvements, and without which the ranch might be worthless. Plaintiff also testified that defendants showed her the ranch, and if, as the court found, it was falsely represented to her that said omitted portion was a part thereof, the question as to the exact amount of acres discussed in the preliminary negotiations becomes more or less immaterial. It is admitted by appellants that they themselves did not know the exact acreage in their ranch, as it had never been surveyed.

[5-7] The evidence is claimed to be insufficient to support the finding with reference to fraudulent representations made on the question of water on the ranch for domestic and irrigation purposes. On this question plaintiff testified that defendant W. H. Latimer told her, in response to her inquiry as to whether or not there was an ample supply of water, that "there was plenty of water"; "that he said there was plenty of water"; "all that water is in the ditch the year around, and we can irrigate with the pump and sell the ditch water; that there is plenty of water the year around"; that she would not have made the trade if defendant had not stated to her that there was plenty of water; that in March, after she had moved on the property, there was not water enough for the house or for irrigation. On the same question, witness Charles Dvorak testified that prior to the execution of the exchange contract he visited the ranch with plaintiff, his wife; that Mr. Latimer, defendant, told him that he could use the pump all the time; that the water never went down, and that they would have enough ditch water to sell to their neighbors; that plaintiff lived on the place six or seven months, and after April there was not enough water for the house; they never got water at all after May.

Appellant takes the position that all the foregoing statements with reference to the water supply are mere expressions of opinion, quoting the following language from Wolleson v. Coburn, 63 Cal. App. 315, 218 P. 479:

> "Mere expressions of opinion * * * are not generally considered as representations of fact. Consequently they are * * * insufficient for the purpose of maintaining an action" for fraud or "deceit, or for the purpose of rescinding a contract."

While that is the general rule followed in this state, it is subject to the qualification that:

> "Matters which might otherwise be only expressions of opinion, when stated as accomplished facts by one of the parties to a contract and accepted and relied upon by the other as such, may, and often do, become the basis of actions for fraudulent misrepresentations." Sheer v. Hoyt, 13 Cal. App. 662, 110 P. 477.

In the case of Owen v. Pomona Land & Water Co., 131 Cal. 530, 63 P. 850, 64 P. 253, relied upon by appellant, no representations were made as to the permanency of the water supply, and the improvements made by purchaser were made upon the strength of his own belief, and not in reliance upon a representation made by the owner. That representations of the character involved in this action may constitute the basis for fraud, and that they are not, as appellant states, expressions of opinion or predictions, has been held to be the rule by the Supreme Court in the case of Hill v. Wilson, 88 Cal. 92, 25 P. 1105. In that case plaintiff sought to rescind a contract for the purchase of land on account of fraudulent representations as to the water supply, and the representations consisted in the statements made to plaintiff by defendant that the land was well and abundantly watered by means of a ditch; that said ditch would carry and there would be flowing therein during all of the dry and irrigating season from two to three hundred inches of water, which was and would be ample and sufficient to irrigate the whole of the land so that the same would produce large and valuable crops of alfalfa and other grasses. The contention that these statements were mere expressions of opinion was answered by the court in the following language:

> "They were statements of very material and important facts, and such as were well calculated to induce the purchase. It was not a statement that there would be water from a certain stream or ditch, but that the ranch was well supplied with water. This was a statement of an existing supply of water. Nor could it be construed as a mere statement that at the time the representation was made it was supplied with sufficient water. To say that the ranch was well watered was equivalent to a statement that it had a supply of water sufficient to irrigate and produce crops at all proper seasons of the year. And this was expressly stated."

The case of Tracy v. Smith, 175 Cal. 161, 165 P. 535, is also authority for the rule that what is a matter of opinion in cases of this character depends largely upon the circumstances of the particular case under consideration, and whether or not the representations were made in the character of a statement of fact.

It might be noted in passing that the fraudulent character of the said representations made in respect to the water supply was established by the testimony of a former employee of defendants, witness Kaehler, who testified that while he was working on the place for several years prior to the time plaintiff went into possession they could not get enough water from the pumping plant to run up to the house; that they could not get the tank half full; that the peach crop dried up the year previous from lack of water.

Upon the question of the character of the representations made upon the water supply, we must hold that they were positive representations made by one assuming to have knowledge of the subject, and that they were not mere expressions of opinion or predictions, but were stated as accomplished facts.

[8, 9] Appellants question the finding of the trial court on the matter of damages and the insufficiency of the evidence in respect thereto. This chief complaint seems to be that there was no evidence of the value of the land if the water supply had been as represented, and the value of the land with water conditions as plaintiff actually found them. It is well established that in a case of this character the measure of plaintiff's damages is the difference between the actual value of the property proffered and passed in exchange by defendants and its value had it been as represented by defendants. Hunter v. McKenzie, 197 Cal. 176, 239 P. 1090. Witness Smith testified that the ranch was worth the sum of $2,500 at the time the contract was made. Defendant testified that his ranch was worth $9,000. The estimate given by defendant was unquestionably the value of the property as he represented it to be. Various other estimates were given of the value of the ranch, and there was ample evidence before the court to justify its finding of damages in the sum of $4,500.

[10] Complaint is made of the manner in which the court computed the credit to be allowed defendants in respect to the said damages. The court allowed defendants credit for the sum of $350.52 paid by them in connection with the exchange of the properties, and also allowed them the sum of $70 per month as the rental value of the San Pedro house, and said rental was held to compensate defendants for money paid out by them for payment of taxes and improvements made upon said house. No exception was made to this computation at the trial. There was evidence that defendants occupied said house, and the value of the house and lot was testified to as being $11,000. While there appears no direct evidence as to the rental value of this property, this was a matter which the court could properly determine with such evidence before it. No complaint is made by defendants upon the ground that the estimate of rental is excessive, and therefore they cannot be prejudiced by this finding. We see no reason why this finding should be disturbed.

[11-15] Appellant next attacks the insufficiency of the finding to the effect that plaintiff offered to restore to defendants everything she received under the contract. This finding is made in the exact language of the amended complaint, and this allegation of the complaint is not denied by defendants in their answer. A failure to deny a material averment in a complaint is an admission of the truth of the fact stated, and obviates the need of introducing evidence and making a finding upon the fact involved. 21 Cal. Jur. p. 156. Notwithstanding this condition of af-

fairs, evidence was introduced by both parties concerning the matter of rescission. Plaintiff offered, in a written notice duly served upon defendants, to "fully restore to you any and all things of value received by me from you as fully and completely as if said contract of exchange had never been made." At the time of said service tender was made of the sum of $42.03 and a deed to said ranch property. Defendants refused to read the said notice. We believe the said notice and tender were sufficient to comply with section 1691 of the Civil Code. Appellants complain because they paid off a $2,000 incumbrance on the San Pedro property, and respondent did not tender this sum to them. We do not see that respondent was concerned with this payment which appellants had voluntarily made, following the fraudulent transaction. The judgment expressly provided that this property should be reconveyed to plaintiff, *subject to an incumbrance of $2,000*, and defendants' rights were fully protected in this respect. As to the sum of $300, which the evidence shows was paid plaintiff out of the proceeds of the loan which defendants placed upon their ranch, prior to the execution of the contract, and which was paid to the real estate agent as his commission, this was a matter which was not mentioned or referred to in the contract. It was an entirely separate transaction, and no offer to repay the same, as a basis for rescission, was required. Section 1691 of the Civil Code obligates the party seeking rescission to "restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same." The $300 was not received *under the contract* sought to be rescinded. It was admittedly a separate agreement which was not before the court. The only thing of value which plaintiff received under the contract in question was the real property, for which the evidence shows a deed was tendered. Where the vendee and vendor, under a contract for the sale or exchange of real property, enter into another independent agreement and advances have been made to the vendee under said agreement, the vendee, upon rescinding the contract for purchase, is not obliged to offer restoration of a sum due under said independent agreement as a condition precedent to the right to maintain an action to enforce rescission. The question of any sum not due under the contract calls for an adjudication of facts independent of the contract itself, and this does not come within the scope of section 1691 of the Civil Code. California Co. v. Schiappa-Pietra, 151 Cal. 732, 91 P. 593. Credit was given appellant in the judgment for said sum of $300 and for taxes and other expenditures made by appellant with respect to the San Pedro property, and we see no reason why the adjustment of the equities between the parties, made by the learned trial judge, should be disturbed. As has been well stated in a case involving rescission based upon fraud:

> "Parties engaged in a fraudulent attempt to obtain a neighbor's property are not the objects of the special solicitude of the courts." Green v. Duvergey, 146 Cal. 379, 80 P. 234.

[16] The court directed plaintiff to reconvey the said ranch, subject to the incumbrance thereon at the time of the exchange, and to the foreclosure proceedings and sale referred to in the statement of facts, supra. We see no reason why appellant can complain of the judgment in this particular. Notice of rescission was served prior to the commencement of proceedings to foreclose said mortgage. The adjustment of this and the other equities between the parties was wholly consonant with the principles of equity, and in pursuance of the right of the court to adjust such equities according to the respective rights of the parties. All of these matters were fully covered by the trial court in its findings, and we do not feel disposed to disturb the conclusions reached in respect thereto.

[17] Appellants are not satisfied with the alternative judgment rendered herein, stating that it is uncertain, in several particulars. Their objections to a judgment in the alternative in cases of this character are all met by the decision of this court in the case of Marks v. Howkins, 55 Cal. App. 664, 203 P. 1035, wherein it was held that, in an action for rescission, based upon fraud, it may be adjudged that plaintiff is entitled to a reconveyance of the property or to the payment to him by the other party of the value of the property found by the court. The situation which confronts defendants was brought about by their own fraud, and, if they refuse to reconvey the San Pedro property, they cannot complain if a money judgment is enforced against them, as an alternative to said reconveyance.

We have examined the other grounds of uncertainty which appellants rely upon, but believe there is no merit in them. The judgment is specific and complete in its details, and it was one which we hold was in form and effect in keeping with the broad and extensive powers which a court of equity possesses and which was necessary to adjust the equities of the case according to the just rights of the parties.

[18] The ability of plaintiff to restore is questioned by appellant. We see no merit in this objection. If appellants offer to convey the San Pedro property to respondent, according to the judgment, and she is, through her own fault, or neglect, unable to convey the ranch to appellants, the matter would be at an end, and no resort to the alternative money judgment could be had by respondent. Thus the finding upon the ability of respondent to restore the property received by her cannot operate in any manner to the prejudice of

appellant, and affords him no ground for complaint. There is, however, some substantial evidence showing the ability of plaintiff to perform.

Summing up our conclusions in respect to the foregoing points urged by appellant, we find substantial evidence in the record to uphold the conclusions of the trial court as set forth in the findings. Respondent was a foreigner unacquainted with the English language. She undoubtedly purchased the ranch under and relying upon the representations made by appellants, in respect to the water supply and land included in the transfer. In these matters fraudulent representations were made to her by appellants, and the court was fully justified in placing the parties in practically the same situation in which they found themselves prior to the execution of the contract.

The conclusions of the trial court being based upon substantial evidence and in accordance with well-recognized principles of equity, the judgment is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

91 Cal. App. 779

ELLIOTT v. SIMS et al. (Civ. 5466.)

District Court of Appeal, Second District, Division 1, California. May 16, 1928.

1. Appeal and error 🔑175—Whether individual cross-defendant was cross-defendant corporation's agent was not properly before appellate court, where cross-complaint alleged collusion to defraud defendant and prayed cancellation of note sued on.

Where cross-complaint alleged that plaintiff and other cross-defendants acted in collusion to defraud defendant and prayed cancellation of note sued on and reimbursement of amount paid thereon, issue whether individual cross-defendant other than plaintiff was agent of cross-defendant corporation and latter was responsible for such individual's conduct was not properly before appellate court.

2. Appeal and error 🔑171(1)—Cause of action alleged in trial court cannot be changed in appellate court.

The cause of action which was alleged in the trial court cannot be changed in the appellate court.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by George Elliott against J. H. Sims, who filed a cross-complaint against plaintiff, the Richfield Southern Oil Company, for which the American Gasoline Corporation was substituted, and another. Judgment for plaintiff, and defendant appeals. Affirmed.

Gerald Willis Myers, of Los Angeles, for appellant.

James P. Fitzpatrick, of Los Angeles, for respondent American Gasoline Corporation.

WOOD, Justice pro tem. Plaintiff sued to recover the balance due on a promissory note for the sum of $1,000, executed by defendant J. H. Sims. Plaintiff alleged that $450 had been paid on the note, and asked judgment for $550 and an attorney's fee. Defendant Sims filed an answer and cross-complaint in which he alleged that J. P. Mannen, originally a party defendant, had sold him a number of shares of the capital stock of Richfield Southern Oil Company; that Mannen was an agent of said company; that the note was to be "placed in escrow by said company until paid." Sims further alleged that the note, quoting from his cross-complaint, "was sold and transferred by the defendant Mannen with the knowledge of the defendant Richfield Southern Company, to the cross-defendant Elliott, who this cross-complainant alleges on information and belief knew and was well acquainted with all of the facts surrounding the case, and further that said cross-defendant Elliott was acting in collusion with the cross-defendants Mannen and Richfield Southern Oil Company, for the purpose of defrauding the cross-complainant Sims of the value of face of said note and of dividing the profits between them." He asks that the note be canceled and that he be given judgment against Elliott, Mannen, and Richfield Southern Oil Company for the sum of $450, the amount he had paid to plaintiff on the note. He now appeals from the judgment entered against him for the balance due on the note.

At the trial it was established that Elliott was an innocent purchaser for value, and this was conceded by counsel for Sims. Mannen was not served with process, and the action was dismissed as to him. Mannen was a salesman employed by Sloan & Noll, who were fiscal agents for the sale of the capital stock of the Richfield Southern Oil Company. The sale of the stock to Sims was not reported to the company, but the note was sold to the plaintiff by Mannen. Sims did not receive his stock, and was unaware that none had been issued to him until some of his neighbors received dividends upon their stock. He thereupon inquired at the office of the company and learned that his note had not been turned in, but had been improperly sold to Elliott by Mannen. In the meantime he had made payments on the note to the amount of $450.

[1, 2] It is now contended that Mannen was the agent of Richfield Southern Oil Company, and that the company is responsible for his conduct. This issue is not properly before us. In his pleadings, Sims alleged that the

plaintiff, Mannen, and the Richfield Southern Oil Company acted together in collusion for the purpose of defrauding him. In his prayer he asked the court to cancel the note and reimburse him for the amount paid thereon by a judgment against these three parties. No evidence whatever was offered to sustain these allegations. The cause of action which was alleged in the trial court cannot be changed in the appellate court. At the trial, Sims conceded that plaintiff, the innocent holder of the note, is entitled to recover the balance due thereon.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

92 Cal. App. 5

BARRINGTON v. SARLES. (Civ. 5473.)

District Court of Appeal, Second District, Division 2, California. May 17, 1928.

Automobiles 🔑204—Automobilist, not exceeding 35 miles per hour along main boulevard as another car entered from private driveway, held not negligent per se.

Driver of automobile, damaged by skidding into ditch in trying to avoid machine being driven from private driveway into main boulevard, *held* not contributorily negligent per se in driving at not exceeding 35 miles per hour.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by Frank Barrington against Don E. Sarles. Judgment for plaintiff, and defendant appeals. Affirmed.

Coleman E. Stewart, of Santa Barbara, for appellant.

Ivan Kelso, Alfred T. Hutchins, and Chas. A. De Flon, all of Los Angeles, for respondent.

STEPHENS, Justice pro tem. This case was tried by the court without the aid of a jury, and judgment went for plaintiff for the sum of $415.05 and costs. Defendant appeals from the judgment.

Defendant was driving from a private driveway into a main boulevard. Plaintiff approached, traveling upon the boulevard. Defendant's machine was partly across the road, and, in endeavoring to avoid it, plaintiff's car skidded against a tree, and a piece of timber lying by the roadside, and into a concrete ditch which ran along the edge of the road, to the damage of his automobile. The court found that plaintiff was not guilty of contributory negligence, and the only question in the case for us to decide relates to such finding. This question is regarding the speed at which plaintiff's car was traveling. In the circumstances of this case, plaintiff was not negligent per se if he was not exceeding 35 miles per hour. Having carefully read the evidence, we cannot say that the trial court abused its discretion in determining that plaintiff's speed was not in excess of that rate.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

91 Cal. App. 760

CITY OF LONG BEACH v. O'DONNELL et al. (Civ. 5692.)

District Court of Appeal, Second District, Division 1, California. May 15, 1928.

Eminent domain 🔑265(5)—Property owners' employment of attorneys on contingent fee basis, dependent on city's condemning property, precluded taxation of attorney fees on dismissal following abandonment (Code Civ. Proc. § 1255a).

In eminent domain proceedings subsequently abandoned, property owners' obtaining judgment of dismissal under Code Civ. Proc. § 1255a, were not entitled to recover attorney's fees thereunder, where it was shown that the property owners had employed attorneys on a contingent fee basis under contract whereby attorneys were to receive nothing unless the city took the property.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Proceeding by the City of Long Beach against Peter O'Donnell, Samuel Matthias Bird, and Emeline Bird, his wife, and others. From an order striking out the item of attorney's fees from the cost bill on judgment of dismissal, the two last named defendants appeal. Affirmed.

Bicksler, Smith & Parke, of Los Angeles, for appellants.

Bruce Mason, City Atty., George W. Trammell, Jr., Asst. City Atty., C. A. Windham, Chief Deputy City Atty., and John K. Hull, Deputy City Atty., all of Long Beach, for respondent.

SHAW, Justice pro tem. This was a proceeding in eminent domain brought to condemn several parcels of real property for public park purposes. The appellants were named in the complaint as defendants, and filed an answer, appearing by attorneys whom they had engaged for that purpose. Thereafter the plaintiff filed notice of abandonment of the proceedings, whereupon appellants sought and obtained, under section 1255a of the Code of Civil Procedure, a judgment of dismissal. Appellants then filed a cost bill in which they included a sum claimed by them as attorney fees. Plaintiff made a motion to tax costs, and upon the hearing of this motion the court made an order striking out entirely the item of attorney fees. From this order the appeal is taken.

The order is defended by plaintiff upon the ground that appellants had employed their attorneys on a contingent fee basis, whereby the attorneys were to receive nothing unless the plaintiff took the property, and that hence appellants had not incurred any liability for attorney fees, and section 1255a of the Code of Civil Procedure did not authorize the award of such fees to them on the abandonment of the proceedings. That section reads in part as follows:

> "Upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees. These costs and disbursements, including expenses and attorney fees, may be claimed in and by a cost-bill, to be prepared, served, filed and taxed as in civil actions. * * *"

We have no doubt at all that the object of this provision as to attorney fees is merely to reimburse a defendant for attorney fees which he has paid, or to indemnify him for such fees for which he has become liable, provided the fees so paid or incurred are reasonable. A statute similar to this provision of the Code exists in Illinois, and the Supreme Court of that state in Chicago, etc., Co. v. Flaherty, 222 Ill. 67, 78 N. E. 29, gave it the construction just stated in substantially the same language which we have used. This precise question has not arisen in California, but in City of Sacramento v. Swanston, 29 Cal. App. 212, 223, 155 P. 101, 106, where this provision for attorney fees was held constitutional, the court said, in the course of its discussion:

> "Under the statute complained of here, * * * if the property is not accepted by the plaintiff, then he must reimburse the defendant for the expenses which he has been compelled to bear in litigation for which he was not responsible."

It has also been uniformly held that mortgages and other agreements providing for the allowance of attorney fees to a party in litigation arising thereon did not extend to a case where the party has neither paid nor incurred a liability to pay such fees. Carriere v. Minturn, 5 Cal. 435; Patterson v. Donner, 48 Cal. 369, 380; Bank of Woodland v. Treadwell, 55 Cal. 379; City Investment Co. v. Pringle, 49 Cal. App. 353, 193 P. 504. In Rapp v. Spring Valley Gold Co., 74 Cal. 532, 16 P. 325, the court intimated that the same rule would apply to the provision formerly contained in section 1195 of the Code of Civil Procedure for allowing reasonable attorney fees to the successful claimant in a mechanic's lien case.

At the hearing of the motion to tax costs, one of the appellants' attorneys testified that he told the appellant Samuel M. Bird, who apparently had charge of the matter for both appellants:

> " 'Well, Mr. Bird, it is a little stiffer fee, being a contingent fee; as you know, it is a little more than if you gave us a per diem, which we would much rather have; the fees will be 20 to 30 per cent.' He just nodded his head up and down and said, 'Well, all right, go ahead.' "

Appellant Samuel M. Bird testified that this was correct; that nothing was said at all about what was to be paid in case there was an abandonment; that he had paid no attorney fees in this proceeding; and that the only obligation which he had with the attorneys was to pay them 20 to 30 per cent. of the value of the property in case it were condemned. This testimony shows that the agreement was for a contingent fee, and that the appellants never incurred any liability to their attorneys for a fee in this proceeding; the contingency on which the fee was payable not having occurred. The case is squarely within the rule declared in Lavenson v. Wise, 131 Cal. 369, 63 P. 622, and Reynolds v. Sorosis Fruit Co., 133 Cal. 625, 66 P. 21. In Lavenson v. Wise, the attorney had made an agreement to collect a note for "the sum of $500 as a fee upon collection of the same," both he and the client expecting at that time that there would be no litigation over the matter. In fact, the suit which he brought upon the note was defended and defeated. The Supreme Court held that the fee was contingent, and that, although the attorney and client had both assumed that there would be no litigation, yet the attorney could not proceed under that agreement and after defeat of his client attempt to repudiate it and collect an attorney's fee. This rule was approved and followed in Reynolds v. Sorosis Fruit Co., supra.

The order appealed from is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

91 Cal. App. 774

PEOPLE v. ALBERT. (Cr. 1021.)★

District Court of Appeal, Third District, California. May 15, 1928.

Hearing Denied by Supreme Court July 12, 1928.

1. Perjury ⟹11(2)—Defendant's false testimony in prior prosecution for larceny of potatoes, relative to purchase of potatoes, and why he did not pay therefor, held material.

In prosecution for perjury, defendant's false testimony, given in his prior prosecution for grand larceny of potatoes relative to purchase by him of such potatoes, and why he did not pay for them, *held* material.

2. Perjury ⟹11(8)—It is sufficient to constitute perjury, if false testimony is circumstantially material; degree of materiality being unimportant.

The false testimony used as basis for perjury prosecution need not be directly material to the proceeding in which it was given, but it is sufficient if it is circumstantially material; the degree of materiality being unimportant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Perjury.]

3. Perjury ⟹34(4)—Corroboration of prosecuting witness as to defendant's perjury in preceding trial held sufficient.

Evidence corroborating prosecuting witness as to defendant's perjury in preceding trial, wherein defendant was alleged to have made the false statements used as basis for perjury charge, *held* sufficient.

4. Criminal law ⟹808½—Instruction on corroborative evidence held not misleading, where substantially in language of statute (Pen. Code § 1103a).

Instruction, in prosecution for perjury, on corroborative evidence, to the effect that it was not absolutely necessary that falsity of testimony be established by two witnesses, but that it might be proved by testimony of one witness and other corroborating facts or circumstances, *held* not misleading so as to be erroneous, since it was substantially in language of Pen. Code, § 1103a.

5. Criminal law ⟹825(1)—In absence of special request otherwise, it is generally sufficient to instruct jury in language of statute.

In absence of special request otherwise, it is generally sufficient to instruct the jury in the language of the statute.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

A. R. Albert was convicted of perjury, and he appeals. Affirmed in part, and reversed in part.

E. T. Taylor, of Modesto, and Frank M. Carr and Richard Liebman, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The information contains four separate charges of perjury. The defendant was convicted of the offenses charged in the first and fourth counts. His motion for a new trial was denied, and he was sentenced to imprisonment for both offenses, the terms of imprisonment to run concurrently. This appeal is from the judgment and the order denying a new trial. The respondent admits inability to find any corroboration of the testimony of the prosecuting witness in support of the fourth count, and a careful search of the record fails to disclose any corroboration thereof.

The first count alleges that in the trial of the defendant, in November, 1926, upon a charge of grand larceny, he falsely testified that he paid certain moneys for certain sweet potatoes. The testimony given in that case shows that the defendant and C. C. Piccanco had entered into an agreement for the sale of the latter's sweet potatoes to the former, payment to be made for each load thereof as delivered, and that the defendant received eight loads of the potatoes; he hauling them in his own truck from the defendant's home in Stanislaus county to Oakland or San Francisco. Piccanco testified in that case and in this that the defendant did not pay for any of the potatoes, but that he was induced to deliver all but the last load to the defendant, without requiring immediate payment, by certain representations and promises of the latter. As to the potatoes so delivered, it may be conceded that the defendant was not guilty of larceny under the law as it then stood; the owner having intentionally parted with possession and title. 17 R. C. L. 12. When the defendant appeared for the purpose of getting the last load of potatoes, Piccanco, according to his testimony, demanded immediate payment for all the potatoes, and it was agreed that, after loading the potatoes on defendant's truck, the parties would go to the town of Turlock, where the load of potatoes would be weighed, and payment would be made for all the potatoes. After the potatoes were so loaded, and weighed, it was agreed that the parties would meet at a certain pool room, where the defendant would make payment. Piccanco testified:

> "He (defendant) started up with full speed. When I got down to the pool room he was stepping on the gas. * * * He started out as fast as the truck could go through town."

Piccanco followed and overtook the defendant, but the latter refused to make payment. A justifiable inference from the evidence is that Piccanco did not intend to surrender control over the last load of potatoes or to part with title thereto until payment therefor by the defendant, and that the defendant was guilty of larceny in taking those potatoes under the circumstances shown by the evidence. In the larceny case the defendant tes-

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★Hearing denied by Supreme Court.

tified that he had paid for all of the potatoes from time to time as they were delivered, except the last load; that the reason he did not pay for that load was "because he (Piccanco) give me two loads of potatoes, small, black, decayed, and I couldn't sell them in Oakland, and I want him to pay for those two loads of potatoes before I pay him."

[1, 2] From the testimony quoted it clearly appears that the alleged false testimony was material. The defendant's explanation of his reason for refusing to pay for the last load of potatoes is wholly without force, if he had made no payments on account of potatoes theretofore delivered to him, because, under such circumstances, Piccanco was under no obligation to pay or repay any money to the defendant, and, therefore, there was no reason for withholding payment for the last load. The false testimony need not be directly material. It is sufficient if it is circumstantially material; the degree of materiality being unimportant. In re Braynard, 52 Cal. App. 631, 634, 199 P. 576; People v. Phillips, 56 Cal. App. 291, 293, 205 P. 40; People v. Dunstan, 59 Cal. App. 574, 584, 211 P. 813; People v. Patterson, 64 Cal. App. 223, 229, 221 P. 394.

[3] Appellant contends that there is no corroboration of Piccanco's testimony to the effect that the defendant did not pay for any of the potatoes. Both Piccanco and the defendant testified that, immediately after the last load of potatoes had been weighed, as stated, the defendant made out and delivered to Piccanco a written statement, which was admitted in evidence, showing the net weight of each load of potatoes and the aggregate weight thereof. From the computations set forth in the statement it appears that 22,785 pounds of potatoes were to be paid for at 3½ cents a pound, amounting to $797.47, and 5620 pounds at 3 cents, amounting to $168.60. These two sums are then added together, showing a total of $966.07. No credit for any payments appears in the statement. It is highly improbable that the defendant would have given Piccanco this statement without inserting therein any credits for payments made, if any. A witness testified that she took down in shorthand certain statements made by defendant in a justice's court, after the delivery of the potatoes, in which the following occurred: "Q. He (Piccanco) claims you owe him about $900, doesn't he? A. I never denied it." Another witness testified that at a time when nearly all the potatoes had been delivered Piccanco asked the defendant "if he had the money to pay for the * * * potatoes," and that the defendant replied, "Yes, I be back to-morrow. I bring the tags back. I straight up all the potatoes with you." The foregoing evidence tends to prove the falsity of the defendant's testimony to the effect that he had paid for all but the last load of the potatoes, and must be held to be sufficient corroboration of Piccanco's testimony. People v. Follette, 74 Cal. App. 178, 204, 240 P. 502.

[4] Complaint is made of the language italicized herein contained in an instruction of the court, reading in part as follows:

> "As regards proving the falsity of such testimony the court instructs the jury that while that fact cannot be established by the testimony of one witness alone, *it is not absolutely necessary that it be established by the testimony of two witnesses; it may be proved by the testimony of one witness and other corroborating facts or circumstances corroborating such witness;* provided, the jury are satisfied beyond a reasonable doubt from the testimony of said witness and such corroborating facts and circumstances that such testimony was willfully false in fact."

The instruction substantially states the rule prescribed by section 1103a of the Penal Code, which reads as follows:

> "A perjury must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances."

[5] In view of the context, it would be hypercritical to hold that the jurors may have understood the instruction to mean that the corroborating facts and circumstances need not tend to prove the falsity of the alleged testimony or that it was sufficient if there was corroboration of other parts of Piccanco's testimony which did not relate to such falsity. If the defendant desired fuller or more explicit instructions on the subject he should have requested them. It is generally sufficient, in the absence of such a request, to instruct the jury in the language of the statute.

The judgment and the order denying a new trial are reversed in so far as they relate to the fourth count and affirmed as to the first count in the information.

We concur: BARTLETT, Justice pro tem.; PLUMMER, J.

PEOPLE v. ESTORGA. (Cr. 1607.)★

District Court of Appeal, Second District, Division 1, California. May 15, 1928.

Hearing Granted by Supreme Court July 12, 1928.

1. Jury ⚷131(3)—Discretionary power of court to limit or deny examination of jurors for purpose of peremptory challenge is absolute (Pen. Code, § 1077, repealed by St. 1927, p. 1048, and section 1078, amended by St. 1927, p. 1039).

The discretionary power of court to limit or deny examination of jurors for purpose of peremptory challenge is absolute, pursuant to St. 1927, p. 1048, repealing Pen. Code, § 1077, and St. 1927, p. 1039, amending Pen. Code, § 1078, relative to examination of prospective jurors by trial court, and preserving distinction between challenges in accordance with definition of Pen. Code, § 1069, of "peremptory challenge," as objection to juror for which no reason need be given.

2. Jury ⚷131(1)—Refusal, in prosecution for rape, to permit interrogation of prospective jurors on voir dire, held erroneous, where court examined entire panel collectively (Pen. Code, § 264).

In prosecution for rape, refusal of trial judge to permit defendant's counsel right to interrogate prospective jurors on voir dire examination to ascertain fitness to act as jurors, *held* erroneous, where examination by court was of entire panel as whole, and only defense consisted of attempt to show mitigating circumstances surrounding commission of offense so as to reduce punishment in accordance with Pen. Code, § 264, providing that jury shall recommend whether punishment shall be by imprisonment in county jail or in state prison.

York, J., dissenting.

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

Charles Estorga was convicted of rape, and he appeals. Reversed.

H. E. Thompson, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant was convicted on three counts in an information charging the crime of rape. The sufficiency of the evidence to sustain the verdict is not questioned by appellant. The testimony of the defendant himself admitted the commission of the offenses charged in the information. His testimony as to certain matters that might have caused the jury to recommend a different punishment was fully before the jury. Appellant contends, however, that "the court erred in holding that the examination for cause, by the court, was sufficient, and in denying defendant's counsel the right to interrogate the prospective jurors on their voir dire examination with competent questions, or any questions, to ascertain their fitness to act as jurors in said cause." This contention should be sustained. We are further of the opinion that the error was prejudicial, because the examination as conducted by the court, together with the court's limitation of examination by counsel for appellant, denied to appellant the right to test, by reasonable inquiry, the qualifications of the prospective jurors.

This court should not put the stamp of approval upon the method used in this case, of collective examination of the entire panel, including those who had not been drawn and called into the jury box as prospective jurors of the case about to be tried. Such method of general examination does not tend to protect the parties in their right to be assured of the proper qualification of the individual jurors.

[1] For a clear understanding of the situation presented when a jury is about to be selected for the trial of a cause, it is important to keep in mind the distinction between the right of challenge for cause and the right to a limited number of peremptory challenges. It must be conceded that the discretionary power of the court to limit or deny examination of jurors for the purposes of peremptory challenge is absolute. In People v. Ferlin, 265 P. 230, 235, the Supreme Court said:

> "Upon voir dire examination, the defendant attempted to ascertain of each juror whether he was a member of or affiliated with a named secret organization. Objection was promptly made by the prosecution, which the court sustained. The defendant thereupon explained the purpose of this line of inquiry as being necessary to his intelligent exercise of peremptory challenges. It is now well settled in this state that a juror may not be examined on voir dire solely for the purpose of laying the foundation for the exercise of a peremptory challenge. People v. Edwards, 163 Cal. 752, 754, 127 Pac. 58."

In People v. Edwards, supra, there is a careful review of the rules governing the subject of challenges of jurors. It should be noted, however, that the Legislature of 1927 made several changes in the Penal Code on that subject. Prior to those amendments, sections 1077 and 1078 provided for exceptions to the challenge of an individual juror, and for trial of the challenge. By the amendments of the year 1927 (St. 1927, p. 1048), section 1077 was repealed, and section 1078 was amended to read as follows:

> "It shall be the duty of the trial court to examine the prospective jurors to select a fair and impartial jury. He shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant."

The title of the amending act describes the amendment as one "relating to selection of jurors by trial judge." Stats. 1927, p. 1039. Giving consideration to the Penal Code as

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★Superseded by opinion of Supreme Court, 273 P. 575.

thus amended, and keeping in mind the decisions above mentioned, we see nothing in the amendment which adds anything to the right of examination of prospective jurors for the purposes of peremptory challenge. The distinction between the two kinds of challenge to an individual juror has been carefully preserved. The peremptory challenge is "an objection to a juror for which no reason need be given, but upon which the court must exclude him." Pen. Code, § 1069. As was said in People v. Edwards, supra:

> "This definition shows that no issue of fact can possibly arise with regard to the reasons for such challenge. * * * The conclusion is that there is no statutory authority for the examination of jurors solely for the purpose of a peremptory challenge or for the allowance of questions which do not tend to prove some fact material to a challenge for cause."

In the case at bar, therefore, the sole question is whether or not the court refused to allow counsel for the defendant to make reasonable examination of the prospective jurors for purposes related to the right of challenge for cause. In the first place, the record shows that the clerk called the roll of the venire men and women, and they were sworn to answer questions touching their qualifications to act as jurors in the trial of the case. The judge asked them to remain standing a few minutes while he stated the nature of the case and asked them a series of questions. It may be assumed, and, indeed, it appears, that they were usual and appropriate questions covering the proper qualifications of jurors, and particularly touched upon the causes of challenge mentioned in sections 1073 and 1074 of the Penal Code. The record does not contain any answer given by any of said prospective jurors, except one, and the record shows that, when the names of the jurors were drawn from the box, that person's name was not drawn, and she never appeared in the jury box at all. After the judge had made this examination, he directed that twelve names be drawn, and this was done. The court then said:

> "Gentlemen, the examination for cause in the opinion of the court is sufficient. Exercise your peremptory challenges."

Mr. H. E. Thompson, counsel for defendant, then said:

> "If the court please, in the answers the veniremen made I was not able to find out how they answered. I was not able to see a nod of the head. There was a large number here standing up. I am not able from the examination to intelligently challenge on behalf of this defendant, and I would like to have the privilege of asking each individual juror a few questions.
>
> "The Court: What questions would you like to ask?
>
> "Mr. H. E. Thompson: I would like to know if they are married men, and if they have children, and whether they are young men or young women, and if they would have any prejudice by reason of those facts, and whether they have had any trouble of the kind in their family, or in the near families or near relations, and I don't know, any questions—all being examined in a body, I don't know how any of them answered any questions, and I would not know unless I individually asked them separately how each one feels.
>
> "The Court: None of the questions you have suggested would tend to develop a ground for challenge for cause, and therefore would be immaterial.
>
> "Mr. H. E. Thompson: Very well. We except to the ruling."

Thereupon two jurors in succession were excused on peremptory challenge of the defendant, and their places supplied. The district attorney passed the jury, and thereupon defendant's attorney said:

> "I will not make any further challenges, for the reason I am not sufficiently informed.
>
> "The Court: Either challenge them or pass them, one or the other.
>
> "Mr. H. E. Thompson. I will have to pass them, your honor."

The jury was then sworn to try the case.

It may be assumed, and under the decisions apparently it must be assumed, that the silence of the veniremen under the questions put to them (and in view of the court's statement to them on this point) was equivalent in some instances to a negative answer to each question, and, in others, equivalent to an affirmative answer, where any other answer would have brought forth facts tending to disqualify. The court asked them to consider the questions as addressed to them individually and personally, and directed them to let the facts be known. Under such circumstances, it has been held that the silence of the jurors may be taken as an answer. A few months ago, in People v. Raymond, 262 P. 442, this court had occasion to discuss the matter of collective examination as to general qualifications of jurors, and referred to People v. Riordan, 79 Cal. App. 488, 250 P. 190, where the collective examination of jurors was criticized, but not held to be illegal. In both cases, however, the jurors so examined were only those who had been drawn and seated in the jury box, who were thus reduced to twelve in number, and who thereby had become, definitely, prospective jurors for the case on trial. Until so drawn, if jurors are at all "prospective jurors" within the meaning of the statute, they are much more remotely in that class. This point becomes clear, if we suppose that the court should undertake to examine an individual venireman whose name had not been drawn from the jury box. This would be a "useless gesture." For it may be that his name will not be drawn at all, and so he would never have any direct connection with the case, even as a "prospective juror." And it should be noted that, in the case before us, after the judge had conducted his general examination, he caused twelve names to be drawn, and the jury box filled, before even the slightest opportunity was given to counsel to ask any questions. If before these names were drawn counsel for defendant had asserted that he was entitled to further examine all of the persons who had been questioned by the judge, the court would have been justified in ruling that such questions could not be allowed, until after the names were drawn from the jury list. The interesting question arises here whether false answers made to questions thus put by the court to one whose name never was drawn by the clerk from the jury list would constitute perjury.

In this case it might perhaps be conceded that there was no miscarriage of justice in defendant's conviction of the crime of rape, because by his own testimony he admitted that he did have illicit relations with the girl named in the information, and that her age was known to him to be less than 18 years. But, even so, it must be remembered that in a case of this kind the jury has a most important function to perform in relation to the penalty.

The rape in this case consisted of acts of sexual intercourse with a female under the age of 18 years. Under the evidence, it was the age alone of the girl which supplied the element of crime in the transaction. In such a case the punishment may be either "imprisonment in the state prison not more than fifty years," or "in the county jail for not more than one year." And the statute provides that "the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison." Pen. Code, § 264. The jury here recommended imprisonment in the state prison. The defense consisted of an attempt to show, by the circumstances which surrounded the commission of the offense, that the defendant ought not to suffer the more severe punishment. It is manifest that in this instance the substantial rights of the defendant are involved, not so much in the decision of the main issue, as in the determination of the punishment to be inflicted. It needs no other information than the slightest knowledge of human nature affords to reveal the fact that a juror who had suffered, in his own family, or among his near relations, from "any trouble of the kind," by an act of rape against some one thus near and dear to him, almost inevitably would prescribe the most severe form of punishment. He would regard with suspicion or dislike evidence of mitigating circumstances shown by the evidence, although to a fair-minded person they might have indicated that punishment in the county jail for not more than one year would be a just sentence, and that imprisonment in the penitentiary for "not more than fifty years" would be a very unjust sentence.

[2] We have arrived at the conclusion that, in view of the proceedings which have been outlined herein, there was never any real or substantial examination made of the prospective jurors "to select a fair and impartial jury," as required by law; and particularly we are of the opinion that, by reason of the manner in which the examination was conducted by the court, it was erroneous, and prejudicial to defendant's rights, to refuse to allow defendant's counsel to supply, by further examination, the defects caused by the irregularity and indefiniteness of the examination made by the trial judge.

The judgment and order are reversed.

I concur: HOUSER, J.

YORK, J. I dissent, for the reason that I do not believe that any of the questions suggested by the attorney for the appellant were proper, or would tend to prove some fact material to a challenge for cause.

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91 Cal. App. 770

LOCKHART v. SOUTHERN PAC. CO.

(Civ. 3526.)

District Court of Appeal, Third District, California. May 15, 1928.

1. Master and servant ⚷276(1)—Evidence held insufficient to establish that railroad employee at time of injury was engaged in interstate commerce.

Evidence in employee's action against railroad for personal injuries *held* insufficient to establish that plaintiff, at time of injury, was engaged in interstate commerce.

2. Commerce ⚷27(5)—Work in which servant was engaged at time of injury does not constitute "interstate commerce" merely because railroad was interstate carrier.

From the mere fact that the railroad company is an interstate as well as an intrastate carrier of passengers, and therefore engaged in interstate commerce, it does not follow that work in which servant was engaged at time of injury constituted interstate commerce.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

3. Commerce ⚷27(8)—Employee, at time of injury repairing cars generally used in interstate commerce, is engaged in "interstate commerce."

Railroad employee, who at time of receiving injury is engaged in repair of cars generally used in "interstate commerce," is at such time engaged in work of an interstate character.

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4. Master and servant 🔑265(4)—Railroad employee, to avoid jurisdiction of Industrial Accident Commission, must prove that at time of injury railroad was engaged in interstate commerce.

Railroad employee, suing for injuries received in course of employment, has burden to allege and prove that at time and place of accident defendant was engaged in interstate commerce, in order to avoid jurisdiction of Industrial Accident Commission.

5. Master and servant 🔑352—Railroad employee, injured in intrastate commerce, cannot maintain action for injuries on ground accident was caused by gross negligence of defendant (Workmen's Compensation, Insurance, and Safety Act 1913, § 12, subd. (b); St. 1917, p. 831).

Provisions of Workmen's Compensation, Insurance, and Safety Act 1913, § 12, subd. (b), St. 1913, p. 279, providing that, in case of gross negligence of employer, injured employee might at his option maintain action in court or apply to Industrial Accident Commission, having been omitted from St. 1917, p. 831, employee injured in intrastate commerce cannot maintain action for damages on ground accident was caused by gross negligence.

6. Appeal and error 🔑1058(2)—Exclusion of testimony later admitted held not error.

Where testimony excluded was later admitted, rulings excluding evidence in the first instance did not constitute prejudicial error.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Thomas R. Lockhart against the Southern Pacific Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Charles W. Rollinson, of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

FINCH, P. J. The complaint alleges:

"That, at all of the times in this complaint mentioned, defendant company has been and now is a foreign corporation, conducting an interstate commerce business in the state of California and for the purpose of this complaint, in the county of Los Angeles, therein engaged in the business of a common carrier.

"That on April 14, 1924, at the hour of 10:45 p. m., on said day, at the Southern Pacific Company shop yards in the city of, and county of, Los Angeles, state of California, the plaintiff herein, Thomas R. Lockhart, was in charge of an engine crew at that time and place."

The complaint then alleges that while in the discharge of his alleged duties the plaintiff was injured through the negligence of the defendant.

The answer admits the allegations of the complaint herein quoted, denies the alleged negligence and injuries, and then alleges:

"Further answering, by way of separate defense, the defendant alleges that at the time and place of the accident the defendant was then and there engaged in intrastate commerce, and that the superior court of the state of California is entirely without jurisdiction to appear or to try said cause, and that the same can be heard only by the Industrial Accident Commission of the state of California."

At the close of plaintiff's case the court entered a judgment of nonsuit on motion of the defendant. This appeal is from the judgment. The only material question raised by the appeal is whether the plaintiff was employed in interstate commerce at the time of the alleged injury.

[1] The evidence shows that he was in charge of a yard switch engine; that his duties were to take cars in need of repairs "into the repair yard," and, after they had been repaired, to place them "on other tracks where they might be cut back into use"; that immediately before the accident he had taken about seventeen cars from the repair yard and had left them on a track outside such yard, all of the cars being "empties except one car of poles for San Pedro"; and that the alleged injuries were sustained on the return trip after so placing the cars. None of the witnesses knew where any of these cars had been used or the use intended to be made of them, except that one car, loaded with poles, was to go to San Pedro.

[2] While the complaint alleges that the defendant was "conducting an interstate commerce business" and "engaged in the business of a common carrier," it is not alleged that the work in which the plaintiff was engaged when injured was connected with interstate commerce. "From the mere fact that a railroad company is an interstate, as well as an intrastate, public carrier of freight and passengers, and therefore is engaged in interstate commerce, it does not follow that the work in which its servant was engaged when killed or injured was interstate commerce." 12 C. J. 44.

[3] If it had been shown that the cars in question were generally used in interstate commerce, it might be argued logically that plaintiff's work was so connected with the repair of the cars as to be of an interstate character. "An employee performing repair work or other work in connection with an engine, car, or other similar instrumentality habitually used in interstate commerce is entitled to the benefit of the provisions of the act, although at the time the instrumentality is temporarily at rest or out of service, or is not being put to the particular use for which it was designed. * * * Where repair work is a part of interstate commerce, all minor tasks which form a part of the larger one are likewise interstate commerce so as to make a person engaging in them engaged in interstate commerce." 12 C. J. 47. Here the evidence not only fails to show that the cars in ques-

tion were habitually used in interstate commerce, but it does not appear that they were ever so used.

[4] The burden was on the plaintiff to allege and prove that at the very time and place of the accident the defendant was engaged in interstate commerce. Johnson v. Southern Pacific Co., 199 Cal. 126, 131, 248 P. 501, 49 A. L. R. 1323. It is clear that he was not relieved of the burden of establishing that fact by his failure to allege it or by defendant's allegation that it then and there engaged in intrastate commerce. The admission in the answer of the allegations contained in the first paragraph of the complaint is not an admission that the particular work in which the plaintiff was engaged at the time of the accident was interstate in character. The defendant is always engaged in both interstate and intrastate commerce. While the allegation in the answer, that "at the time and place of the accident the defendant was then and there engaged in intrastate commerce," may have cured the defect in the complaint resulting from the plaintiff's failure to allege that the defendant was then and there engaged in interstate commerce, it did not shift the burden of proof on this necessary element of his cause of action. Such allegation in the answer does not constitute an affirmative defense, but is in effect the denial of a fact necessary for the plaintiff to establish, but which he failed to allege.

[5] Appellant contends that, whether the work in which he was engaged at the time of the accident was interstate or intrastate, he is entitled to maintain this action on the ground that the accident was caused by the gross negligence of the defendant, citing Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 P. 510. The decision in that case was based on the provisions of subdivision (b) of section 12 of the Workmen's Compensation, Insurance, and Safety Act of 1913 (St. 1913, p. 279) providing that, in a case of gross negligence of an employer, an injured employee might, at his option, maintain an action in court for damages or apply to the Industrial Accident Commission for compensation for the injury. Those provisions were omitted from the act of 1917 (Stats. 1917, p. 831), and therefore the case cited is inapplicable. It may be stated further that gross negligence was neither alleged nor proved in this case.

[6] Appellant complains of several rulings made by the trial court. The plaintiff was asked: "Where were those empties from, if you know? * * * Did you notice any of those cars as to whether they all belonged to the Southern Pacific?" The defendant's objections to these questions were sustained. The plaintiff suffered no prejudice by reason of the rulings, however, because he was permitted, at a later stage of the trial, to testify relative to the subject-matter of the injury, and then testified that he did not know where the cars came from or "whether or not any of those cars on the last cut were from any other road besides the Southern Pacific." The other rulings of which complaint is made are so clearly correct that a discussion thereof is deemed unnecessary.

The judgment is affirmed.

We concur: PLUMMER, J.; BARTLETT, Justice pro tem.

91 Cal. App. 781

PEOPLE v. RAY et al. (Cr. 1631.)

District Court of Appeal, Second District, Division 1, California. May 16, 1928.

1. Criminal law 🔑964, 1144(18)—Court's oral statement is not part of order granting new trial, and so does not affect presumption on appeal, where order is silent as to ground.

Any oral statement by the court, made at time of granting new trial, excluding insufficiency of the evidence as a ground for granting it, cannot be considered as part of the order, and so does not interfere with applicability of rule that, one of the grounds of the motion being insufficiency of the evidence, and the order granting it not specifying the grounds therefor, appellate court will presume that new trial was granted for insufficiency of the evidence.

2. Criminal law 🔑1158(1)—Exclusion by order of insufficiency of evidence as ground for new trial is not conclusive on appellate court, in absence of conflict in evidence.

Even where trial court by its order expressly excludes insufficiency of the evidence as ground for granting new trial, such action is conclusive on the appellate court only where there is a conflict in the evidence.

3. Criminal law 🔑406(1)—There must be prima facie proof of corpus delicti that extrajudicial admissions may be considered.

In absence of prima facie proof of the corpus delicti by other evidence, extrajudicial admissions of defendants should be excluded from consideration.

4. Embezzlement 🔑44(6)—Conviction of embezzlement held not sustained; there being no proof of fraudulent misappropriation.

Evidence *held* insufficient to sustain conviction of embezzlement for want of any proof of fraudulent misappropriation.

5. Embezzlement 🔑44(6)—Charge of embezzling money held not sustained by evidence merely of receipt of note.

Charge of embezzling money from a corporation *held* not sustained by evidence merely that defendants, its managing agents, authorized to sell memberships for it, but not shown to have authority to take notes therefor, sold one and took in payment a note payable to the buyer and executed by one of defendants and another, with no showing as to what they did with the note; its receipt not being converted into a receipt of money by the fact that no other representative of the corporation knew of the transaction, and so it took no action to repudiate or ratify it.

Appeal from Superior Court, San Diego County; Shelly J. Higgins, Judge.

J. M. Ray and another, after conviction of embezzlement, were granted a new trial, and appeal is taken by the People. Affirmed.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Stephen Connell, Dist. Atty., and E. N. Clark, Deputy Dist. Atty., both of San Diego, for the People.

M. W. Conkling, of El Centro, and Arthur Dorn and Edgar B. Hervey, both of San Diego, for respondents.

SHAW, Justice pro tem. This is an appeal by the people from an order granting a new trial. The defendants were prosecuted upon an indictment in five counts, charging the following offenses: First, obtaining of $1,660, lawful money of the United States, from Mrs. E. A. Nulton by false pretenses; second, larceny of the same sum of money from Mrs. E. A. Nulton; third embezzlement of $1,660, lawful money of the United States, from the Welfare League of America, a corporation; fourth, embezzlement of $11,000 from the Welfare League of America; fifth, larceny of $11,000 from the Welfare League of America. At the conclusion of the prosecution's evidence, the court held that there was a variance between the pleading and the proof as to the first two counts, dismissed the indictment as to those two counts, and ordered them resubmitted to the grand jury. The defendants were convicted upon the third and fourth counts, and found not guilty upon the fifth count. Thereupon they made a motion for a new trial, which was granted as to both the third and fourth counts.

[1, 2] The motion for a new trial was not written, but oral, and appears from the record to have been made upon the following grounds: First, insufficiency of the evidence; second, errors of law occurring at the trial which prevented the defendants from having a fair trial; third, misconduct of the district attorney which prevented the defendants from having a fair trial. The minute entry of the order granting a new trial does not state the grounds upon which it was made, but appellant claims that the court, by its remarks, made at the time and set forth in the reporter's transcript, excluded insufficiency of the evidence as a ground of the order. We cannot so construe the statement of the court. It appears rather to be a declaration that there was sufficient proof of the corpus delicti to justify evidence of the admissions of the defendants and to warrant the submission of the case to the jury. But, even had the court orally made such a statement of the reasons for its action as appellant suggests, it could not be regarded as a part of the order; and this court, on finding that insufficiency of the evidence was one of the grounds of the motion and that the order granting it did not specify the grounds upon which it was made, must presume that the new trial was granted for insufficiency of the evidence. People v. Lum Yit, 83 Cal. 130, 23 P. 228; People v. Flood, 102 Cal. 330, 36 P. 663; People v. Dewar, 49 Cal. App. 263, 193 P. 156. In People v. Flood, supra, this rule was applied, although the Supreme Court had before it a written opinion of the trial court filed upon the granting of a new trial, which clearly showed that the new trial was granted because of an instruction which the trial court regarded as erroneous. Furthermore, even where the trial court has by its order expressly excluded insufficiency of the evidence as a ground for granting a new trial, its action in that respect is conclusive upon the appellate court only where there is a conflict in the evidence. It is therefore proper in this case for us to examine the evidence to ascertain whether its condition is such as to justify the order granting a new trial.

It appeared that the Welfare League of America was a corporation, and that it was engaged in operating on certain premises, known as the Palms Hotel, a home for aged persons. The defendants were members of the board of directors of this corporation, and were acting as its managing agents. In that capacity they disposed of a number of life memberships in the home above mentioned, receiving from the parties to whom the same were sold, except in the case of Mrs. Nulton, various sums of money, ranging from $1,000 to $1,500. It appeared without dispute from the testimony of Mrs. Nulton, mentioned in the first and second counts as the victim of the offenses therein charged, that defendants had not obtained from her any lawful money of the United States, as charged in the indictment, but that she had turned over to them in payment for her life membership a promissory note in her favor signed by the defendant Estella Ray and one C. Q. Ray in the principal sum of $1,500, upon which the total amount due at the time, including interest, was $1,660. It was for this variance between the indictment and the proof that the first two counts were dismissed.

[3, 4] The third and fourth counts charged two separate embezzlements from the Welfare League of America; and, while there was evidence that the defendants had received the promissory note above mentioned from Mrs. Nulton and considerable sums of money from other persons, for the account of said Welfare League of America, the evidence that the defendants had fraudulently misappropriated any of this property was not at all certain or satisfactory. The fraudulent misappropriation of the property is, of course,

one of the essential elements of the crime of embezzlement. There was no showing of a demand for the property by or in behalf of the Welfare League or of any failure or refusal of the defendants to account therefor upon request. There was no showing as to what they did with the note received by them. The evidence as to their use of money received by them consisted entirely of their extrajudicial admissions contained in statements made by Estella Ray before the grand jury and to a grand jury accountant, and by J. M. Ray to the district attorney, and in written statements made by Estella Ray as to the financial condition of the home. In their statements the defendants claimed with considerable plausibility that all of the expenditures mentioned by them were made for the use and benefit of the Welfare League of America. As to some of the expenditures, this claim was unquestionably true, but the facts admitted would perhaps support a finding that other expenditures were made for the personal benefit of the defendants. The defendants objected to the introduction of these extrajudicial admissions in evidence when they were received, and at the close of the prosecution's case they moved to strike them out, basing the objection in both cases on the lack of any other proof of the corpus delicti, but the court ruled against them on each objection. "Proof of the corpus delicti should be made before the introduction of evidence of extrajudicial statements or admissions, and confessions. But, in the absence of any showing of prejudice, irregularity in the order of proof is of no consequence, if the commission of the crime is ultimately established independently of the alleged admissions of the defendant." 8 Cal. Jur. 234; People v. Quarez, 196 Cal. 404, 238 P. 363; People v. Watters (Cal. Sup.) 259 P. 442. To authorize the reception in evidence of such extrajudicial statements, admissions, or confessions, or their consideration by the jury, it is not necessary that the other evidence of the corpus delicti prove it beyond a reasonable doubt; prima facie proof is sufficient for either purpose. 8 Cal. Jur. 235; People v. Selby, 198 Cal. 426, 245 P. 426. But "the extrajudicial statements or admissions of a defendant, in the absence of other evidence of the commission of the crime charged against him, are insufficient to establish his guilt; and they are equally insufficient to establish the existence of any substantive or essential elements of a crime charged against the defendant." People v. Chadwick, 4 Cal. App. 63, 87 P. 384; People v. Quarez, 196 Cal. 404, 238 P. 363; People v. Villanueva, 74 Cal. App. 276, 240 P. 43. The ruling refusing to strike out the evidence of defendants' admissions constituted error of such importance as to require the granting of a new trial. Furthermore, excluding these admissions from consideration, as we must do in determining the sufficiency of the evidence on this point, we find there is no evidence to uphold the conviction on either the third or the fourth count, for want of any proof of a fraudulent misappropriation.

[5] The third count charged the defendants with embezzling $1,660 in lawful money of the United States from the Welfare League of America, and alleged that this was another statement of the offense alleged in the first count. We question whether the latter allegation can be correct, for it would seem that the offense of obtaining the money from Mrs. Nulton must necessarily have been completed before the defendants could embezzle the money so obtained from the Welfare League of America, for which it was obtained. But this allegation connects the offense charged in the third count with the transaction by which defendants delivered to Mrs. Nulton a life membership as above stated. Unless that transaction amounted to a receipt of money by the defendants, the evidence is insufficient to uphold the conviction on the third count for the reason that there is a failure of proof that the property embezzled was that described in the indictment. A material variance in the description of the property embezzled is fatal. 10 Cal. Jur. 262; 20 Cor. Jur. 478; People v. Meseros, 16 Cal. App. 277, 116 P. 679; People v. Nelson, 70 Cal. App. 476, 233 P. 406; Ex parte Cirro, 76 Cal. App. 142, 243 P. 888. The note received by the defendants was not money, and under the circumstances of the case cannot be treated as money. An agent whose authority is merely to sell property or to collect a debt has no authority to accept in payment a credit on, or a discharge of, his own personal indebtedness. If he does so, the principal may repudiate the transaction and enforce the liability of the other party as if no such transaction had been made; and, if the other party claims the existence of special authority for such a transaction, the burden is on him to prove it. 2 Mechem on Agency (2d Ed.) § 886; Stetson v. Briggs, 114 Cal. 511, 46 P. 603; Runyon v. Snell, 116 Ind. 164, 18 N. E. 522, 9 Am. St. Rep. 839; Stewart v. Woodward, 50 Vt. 78, 28 Am. Rep. 488; Wheeler v. Givan, 65 Mo. 89. While the defendants appear to have had authority to sell life memberships for the Welfare League of America, there is no showing at all that their authority was broad enough to cover the transaction with Mrs. Nulton. The Welfare League might therefore have repudiated the transaction if brought to its notice and enforced payment of the price from her in money; and, if it had taken this course, there could have been no ground for the claim that defendants had received any money in its behalf. It might also have ratified and adopted the transaction, but, if it had done so, it must have accepted the transaction as made and could not have claimed that the defendants had received for it money instead

of the note. In that case its remedy to recover the money would have been a suit upon the note, and a failure to pay the note would not have been an embezzlement. In fact it does not appear that this transaction was ever made known to any of the officers or representatives of the Welfare League other than the defendants themselves; hence it had no opportunity to elect which course it would take, and it took no action. But these facts cannot convert the receipt of the note into a receipt of money and thus give the transaction an aspect which the Welfare League could not possibly have given to it.

The foregoing reasons are sufficient to uphold the action of the trial court. There are other matters argued, and some of the other rulings complained of by defendants may have been erroneous, but there seems no probability that they will occur again upon a new trial, and it is therefore not necessary to consider them.

The order is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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92 Cal. App. 31

WALLACE v. CARLIN. (Civ. 5376.)

District Court of Appeal, Second District, Division 1, California. May 18, 1928.

1. Appeal and error 🔑419(1)—Notice of appeal, stating appeal was taken from judgment of nonsuit, notwithstanding reference to formal judgment in final words, held to sufficiently refer to judgment.

Where plaintiff, in notice of appeal, stated that he appealed from judgment of nonsuit heretofore rendered, and final words of notice referred to formal judgment, *held* that, since liberal construction should be placed upon notice in order that right to have review might be preserved, final words of notice referring to formal judgment could be regarded as surplusage.

2. Appeal and error 🔑419(1)—Identification of judgment appealed from in notice of appeal must be made with reasonable certainty.

Identification of judgment appealed from in notice of appeal must be made with reasonable certainty.

3. Brokers 🔑63(1)—Under unconditional promise to pay sum equal to 5 per cent. commission on total sale, salesman who had performed was entitled to whole commission, notwithstanding project was abandoned.

In action for commissions under contract, in which promoter unconditionally promised sum equal to 5 per cent. commission on total sale of each apartment, providing that salesman received 1 per cent. of commission when sale was accepted and 4 per cent. when contract to erect apartments was let, where project was abandoned by promoter because he was unable to finance it, *held* that, project having been abandoned, salesman, having waited reasonable length of time, had right to demand sum earned as commissions.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Lucian E. Wallace against David B. Carlin for services. From a judgment of nonsuit, the plaintiff appeals. Reversed.

Walter W. Hoye, of Los Angeles, for appellant.

Carl E. Cameron, of Long Beach, for respondent.

WOOD, Justice pro tem. Plaintiff seeks to recover a sum alleged to have been earned as a salesman for defendant. At the close of plaintiff's testimony, defendant presented a motion for nonsuit, which was taken under advisement and on a later date, December 18, 1925, granted by the court. An entry of the order granting the motion was made upon the minutes of the court. On January 5, 1926, a judgment was signed by the trial judge and caused to be filed, in which the following appears:

> "Whereupon, upon motion of said counsel, said court *take* said motion under advisement, and thereafter and upon the 18th day of December, 1925, said court decided to and did grant such motion for nonsuit, and there was caused to be entered in the minutes of said court a minute order granting judgment for defendant on defendant's motion of nonsuit thereon: Now therefore, pursuant to law and the premises, it is hereby ordered, adjudged, and decreed, that a judgment of nonsuit be and the same is hereby entered in favor of defendant and against the plaintiff, on the ground that upon said trial the plaintiff has failed to prove sufficient facts to constitute a *course* of action in favor of plaintiff and against the defendant. It is hereby further ordered and adjudged that defendant have and recover against plaintiff its costs of suit herein, taxed at $———."

A motion for new trial was made within due time and denied. On February 25, 1926, plaintiff filed the following notice of appeal:

> "Notice is hereby given that Lucian E. Wallace, plaintiff in the above-entitled cause, intends to appeal, and does hereby appeal, to the District Court of Appeal of the state of California, from the judgment of nonsuit heretofore rendered in said cause in favor of defendant and against plaintiff, by the Honorable John L. Fleming, judge of said court; which said judgment was formally entered of record in said court under date of January 5, 1926."

[1, 2] Defendant asks us to dismiss the appeal, claiming that it was taken from the formal judgment entered on January 5, 1926, and that no appeal was taken from the judgment of nonsuit entered in the minutes on December 18, 1925. The order granting the motion for a nonsuit was a final judgment and

as such was "effective for all purposes." Section 581, Code Civ. Proc. If, therefore, there is no appeal before us from the order of December 18, 1925, there is presented only a moot question. Burks v. Bronson, 58 Cal. App. 143, 207 P. 1018. We are of the opinion, however, that plaintiff has in fact appealed from the judgment of nonsuit entered on December 18, 1925. Although it is necessary for the appealing party to specify the judgment or order from which he wishes to appeal, a liberal construction should be placed upon the notice in order that his rights to have a review of the proceedings may be preserved. The identification of the judgment appealed from must be made with reasonable certainty. 2 Cal. Jur. 315; Hopkins v. Sanderson, 29 Cal. App. 666, 159 P. 1063. In his notice, plaintiff states that he appeals "from the judgment of nonsuit heretofore rendered in said cause." In Burks v. Bronson, supra, the court referred to an order granting a motion for nonsuit as "the judgment of nonsuit." It is therefore apparent that plaintiff did in fact appeal from the order of December 18, 1925. It was manifestly his intention to appeal from the judgment which terminated his action, and he has in fact specifically referred to that judgment. The final words of the notice in which plaintiff refers to the formal judgment may be regarded as surplusage.

[3] Defendant was contemplating the erection of a building to be known as the "Ambassador Apartments," and which was to be operated on what is commonly called the "own-your-own apartment" plan. He employed plaintiff to sell apartments in the proposed building; the contract between the parties being in writing and containing, among others, the following provisions:

> "Party of the first part agrees to employ party of the second part as a salesman for the sale of apartments in the proposed Ambassador Apartments and agrees to pay him for such services a sum equal to a five per cent. commission on the total sale of each apartment. Said commission to be paid to party of the second part in the following manner: One per cent. (1) shall be paid when the sale is accepted and the contract signed, the balance of four per cent. (4) shall be paid when the contract to erect the Ambassador Apartments is let. All payments for commissions shall be paid through the selling agents, the Davidson Investment Company. Party of the second part in consideration of the commission of five per cent. (5) to be paid by the party of the first part as stated above agrees to devote his entire time to the sale of apartments in the Ambassador Apartments and to use his best efforts in closing the sale of apartments."

It is established by plaintiff's evidence that he sold apartments for the total sum of $41,342.50. Defendant paid plaintiff a sum equal to 1 per cent. of the total selling price. The project for the erection of the Ambassador Apartments was abandoned by defendant for the reason that he was unable to finance it. Plaintiff commenced the action to recover the remaining 4 per cent. due him as commission more than a year after the last sale was made by him and after the project had been abandoned by defendant.

In the contract of employment defendant made an unconditional promise to pay "a sum equal to a 5 per cent. commission on the total sale of each apartment." The remaining portion of the contract fixes the time when the commission shall be paid, 1 per cent. to be paid upon the signing of the contract for the sale of the apartment and the balance upon the letting of the contract for the erection of the building. The agreement does not provide that the plaintiff should be paid his commission *if* the contract for the erection of the building should be let or *if* the project should not be abandoned. Defendant cannot, by abandoning the project, deprive plaintiff of his right to demand commissions which had been earned. The agreement is silent as to the time for the letting of the contract for the erection of the building. In such a case the law fixes the period as a reasonable length of time. The project having been abandoned and the plaintiff having waited a reasonable length of time, he now has the right to demand the sum earned as commissions. In Taylor v. Simi Construction Co., 23 Cal. App. 308, 137 P. 1095, plaintiff sued upon a contract which provided that the payment should "be made within three days after water is turned on the first twenty-five or more acres of land," etc. The court said:

> "The defendant, having agreed to make payment within a stated time after the happening of an event, could not by refusing to permit that event to occur escape liability upon its contract."

In Rosenheim v. Howze, 179 Cal. 309, 176 P. 456, an architect was suing for a fee on a contract in which it was provided:

> "I will further agree to make no demand for payment on account of my own services until you have succeeded in negotiating a loan."

In affirming a judgment for plaintiff the court said:

> "Mr. Howze could not, therefore, by abandoning the contract, defeat recovery by the plaintiff, who had fully performed his part. If he did not negotiate a loan, the indebtedness became payable within a reasonable time. Nunez v. Dautel, 19 Wall. 560, 22 L. Ed. 161; Williston v. Perkins, 51 Cal. 554; Greenstreet v. Cheatum, 99 Kan. 290, 161 P. 596; Randall v. Johnson, 59 Miss. 317, 42 Am. Rep. 365; Doe v. Thompson, 22 N. H. 217; Sears v. Wright, 24 Me. 278."

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

204 Cal. 225

BUCKNER v. A. LEON & CO. (Sac. 4010.)

Supreme Court of California. May 24, 1928.

1. Evidence ⚷442(1)—Separate oral agreement as to matters not referred to in written instrument and not inconsistent therewith is admissible.

Where parties have not incorporated into written agreement all the terms of their contract, evidence is admissible to prove the existence of a separate oral agreement as to matter not mentioned in the written instrument and which is not inconsistent with its terms.

2. Customs and usages ⚷13—Persons carrying on trade are deemed to have contracted with reference to known usage.

Where there is a known usage of the trade, persons carrying on that trade are deemed to have contracted with reference to the usage, unless the contrary appears.

3. Customs and usages ⚷15(1)—Known usage, which does not alter or vary contract's terms, is admissible to supply deficiency in construing contract.

Known usage forms a part of contract, and evidence of usage is admissible to supply deficiency therein as means of interpretation, where it does not alter or vary contract's terms.

4. Customs and usages ⚷16—Evidence ⚷441(9)—Separate oral agreement and custom conforming thereto whereby buyer of grapes was to furnish lug boxes at seller's ranch held admissible, notwithstanding written contract which called for seller's delivery f. o. b.

Evidence of separate oral agreement whereby one buying grapes, to be delivered by seller f. o. b. a shipping point near seller's vineyard, was to furnish lug boxes for the grapes at seller's ranch, and evidence of prevailing custom to that effect in the county where the transaction took place, *held* admissible as collateral, contemporaneous oral agreement, since furnishing of lug boxes was mere preliminary act not inconsistent with written sales contract requiring delivery f. o. b.

Department 1.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by A. B. Buckner against A. Leon & Co. for damages for breach of contract. Judgment for plaintiff, and defendant appeals. Affirmed.

John G. Covert, of Hanford, and Donahue, Hynes & Hamlin, of Oakland, for appellant.

Clark Clement, of Lemoore, for respondent.

PRESTON, J. This is an appeal from judgment in favor of plaintiff in an action for damages because of failure of defendant buyer to accept full delivery under a written contract between the parties for the sale and purchase of green grapes.

Said contract provided that the grapes were to be delivered f. o. b. a shipping point near plaintiff's vineyard. At the same time the parties also agreed orally, as alleged, proved, and found by the court, that defendant would furnish lug boxes for said grapes at plaintiff's ranch in accordance with the prevailing custom of the county where the transaction took place, and defendant did, in fact, furnish many such boxes, but not in sufficient numbers to permit of delivery of the total tonnage contracted for; hence plaintiff was obliged to make other disposition, at a loss, of the undelivered balance of said grapes for which no boxes were furnished. The trial court gave judgment in his favor for the contract price of said undelivered grapes, less the amount received by him from sale thereof, and certain costs. Defendant has appealed.

[1-3] It has long been the rule that, when parties have not incorporated into an instrument all of the terms of their contract, evidence is admissible to prove the existence of a separate oral agreement as to any matter on which the document is silent and which is not inconsistent with its terms. Sivers v. Sivers, 97 Cal. 518, 521, 32 P. 571; Torrey v. Shea, 29 Cal. App. 313, 317, 318, 155 P. 820; Greathouse v. Daleno, 57 Cal. App. 187, 190, 206 P. 1019; Mitchell v. North Pacific, etc., Co., 60 Cal. App. 554, 558, 213 P. 293. And likewise:

> "It is the general rule that, when there is a known usage of the trade, persons carrying on that trade are deemed to have contracted in reference to the usage, unless the contrary appears; that the usage forms a part of the contract, and that evidence of usage is always admissible to supply a deficiency or as a means of interpretation where it does not alter or vary the terms of the contract." Hind v. Oriental Products Co., Inc., 195 Cal. 655, 667, 235 P. 438, 443.

See, also, cases therein cited, and Civ. Code, §§ 1646, 1647, 1655, 1656.

But it is appellant's contention that the contract was not silent on the matter here in question, but, on the contrary, by use of the term "f. o. b." it expressly relieved the buyer from any obligation to furnish lug boxes under said contemporaneous oral agreement. In other words, appellant contends that, in the face of the written contract to deliver grapes f. o. b. a specified shipping point, plaintiff was not entitled to prove an oral agreement or custom in conflict therewith, to wit, an oral agreement imposing upon appellant the duty assumed by plaintiff under the term "f. o. b." of boxing the grapes.

[4] Said term, as defined by various cases (Whitaker v. Dunlap Morgan Co., 44 Cal.

App. 140, 144, 186 P. 181; Acton Rock Co. v. Lone Pine Co., 44 Cal. App. 597, 601, 186 P. 809; 22 Cal. Jur. 938), implies no obligation on the part of a seller to furnish lug boxes prior to hauling, loading, or transportation to a shipping point of a commodity of this character, when interpreted in accordance with the prevailing custom in the place where the transaction took place. The furnishing of the lug boxes was a preliminary act to be performed prior to assumption of the transportation obligations within the common import of said term; that is, the furnishing of boxes was a matter not contemplated by use of the term concerning which the contract was silent, and as to which evidence of a collateral, contemporaneous, oral agreement conforming to custom was properly received. This is the only practical construction of the contract and appellant must have so understood it, for he did, in fact and without objection, furnish upon the 17 different dates, covering a large portion of the contract period, boxes in sufficient numbers to care for at least half of the grapes contracted for. Under such circumstances, it cannot be denied that he understood and concurred in the agreement here contended for by plaintiff.

Judgment affirmed.

We concur: CURTIS, J.; TYLER, Justice pro tem.

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204 Cal. 247

TOBIN GROCERY CO. v. SPRY et al.

(Sac. 4040.)

Supreme Court of California. May 25, 1928.

1. Principal and agent ⚷69(2)—Employee, buying and selling cattle with employer's money, must account for moneys, together with profits, without reduction for losses (Civ. Code, § 2237).

Employee, buying and selling cattle on his own account, paying therefor with money of employer, *held*, under Civ. Code, § 2237, required to account for money, together with profits made, without reduction for losses, as dealing with trust funds.

2. Appeal and error ⚷1039(2)—Judgment for plaintiff suing for conversion will not be reversed because of failure of complaint to specifically charge making of profits with converted money.

Where complaint in action to recover money wrongfully converted contained general charge of conversion of money for use of defendants and prayer for general relief, judgment for plaintiff will not be reversed for failure to definitely and specifically charge making of profits with converted money, in absence of showing that prejudice resulted from error of attorney drawing pleading.

3. Appeal and error ⚷1039(1)—Judgment will not be reversed for errors in pleadings, where substantial justice has been done.

Supreme Court, on appeal, is bound to take account of equities of case as between parties, and not to reverse a judgment for errors in pleadings, where substantial justice had been done by judgment rendered.

Department 2.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by the Tobin Grocery Company against Frank Spry and another. Judgment for plaintiff against named defendant, and such defendant appeals. Affirmed.

See, also, 255 P. 791.

Samuel V. Cornell, of Turlock, for appellant.

Wm. N. Graybiel, of Turlock, for respondent.

LANGDON, J. This is an appeal by the defendant Frank Spry from a judgment against him for $571.50 in an action brought to recover money wrongfully converted to the use of defendants.

The plaintiff, a copartnership, employed the defendants as manager and clerk, respectively, in its Turlock branch. The complaint charged that the defendants, while so employed, "wrongfully and without the assent of said plaintiff, conspired together to apply some of the money or receipts and profits of said business * * * to their own use. * * *" It is alleged that said money, receipts, and profits were applied to the joint use and benefit of defendants, and by reason of this fact they became indebted to plaintiff; that plaintiff has repeatedly requested an accounting from defendants, which has been refused. It is prayed that the defendants and each of them be required to account for the profits and moneys belonging to said plaintiff which said defendants have misappropriated to their own use and benefit, and that judgment be given plaintiff for the amount found due and for general relief. The answer admitted that the defendant Emma Spry was indebted to the plaintiff in the sum of $12.50; being the amount of a profit made by her in the course of her employment, and alleged that defendant Frank Spry had mingled certain moneys of his own with money belonging to the plaintiff, and that he thereupon drew upon such commingled fund for use in a private enterprise not connected with his employment, and also alleged that said defendant had accounted for and paid to the plaintiff all money due to it by him, and that said defendant was not indebted to said plaintiff.

The court found:

"That said defendant Frank Spry, while in the employ of said plaintiff, did buy merchandise and resell it to plaintiff at a profit, said merchandise being the same kind of merchandise as said defendant was employed to buy and sell for the sole use and benefit of said plaintiff, and said Frank Spry also, while in the employ of said plaintiff as aforesaid mentioned, took money

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

> from the business of said plaintiff, said money being at the time the money of said plaintiff, and said Frank Spry used said money for his own use and benefit, and he has failed, refused, and neglected to return said money or any part to said plaintiff; that the amount of profits made as aforesaid and moneys taken from said plaintiff by said defendant Frank Spry was and is the sum of $571.50."

It appears from the testimony of the appellant that at the time he undertook the management of the plaintiff's store he expected to purchase an interest in the business, and for that purpose paid $500 to the plaintiff; that shortly thereafter he concluded he did not wish to own an interest in the business, and told his employer of this decision. Apparently no objection was made by the employer, and Mr. Tobin asked Mr. Spry what was to be done about the $500. Spry replied that the money might be left in the business, and when he wanted it he would get it. Spry also testified that he later drew this money out by check; so it is not involved in the problems presented upon the appeal.

[1] It is admitted by the appellant that during the period of his employment he bought and sold cattle on his own account, paying for the cattle with the money of the plaintiff. On some of these transactions he made a profit and on others a loss. Appellant contends that, as the net result of the cattle ventures was a loss, he is to be charged only with the amount of money which he used of the plaintiff's funds, together with interest. In other words, his position is that he may not be charged with the profits made with the trust fund unless the plaintiff will bear a share of the losses. The respondent contends, however, and the judgment of the trial court was based upon this position, that, as the appellant dealt with trust funds, he was liable to account for all profits made therewith, with no reduction for losses which he may have sustained. This would appear to be the proper interpretation of section 2237, Civil Code. In the case of Oakland Bank of Savings v. Wilcox, 60 Cal. 141, it was said:

> "An officer of a bank could not make profit to himself out of loans made by him of the money of the bank; and it very naturally follows, if losses occur in the attempt he must bear the losses."

In the case of Walls v. Walker, 37 Cal. 424, 99 Am. Dec. 290, it was said:

> "If he [an administrator] makes a profit, he becomes liable for that also at the election of the parties in interest. * * * If, in this case, the administrator sustained a loss, the loss is his. * * *"

In Estate of Piercy, 168 Cal. 755, 145 P. 91, it was said:

> "If any loss occurs, the loss must be borne by him [trustee], while the beneficiaries are entitled to any profits realized."

The losses would not be borne by a trustee if he were entitled to set them off against profits realized from property of his cestui que trust.

The foregoing discussion involves the main point upon appeal, because, if the rule adopted by the trial court with reference to the profits and losses upon the cattle transactions be the correct one, the judgment is amply supported. The evidence was susceptible of the inference that appellant had made profits in these transactions amounting to $477.50. Appellant admits liability upon two other items—one for $17.45, paid by plaintiff as freight upon merchandise of defendant, and the other an admitted profit of $12.50 upon sugar sold to the plaintiff by defendant, but which profit the evidence would indicate was really of a much larger amount. The evidence also admits of the conclusion that there was a misappropriation of $100 in connection with the check drawn by appellant in favor of the Sperry Flour Company, which appeared upon his books as $137.50, but which was shown to have been in fact for but $37.50.

It is true that the proof was somewhat uncertain and inferential in some particulars, which was due to the fact that the defendants could not or would not testify definitely as to matters wholly within their knowledge, and the trial judge seems to have given defendants the benefit of the doubt with reference to many matters disclosed by the record.

[2, 3] It is also contended by the appellant that the findings were beyond the issues made by the pleadings. The foregoing quotation from the complaint shows its inadequacy to meet the facts relied upon in this case. Certainly it should have definitely and specifically charged the making of profits with the converted money if recovery of such profits was sought. While we are not disposed to encourage attorneys in violating logical and fundamental rules of pleading, we are also bound to take account of the equities of the case as between the parties, and not to reverse a judgment for errors in pleadings where substantial justice has been done by the judgment rendered. This is an equitable proceeding; the equities are all with the plaintiff. A general charge of conversion of money to the use of defendants was made in the complaint, and general relief was asked. It does not seem that any prejudice has resulted to defendants from the error of the attorney in drawing his pleading. The record discloses the utmost bad faith on the part of defendants, to say the least, and justice has been done by the judgment.

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.

204 Cal. 207

BOGGS v. JORDAN, Secretary of State.
(S. F. 12911.)

Supreme Court of California. May 21, 1928.

1. **Statutes ⚷35½—Duties of county clerk or registrar of voters respecting referendum petition are ministerial, and he may not go beyond face of petition or resort to extraneous evidence (Const. art. 4, § 1).**

When referendum petition regular in form and substance has been filed and county clerk or registrar of voters has determined from records what number of qualified electors has signed it and has attached his certificate thereto showing result of examination, and has transmitted petition and certificate to secretary of state, his duties under Const. art. 4, § 1, have been fulfilled, and he has no authority to go beyond the face of the petition or to resort to extraneous evidence to determine contents thereof, his duties being ministerial.

2. **Mandamus ⚷172—Clerk or registrar having determined sufficiency of referendum petition, fact that others than signers affixed dates of signatures may not be inquired into in mandamus proceeding against secretary of state (Pol. Code, § 1083a; Const. art. 4, § 1; Code Civ. Proc. § 1085).**

If county clerk or registrar of voters is justified in rejecting names of persons who signed referendum petition without affixing dates of signing as required by Pol. Code, § 1083a, and Const. art. 4, § 1, when dates of signing are actually affixed and clerk or registrar has determined that signatures are those of qualified electors and has so certified to secretary of state, whether persons other than signers affixed said dates may not be inquired into in mandamus proceeding against secretary of state under Code Civ. Proc. § 1085, in absence of any allegations of fraud or misconduct on part of county clerks or registrars.

3. **Statutes ⚷35½—Duty of secretary of state in submitting referendum petition to electors is ministerial and mandatory (Const. art. 4, § 1).**

Under Const. art. 4, § 1, when secretary of state receives certificates of county clerks and registrars of voters showing that sufficient referendum petition has been filed and that requisite number of qualified electors has signed petition within time prescribed by law, it is his duty to submit act named in petition to electors of state for their approval or rejection, and his duty in doing this is ministerial and mandatory.

4. **Statutes ⚷35½—Contention that constitutional requirement of referendum related only to reapportionment by commission and not by Legislature held without merit (Const. art. 4, § 6, as amended in 1926).**

Contention that Const. art. 4, § 6, as amended in 1926, providing that if Legislature fails to reapportion state as required thereby a reapportionment commission shall reapportion assembly and senatorial districts, subject to same provisions of referendum as apply to acts of Legislature, made referendum provision applicable only to reapportionment by commission and not by Legislature, *held* without merit.

In Bank.

Application for writ of mandate by Frank S. Boggs, to be directed to Frank C. Jordan, as Secretary of State, to compel him to disregard certain referendum proceedings for submission to the people of the act of the Legislature (St. 1927, p. 1757), providing for reapportionment. Writ denied.

J. M. Inman and P. G. West, both of Sacramento, and Edson Abel, of San Francisco (Frank L. Coombs and Nathan F. Coombs, both of Napa, amici curiæ), for petitioner.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen. (Henry E. Carter, Harry Lyons, J. W. McKinley, and Frank Weller, all of Los Angeles, amici curiæ), for respondent.

SHENK, J. This is an application for a writ of mandate to compel the respondent, secretary of state, to disregard and take no further action with reference to certain referendum certificates heretofore filed in his office and to notify the county clerks and registrars of voters throughout the state of the offices of members of the Legislature to be nominated at the primary election to be held in August, 1928, in their respective counties and city and county, such notification to be in accordance with the provisions of the reapportionment measure adopted by the Legislature in 1927 (Stats. 1927, p. 1757).

As a return to the alternative writ the respondent filed a general demurrer and at the same time an answer denying, for want of information or belief, the allegations of the petition which form the basis of the petitioner's alleged cause of action.

Prior to November 2, 1926, and since the adoption of the Constitution in 1879, section 6 of article 4 thereof provided, among other things, for the division of the state into senatorial and assembly districts in such manner that the 40 senatorial districts and the 80 assembly districts should be "as nearly equal in population as may be." It was also provided that the Legislature, at its first session after each federal census, should adjust such districts and reapportion the representation so as to preserve them "as nearly equal in population as may be" in accordance with the last census. With substantial regularity the Legislature complied with the constitutional mandate up to and following the federal census of 1910. The last action of the Legislature, however, prior to 1927, was the amendment of sections 78 and 90 of the Political Code at its special session in 1911. Stats. Ex. Sess. 1911, p. 140. No action was taken by the Legislature with reference to reapportionment following the federal census of 1920 until the passage of the act of 1927 above referred to, which act was adopted pursuant to the provisions of section 6 of article 4 of the Constitution as amended at the general election on

November 2, 1926. This amendment effected a radical departure from the former plan, especially with reference to representation in the Senate. It was provided by the amendment that the representation in the assembly should continue by the formation of districts "as nearly equal in population as may be," but with reference to representation in the Senate it was provided that the senatorial districts should continue to be 40 in number, but that in the formation of such districts no county or city and county should be divided. The effect of this amendment is that while a senatorial district may embrace more than one county, no county or city and county may embrace more than one senatorial district.

Pursuant to the requirements of the constitutional amendment the Legislature at its session in 1927 adopted said reapportionment measure by amending section 78 and by repealing section 90 of the Political Code. By section 78 as amended the assembly districts in the state were in some instances changed and renumbered and the senatorial districts were readjusted and in some instances renumbered in conformity with the requirements of the constitutional amendment.

The Reapportionment Act of 1927, which was known as Senate Bill No. 490, was scheduled to become effective on July 31, 1927, and did take effect on that date unless the same was suspended by the referendum proceedings alleged in the petition herein. The petition sets forth that on June 27, 1927, there were filed with the registrars of voters of the county of Los Angeles and of the city and county of San Francisco and with the county clerk of the county of Alameda, and on July 14, 1927, with the county clerk of the county of Santa Clara, "certain identical original referendum petitions addressed to the secretary of state of the state of California, asking that there be submitted to the electors of the state of California for their approval or rejection said act of the Legislature of the state of California, known as Senate Bill No. 490." It is further alleged:

> "That said registrars of voters and said county clerks within 20 days after said filing transmitted said petitions, except the signatures thereto appended, to the respondent, attaching thereto their respective certificates as to the date of the filing of said petitions, the number of sections comprising it, and further certifying that each of said sections contained signatures and dates purporting to be, respectively, the signatures of qualified electors of the respective counties and the dates upon which such electors had, respectively, signed said petition. That attached to said petition at the time of its filing was an affidavit purporting to be the affidavit of the person who solicited the signatures thereof. That the person by whom said affidavit purported to have been taken and verified was at the time thereof an officer authorized to administer oaths. That in said affidavit the affiant stated his own qualifications, that he had solicited the signatures upon said section, that all of said signatures were made in his presence, and that to the best of his knowledge and belief each signature was the genuine signature of the person whose name it purported to be. Said certificates further attested that the certifying officers, after said petitions had been filed with them, had examined the affidavits of registration in their respective counties, and the records relating thereto, current and in effect at the respective purported dates of each signing, to determine therefrom what number of qualified electors had signed said petitions, and had respectively affixed thereto the purported dates of their signing, and from said examination it was determined that said petitions were signed by a specific number of qualified electors of their respective counties or city and county, each of whom had affixed to said petition a date purporting to be the date when such elector had signed said petition, and each of whom was a registered, qualified elector of the respective counties and city and county on said date. That the total number of qualified electors certified to have signed said original referendum petitions by said registrars of voters and said county clerks was 904. That thereafter, to wit, on the 18th, 23d, and 25th days of July, 1927, respectively, there were filed with the registrar of voters of the city and county of San Francisco, with the registrar of voters of the county of Los Angeles, and with the county clerk of the county of Alameda, certain supplemental petitions identical with each other and with said original petitions in wording, content, and all other respects except as to the purported signatures attached thereto, and bearing the purported signatures of other qualified electors of the respective counties. That thereafter and within ten days after said filing and within the time allowed by law, said registrars of voters and said county clerk transmitted to and filed with the respondent said supplemental petitions, except the signatures thereto appended, attaching thereto their respective certificates of a form and tenor identical in all material respects with the certificates attached by them to said original referendum petitions except as to the number of qualified electors certified to have signed said petitions. That the total number of qualified electors certified to have signed said supplemental referendum petitions by said registrars of voters and said county clerk was 76,521."

It is further alleged:

> "That the total number of qualified electors of the state of California certified to the respondent within the time allowed by law by the various registrars of voters and county clerks to have signed said original and said supplemental referendum petitions was 77,425."

It is also alleged that the total number of votes cast for all candidates for Governor at the last preceding general election at which a Governor was elected is 1,144,112, and that the total number of genuine signatures required to be affixed to said petition in a lawful manner in order to subject said act to referendum is 57,206. From the foregoing allegations of the petition it appears that all of the steps necessary to subject the said act to a referendum have been regularly taken, and said act has not become a law by reason of said referendum proceedings unless the allegations of paragraph VII of the petition may now be inquired into, and, the truth thereof having been established on a hearing either before this court or before a referee, the said referendum proceedings be declared a nullity.

In said paragraph VII of the petition it is alleged in subdivision (a) thereof that:

> "In the case of not less than 25,000 purported signatures the purported signers of said petitions failed, neglected or refused to affix to the section of said petitions purporting to have been signed by them the date of such signing, and dates purporting to be the dates on which such signers signed their respective sections of said petition were unlawfully and in fraud and deception of said county clerks and said registrars of voters with whom said petitions were originally filed, inserted and forged to said sections by persons other than the respective signers but unknown to this petitioner."

It is further alleged in subdivision (b) of said paragraph that in the case of not less than 5,000 of such signatures the signers thereof failed, neglected, or refused to affix to the section of said petition signed by them the date of such signing, and in subdivision (c) of said paragraph it is alleged that in the case of not less than 5,000 of such signatures there was not attached to any of the sections of said petitions bearing such signatures any affidavit by the person purporting to have solicited the signatures to the same to the effect that the signatures to said sections were made in the presence of the solicitor.

It is further alleged in said petition that notwithstanding the alleged illegal, false, fictitious, and fraudulent character of said signatures and their respective dates, the said registrars of voters and said county clerks included in their enumeration of the number of qualified electors of their respective counties and city and county, and in fraud of the respondent herein certified to said respondent the aforesaid signatures as good and sufficient signatures attached to said petitions. It is then alleged that the actual number of qualified electors whose signatures are appended to said petition is not in excess of 50,000. Further, that demand has been made upon the respondent to disregard said referendum certificates and that the respondent has refused to comply with such demand, and unless compelled by this court to the contrary will notify the registrars and county clerks of the state in accordance with the law in effect prior to January 1, 1927, and will submit said act to the electors of the state for their approval or rejection at the next general election.

It is readily apparent that if the 5,000 signatures referred to in subdivision (b) of said paragraph VII of the petition and the 5,000 signatures referred to in subdivision (c) of said paragraph had been subject to proper rejection or had even been rejected arbitrarily, the said referendum petitions would have had more than the sufficient number of signatures, for there would still have been 67,425 good signatures appended to said petitions if the 25,000 names mentioned in subdivision (a) of paragraph VII of the petition were properly included. So that the vital point in the consideration of the petition herein is whether the allegations of said subdivision (a) state a cause of action against this respondent. In brief, it is alleged therein that in the case of not less than 25,000 of said signatures the signers did not affix to said petition the date of their signatures and that such dates were affixed thereto by persons other than the respective signers and that such dates were so affixed unlawfully and in fraud and deception of said county clerks and said registrars of voters. It thus appears from the pleading, by necessary inference, that dates were affixed to each of said 25,000 signatures, and it is not alleged that the dates so affixed do not represent the true dates of such signatures, but only that the said dates were so affixed by persons other than the signers and without the latter's authority.

The petition herein contains no sufficient allegations of fraud or misconduct on the part of the said county clerks or registrars of voters. It is not alleged that they or either or any of them inserted the dates opposite said names or knew anything about the time or manner of the insertion of said dates or by whom the same were affixed. It is also to be observed that no fraud or misconduct or dereliction of duty is charged against the respondent, secretary of state. From the allegations of the petition the conclusion is compelled that said referendum petitions came into the hands of said county clerks and registrars of voters regular in form. The substance of the allegations of fraud respecting said dates, therefore, is that the dates were affixed by persons unknown and other than by the signers themselves, and that this worked a fraud and deception on said county clerks and said registrars of voters and on the respondent, secretary of state. In other words, the petitioner's complaint is that, because the dates affixed to not less than 25,000 signatures to said referendum petition were affixed by persons unknown, and not by the signers, it is the official duty of the respondent, secretary of state, to disregard the certificates now in his hands and to proceed in accordance with said enactment notwithstanding the said referendum proceedings. The claim is based on the provisions of section 1083a of the Political Code as amended in 1915. This section of the Code was intended to supplement the constitutional regulations governing the circulation, filing, and examination of initiative, referendum, and recall petitions. It prescribes the qualifications of those entitled to sign such petitions by providing that only those who are registered qualified electors at the time of signing any such petition shall be entitled to sign the same. It also provides that whenever, by the Constitution or laws of this state, the county clerk or registrar of voters is required to determine from the records of registration what number of qualified electors has signed such a petition, he shall determine the fact with respect to the purported signature of any person from the affidavit of registration and the records relating thereto. As a statutory duty imposed on each signer the section provides as follows:

> "Such signer shall at the time of so signing such petition or paper affix thereto the date of such signing."

It is the alleged violation of the foregoing quoted requirement of the statute that forms the sole basis for the cause of action of the petitioner as to the said 25,000 signatures. It does not appear and it is not claimed that the dates to said signatures were not affixed thereto nor that said dates were not so affixed at the time the signatures were appended. The alleged violation, therefore, consists in that "such signer" did not affix the date at the time, but that the said date was affixed by some person other than the signer and unlawfully.

It is insisted by the petitioner that the provision of section 1083a of the Political Code relied upon is a valid regulation. This is not disputed by the respondent and need not now be questioned. Chester v. Hall, 55 Cal. App. 611, 616, 204 P. 237. And the requirement of affixing the dates to the signatures has been held to be mandatory to the extent that a failure to comply therewith is justification for the refusal of the proper officer to certify as sufficient the names of signers as to whose signatures the dates of "such signing" were not affixed. Chambers v. Glenn-Colusa Irr. Dist., 57 Cal. App. 155, 206 P. 773.

[1] It is the duty of the county clerk or the registrar of voters under the Constitution to examine the petition filed in his office and to "determine from the records of registration what number of qualified electors has signed the same." Const. § 1, art. 4. It may be assumed that it is also his duty to see that the petition filed with him meets the requirements of the Constitution and of section 1083a of the Political Code. But when, as in the case at bar, a petition has been filed in his office which is regular in form and substance and appears on its face to be in conformity with the law, and he has examined the same and has determined from the records of registration what number of qualified electors has signed the same, and has made and attached to the petition his certificate showing the result of his examination, and has transmitted the petition and his certificate to the secretary of state, his duties in the premises have been fulfilled. His duties are ministerial, and he has no authority to go beyond the face of the petition or to resort to extraneous evidence to determine the contents of the petition. Wright v. Engram, 186 Cal. 659, 201 P. 788; Williams v. Gill, 65 Cal. App. 132, 223 P. 559; Ratto v. Board of Trustees, 75 Cal. App. 724, 243 P. 466.

The constitutional duties of the clerk or registrar with reference to the petition here involved are set forth in section 1 of article 4, as follows:

> "Within twenty days after the filing of such petition in his office the said clerk, or registrar of voters, shall determine from the records of registration what number of qualified electors have signed the same. * * * The said clerk or registrar, upon the completion of such examination, shall forthwith attach to said petition, except the signatures thereto appended, his certificate, properly dated, showing the result of said examination and shall forthwith transmit said petition, together with his said certificate, to the secretary of state and also file a copy of said certificate in his office."

[2] Provision is then made in said section of the Constitution for the filing of a supplemental petition, and the same duties are enjoined on the clerk or registrar as are provided in the case of the original petition, except that his examination and certificate as to the supplemental petition must be made within ten days after the supplemental petition is filed in his office. In addition to the duties provided by the Constitution, said section 1083a of the Political Code enjoins upon the clerk or registrar the duty to determine the fact with respect to the purported signatures of any person "from the affidavit of registration, and records relating thereto, current and in effect at the date of such signing of such petition or paper." It appears from the petition herein that the clerks or registrars of the four counties in question have performed all of their duties in the premises, both constitutional and statutory. It must be noted that the duty of appending the dates of the signatures is not enjoined upon the clerk or registrar, but is enjoined on the signers of the petition. "The manifest purpose of the law requiring the signers to affix the date of signing is to guard against signatures by persons who are not qualified electors at the time of signing." Chester v. Hall, supra. Assuming that the clerk or registrar would be justified in rejecting the names of all persons as to whose signatures no dates of signing were affixed, it is clear that when, as here, dates of signing are actually affixed to the signatures of the 25,000 names in question, and the clerk or registrar has, upon an examination of said petition, determined that said 25,000 signatures were those of qualified electors entitled to sign the same, and has attached to said petition his certificate to that effect, and has transmitted said petition, except the signatures thereto attached, together with said certificate, to the secretary of state, the fact that some person or persons other than the signers affixed said dates may not be inquired into in a mandamus proceeding against the secretary of state.

A mandamus proceeding in this state is an independent proceeding, having for its purpose the compulsion of an act which the law specially enjoins as a duty resulting from an office, trust, or station. Section 1085, Code Civ. Proc.; Sheehan v. Board of Police Com'rs, 188 Cal. 535, 206 P. 70; Perrin v. Honeycutt, 144 Cal. 87, 90, 77 P. 776.

[3] The duties of the secretary of state in the premises are prescribed by the Constitution. Const. § 1, art. 4. It is therein provided:

> "The second power reserved to the people shall be known as the referendum. No act passed by the Legislature shall go into effect until ninety days after the final adjournment of the session of the Legislature which passed such act [with certain exceptions hereinafter referred to]. * * * Upon the presentation to the secretary of state within ninety days after the final adjournment of the Legislature of a petition certified as herein provided, to have been signed by qualified electors equal in number to five per cent. of all the votes cast for all candidates for Governor at the last preceding general election at which a Governor was elected, asking that any act or section or part of any act of the Legislature be submitted to the electors for their approval or rejection, the secretary of state shall submit to the electors for their approval or rejection, such act, or section or part of such act, at the next succeeding general election. * * *"

The clause in the above-quoted constitutional provision, namely, "a petition certified as herein provided," refers to the certification by the county clerks or registrars of voters, as elsewhere provided in the same section of the Constitution, whereby it is made the duty of the county clerk or registrar, upon the completion of his examination of the said petition, forthwith to attach to the said petition, except the signatures thereto appended, his certificate showing the result of his examination. It thus appears that the secretary of state receives nothing from the county clerks or registrars of voters save and except a copy of the petition and a supplement thereto, if any, and the certificate showing the result of the examination thereof by the clerk or registrar, as the case may be. The papers bearing the signatures appended to the referendum petitions and the dates affixed thereto are not transmitted to him. Consequently he is presumed to know nothing, and it is of no concern to him in the discharge of his official duties, as to what names are signed to the original petitions, whether the signatures appended to the original petition were appended by persons who were qualified electors at the time the names were signed, whether each or any signer had added his place of residence, whether each or any signer had affixed to his signature the date of his signing, or whether the date affixed was appended by the signer or by some other person or persons. All of the matters enumerated are not within his province. They fall within the official cognizance of the clerks and registrars. When the secretary of state receives, as it here appears affirmatively and without question he has received, the certificates of county clerks and registrars of voters showing that a sufficient referendum petition has been filed and that the requisite number of qualified electors has signed said petition within the time prescribed by law, it becomes the constitutional duty of the secretary of state to submit the act named in the petition to the electors of the state for their approval or rejection. He is preparing to do this, and his duty in the premises is ministerial. When, upon his inspection of the certificates filed in his office, it is disclosed to him that a sufficient number of qualified electors has signed the referendum petition, then, upon the ascertainment of that fact, his duty is mandatory. See Tulare Water Co. v. State Water Commission, 187 Cal. 533, 202 P. 874.

The petitioner earnestly contends that because fraud is alleged on the part of signers of the petition the conclusiveness of the certificate should not apply. Assuming that equitable relief may be available to prevent the certification of a referendum petition containing forged signatures or otherwise fraudulently presented to the clerk or registrar of voters, it is enough to say that such is not the relief here sought. As was said in Wright v. Engram, supra, at page 660 (201 P. 788):

> "If it should happen that names were forged to the petition in sufficient number to reduce the lawful signatures to the petition below the statutory requirement, persons legally interested perhaps might have a remedy, the nature and character of which we need not here decide."

It is earnestly insisted by the petitioner that the respondent, secretary of state, occupies a position identical with that of the members of the various boards of trustees and city councils of the state who are charged by law with the calling of elections under referendum petitions and who have been subjected to judicial process to the end that the true facts be ascertained and appropriate action be taken, as disclosed by numerous cases cited by petitioner. It may be said that some similarity exists between the position of the local governing bodies charged with the duty of calling elections under referendum proceedings and the position of the secretary of state in submitting a statute subjected by proceedings in referendum to a vote of the people of the state at large. The similarity consists in this, that when the facts exist and the proceedings are regular the duty of each becomes mandatory. But their positions are not otherwise the same. The secretary of state is so far removed from the locus in quo and his duties in the premises are such as to render it imperative that all questions of alleged irregularity in the signatures appended to the referendum petitions, concerning which the secretary of state has no official cognizance, should be raised and tried out before the certificates reach his office. Those charged with fraud or irregularity may then be made parties to the proceeding and the ends of justice be accomplished. It may readily be seen what confusion would result if the secretary of state should be charged with or take upon himself the duty of supervising the duties of the clerks and registrars in the checking of such petitions. His activities in that respect might be state-wide and be entirely beyond his power to compete with the resources at his command and within the time required by law. The constitutional right of the people under the referendum may not thus be jeopardized. It may be that the secretary of state might be charged with that duty by proper legislative enactment, but it would be unreasonable to conclude that under present law he has anything to do with the checking of the names of the referendum petitions or with the form or substance of those portions of the petitions which bear the signatures of electors.

[4] Counsel appearing as amici curiæ in support of the petitioner's position make the further contention that by the amendment of section 6 of article 4 of the Constitution in 1926, the referendum provisions of section 1 of the same article do not apply to the legislative enactment in question. That portion of the amendment which forms the basis of the contention is the part which provides that if the Legislature should fail to reapportion the state as required by the section, a reapportionment commission, constituted as therein provided, should reapportion the assembly and senatorial districts according to the requirements of the section, and that such reapportionment should be effective the same as though the said act of reapportionment were an act of the Legislature, "subject, however, to the same provisions of referendum as apply to the acts of the Legislature." From the proviso just quoted it is argued that the referendum is thereby made to apply only to apportionment by the commission. There is no merit in the contention. Section 1 of the article, as above noted, provides that:

> "No act passed by the Legislature shall go into effect until ninety days after the final adjournment of the session of the Legislature which passed such act, except acts calling elections, acts providing for tax levies or appropriations for the usual current expenses of the state, and urgency measures. * * *"

The reapportionment act here in question does not fall within the classification of any of the specially excepted enactments, and the amendment of section 6 in 1926 does not except it. Not only is this so, but the said amendment, to make assurance doubly sure, provides that the apportionment by the commission shall be subject to the same provisions of referendum as apply to the acts of the Legislature, including, of course, the act here in question. The obvious meaning of the constitutional amendment is contrary to that placed upon it by these amici curiæ.

From the foregoing it necessarily follows that the demurrer should be sustained and the peremptory writ be denied.

It is so ordered.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; RICHARDS, J.

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204 Cal. 241

PEOPLE v. BALL. (Cr. 3131.)

Supreme Court of California. May 25, 1928.

1. Criminal law 🔑93—Superior court held without jurisdiction to render judgment under statute making taking of automobile to use temporarily misdemeanor (Pen. Code, § 499b).

Superior court has no power or jurisdiction to render judgment under Pen. Code, § 499b, providing any person who shall without permission of owner take an automobile for purpose of temporarily using same shall be deemed guilty of misdemeanor.

2. Automobiles 🔑351—Information charging defendant with taking automobile temporarily, depriving owner of possession, did not charge offense under statute prohibiting taking to temporarily use or operate (Pen. Code, § 499b).

Information charging defendant with taking automobile for the purpose of temporarily depriving owner of possession of said vehicle charges entirely different "purpose" from that which is material element of offense defined in Pen. Code, § 499b, making it a misdemeanor for person to take automobile or other vehicle for purpose of temporarily using or operating same, and therefore fails to state any offense under said section.

3. Criminal law 🔑1186(4)—Under act providing taking of automobile must be in absence of owner to constitute offense, information omitting this requirement held insufficient (Motor Vehicle Act, § 146; Const. art. 6, § 4½).

Under Motor Vehicle Act, § 146 (St. 1923, p. 564), providing taking of or driving of automobile must be in absence of owner in order to constitute offense, information entirely omitting this requirement *held* insufficient and not cured by Const. art. 6, § 4½, since provision of statute is highly penal and should receive strict construction.

In Bank.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

George Ball was convicted of taking an automobile without the consent of the owner, and he appeals. Reversed. Superseding opinion of District Court of Appeal in 265 P. 890.

Stahlman & Bennett, George Stahlman, and Sydney C. Bennett, all of Stockton, for appellant.

Guard C. Darrah, Dist. Atty., and H. C. Stanley, Asst. Dist. Atty., both of Stockton, U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CURTIS, J. This is an appeal from a judgment of the superior court of San Joaquin county, Cal., sentencing defendant to imprisonment in the state prison at San Quentin, on his plea of guilty when arraigned on an information, the charging part of which is as follows:

> "The said George Ball is accused by the district attorney of the county of San Joaquin, state of California, by this information of the crime of taking an automobile without permission of the owner, a felony, committed as follows: The said George Ball did on or about the 11th day of November, A. D. 1927, prior to the filing of this information, at and in the county and state aforesaid, willfully, unlawfully, and feloniously take an automobile, to wit, a Buick roadster, Oregon license No. 193783, motor No. 412665, for the purpose of temporarily depriving the owner of the possession of said vehicle, and at the time of so taking said automobile the said defendant did not have permission or consent of the owner thereof, to wit, A. M. Parry, to so take said automobile."

Defendant claims that the foregoing statement of acts on the part of defendant set forth in the information does not describe any prescribed felony under the laws of the state of California, and because of this he asks a reversal of the judgment. The question presented by the appeal involves the construction of section 499b of the Penal Code and section 146 of the State Automobile Act, as enacted in 1923 (Cal. Stats. 1923, p. 564).

Section 499b of the Penal Code, which was adopted in 1905, is as follows:

> "Any person who shall, without the permission of the owner thereof, take any automobile, bicycle, motorcycle, or other vehicle, for the purpose of temporarily using or operating the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding two hundred dollars, or by imprisonment not exceeding three months, or by both such fine and imprisonment."

Section 146 of the State Automobile Act reads thus:

> "Driving vehicle without owner's consent. Any person who shall drive a vehicle not his own, without the consent of the owner thereof and in the absence of the owner, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, shall be deemed guilty of a felony. The consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of such owner's consent on a previous occasion to the taking or driving of such vehicle by the same or a different person. Any person who assists in, or is a party or accessory to or an accomplice in, any such stealing or unauthorized taking or driving, shall also be deemed guilty of a felony."

[1, 2] It is not necessary for us to consider whether the information in this case charges the defendant with the offense defined by section 499b of the Penal Code. Such offense is a misdemeanor only, punishable by fine of not exceeding $200 or by imprisonment not exceeding three months, or by both said fine and imprisonment, and therefore it is not within the jurisdiction of the superior court. Under such an information the superior court would be without power to render not only the judgment which was given against the defendant in this action, but it would have no authority to take jurisdiction of such offense, or to render any judgment whatever therein. We think, however, that there is a material variance between the statement of the offense charged in the information and that described in section 499b. The information charges the defendant with taking an automobile "for the purpose of temporarily depriving the owner of the possession of said vehicle," while section 499b makes it a misdemeanor for a person to take an automobile or other vehicle "for the purpose of temporarily using or operating the same." It is perfectly obvious that the "purpose" for which defendant took the automobile, as charged in the information, is an entirely different "purpose" from that which is made a material element of the offense defined in the Penal Code section. The information, therefore, fails to state any offense under said section of the Penal Code.

[3] The information is also fatally defective and fails to state the offense denounced in section 146 of the Motor Vehicle Act. Conceding that to "take" an automobile is equivalent to "drive" an automobile, still the information fails to state one of the material elements of the offense defined by this section of the Motor Vehicle Act. This section provides that the taking or driving of the automobile must be "in the absence of the owner." The information omits entirely this requirement of the statute. Its omission renders the information insufficient to state the offense defined in section 146 of said statute. This provision of the statute is highly penal in its nature, and it should therefore receive a strict construction. Nor do we think section 4½ of article 6 of the State Constitution cures this defect, as the information as it now stands fails to state any offense whatever against the defendant.

The judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; TYLER, Justice pro tem.; LANGDON, J.; RICHARDS, J.; SHENK, J.

204 Cal. 201

FIRST METHODIST EPISCOPAL CHURCH OF SANTA MONICA v. LOS ANGELES COUNTY. (L. A. 9264.)

Supreme Court of California. May 18, 1928.

1. Statutes 🔑185—Intention to legislate by implication will not be presumed.

Court will not presume that Legislature, omitting express declaration from statute, intended to legislate by implication.

2. Constitutional law 🔑29—Legislature may in furtherance of self-executing constitutional provision enact legislation to facilitate its operation and provide convenient remedies.

Even though constitutional provision is self-executing, Legislature may enact legislation to facilitate its operation and to provide convenient remedies for rights established thereunder.

3. Taxation 🔑249—Failure of church to file affidavit as to use of church property held not waiver of constitutional exemption from taxation (Pol. Code, § 3611; Const. art. 13, § 1½).

Failure of church owning real property containing building used solely for religious worship to make affidavit to assessor as to use of property, required by Pol. Code, § 3611, *held* not waiver of exemption provided for such property by Const. art. 13, § 1½, in view of absence of express provision in section 3611 for waiver or penalty, and in view of sections 3612 and 3613.

In Bank.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by the First Methodist Episcopal Church of Santa Monica against the County of Los Angeles. Judgment for defendant, and plaintiff appeals. Reversed.

For opinion of District Court of Appeal, see 258 P. 625.

Tanner, Odell & Taft and Walter L. Mann, all of Los Angeles, for appellant.

Edward T. Bishop, J. A. Tucker, Everett W. Mattoon, and W. Sumner Holbrook, Jr., all of Los Angeles, for respondent.

LANGDON, J. In this action a hearing was granted by this court after decision by the District Court of Appeal, in order that the case might be considered with another one growing out of a similar controversy in which a decision had been rendered by the District Court of Appeal, and which latter decision was inharmonious with the decision in the instant case. West Glendale M. E. Church v. McClellan, L. A. No. 8432 (Cal. Sup.) 267 P. 705. A careful consideration of the arguments and opinions in both cases has convinced us of the correctness of the views announced in the decision of the District Court of Appeal, Craig, J., heretofore filed herein, and that decision is accordingly adopted as and for the opinion and decision of this court. It reads as follows:

This appeal is from a judgment sustaining a demurrer to a second amended complaint, which alleged that the appellant is a religious corporation, owning two lots in the city of Santa Monica, Los Angeles county, upon which is situated a church building used solely and exclusively for religious worship, and that all of its real property here involved is required for the convenient use and occupation of said building. In the year 1924, the properly constituted authorities of Los Angeles county assessed and levied upon said property a tax amounting to $849.51, without the knowledge, acquiescence or consent of appellant, of which tax appellant learned on December 1, 1924, and upon said date paid it to the tax collector under protest. The amended complaint also alleges that the assessor and his deputy at all times mentioned had actual personal knowledge of the ownership and use of the property in question as therein stated, and that the same was exempt from taxation; further, that the assessor did not at any time during the year 1924 demand, exact, or notify the plaintiff to make, verify, or file a statement setting forth property owned by it or under its possession or control. It appears that after paying the tax appellant duly claimed the return thereof, which was refused, whereupon this action was begun to recover the amount paid, upon the claim that the property is exempt from taxation under section 1½ of article 13 of the Constitution, and section 3611 of the Political Code. In resisting the suit, respondent's sole contention is that the failure to file the affidavit required by section 3611 of the Political Code amounts to a waiver of such exemption, and that the amended complaint is fatally defective in that it contains no allegation that such affidavit was filed.

Appellant's contention is that this section is intended only to provide a method of supplying evidence of the fact that the property is exempt, and that it does not provide for a waiver of the exemption in case no affidavit be filed; further, that if it were construed as requiring the filing of an affidavit in order that exemption may be secured, such provision would be unconstitutional, because, it is said, it would conflict with section 1½ of article 13 of the Constitution of this state. Section 1½ reads as follows:

> "All buildings, and so much of the real property on which they are situated as may be required for the convenient use and occupation of said buildings, when the same are used solely and exclusively for religious worship shall be free from taxation; provided, that no building so used which may be rented for religious purposes and rent received by the owner therefor, shall be exempt from taxation."

The Political Code, section 3611, quoting and providing the method of procedure for acquiring exemption under the foregoing section of the Constitution, was enacted by the Legislature in the following language:

> "That any person claiming property to be exempt from taxation under this section shall make a return thereof to the assessor annually, the same as property is listed for taxation, and shall accompany the same by an affidavit showing that the building is used solely and exclusively for religious worship, and that the described portion of the real property claimed as exempt is required for the convenient use and occupation of such building, and that the same is not rented for religious purposes and rent received by the owner therefor."

[1-3] Respondent is correct in stating the issues to be, first, does the failure to comply with the provisions of section 3611 of the Political Code constitute a waiver of the exemption; and, second, so construed, is section 3611 constitutional? However, we find it unnecessary to decide the second question. We search the section in vain for any provision therein requiring that a failure to file an affidavit shall result in a waiver of the right to exemption. It contains no such express declaration. Nevertheless, respondent contends that it does not contain such provision. If so it must arise by implication. But an intention to legislate by implication is not to be presumed. Crowell v. Gilmore, 18 Cal. 370. No very definite reasons are assigned for believing that the Legislature meant to provide by implication that a failure to file the affidavit should result in a waiver of the right provided by the Constitution to tax exemptions. An analysis of section 3611 of the Political Code shows that the first provision of it is merely a quotation of section 1½ of article 13 of the Constitution. The appellant asserts, and the respondent concedes, that this section is self-executing. Since we think it unnecessary to a decision upon this appeal to pass upon that question, no opinion is expressed. It may be assumed, as argued by respondent, that even though a constitutional provision is self-executing, the Legislature may, and in many instances must, enact legislation to facilitate its operation, and to provide convenient remedies for the protection of the right established, and for the determination thereof and the regulation of claims thereto. Such legislation must be in furtherance of the purposes of the constitutional provisions, but, if so, it is valid and enforceable. The last provision of section 3611 is, we think, such a law. It is regulatory and places no unreasonable burden upon those entitled under section 1½ of article 13 of the Constitution to tax exemption. It creates no hardship to require of a property owner that he file an affidavit showing that the property claimed to be exempt is used solely for religious worship, that it is required for the convenient use and occupation of the building upon the premises, and that the same is not rented for such purposes and rent received by the owner therefor. If the person claiming exemption fails to make a return to the assessor by filing the affidavit contemplated, the latter acts entirely within the scope of his authority in assessing the property just as he would any other property. This is clearly intended by section 3611 of the Political Code. But respondent argues further that the language employed is mandatory, that any one claiming exemption must comply with the section, and that unless such a construction is placed upon it the provision amounts to nothing more than a request to the taxpayer that he file an affidavit in order that the assessor may be aided in his work.

It may be that the statute would be more effective if the legislators had provided it with teeth, and annexed a penalty merely to make the law more effective and to reduce the work of the assessor, or to avoid time wasting on the part of other public officials. Even though the construction placed upon the law by respondent is not adopted, it cannot be said that the claimant has no incentive to comply with the requirement that he file an affidavit. The result of his failure to make a return to the assessor is bound to be, as in the instant case, that his property is taxed and he is put to the trouble and expense of a proceeding before the board of supervisors for a cancellation of the assessment, after being required to secure from the district attorney the latter's consent, or else he must pay his taxes under protest and apply to the board of supervisors for their refund, or, upon the refusal of the supervisors to direct such refund, he is compelled to institute an action in the superior court. In either of such proceedings the taxpayer would be required to show that the property in question was used exclusively for religious purposes and that it was not rented for such purposes. It may reasonably have been the idea of the legislators in enacting this law that such inconvenience and the loss of money and time incidentally involved would provide sufficient incentive to inspire compliance with the sections of the Constitution and Political Code in question without adding the further penalty of a loss of the exemption itself. At any rate they omitted provision for such a penalty.

Aside from consideration of the language of a statute where any substantial doubt exists as to its meaning, it is of course proper to regard extrinsic aids. One which may reasonably be given weight in this case, and which must throw great light upon the legislative intent, is a comparison of other provisions of the same chapter of the Political Code, having to do with other related exemptions. Sections 3612 and 3613 of the Political Code respectively provide for the exemption from taxation of war veterans and of educational institutions. It will be noted that each of these sections, after providing for a showing to be made by one claiming exemption similarly to that called for by section 3611, expressly add that a failure to make a return shall be deemed to constitute a waiver of the right given by the Constitution. In People v. Buster, 11 Cal. 221, which is not distinguishable in principle, the Supreme Court said, at page 221: "The omission of this provision in the sections which touch cases like this is significant to show that a different intention existed." Surely, the fact that these parallel provisions for tax exemption, one immediately following the other, are distinctly dissimilar in this one provision, is indicative of the fact that the Legislature in making the difference did so intentionally and deliberately. We are satisfied that the provision of section 3611 of the Political Code requiring any person claiming property to be exempt from taxation under that section to make a return thereof to the assessor was intended to assist the assessor in determining what property should be omitted from assessment, but that it was not the purpose of the Legislature in enacting it to make a failure to comply therewith a waiver of the exemption provided in section 1½ of article 13 of the Constitution. Consequently, one entitled to such an exemption may still avail himself of it in a proper proceeding, and for that purpose the complaint filed in the instant cases states a cause of action.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; PRESTON, J.

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204 Cal. 697

WEST GLENDALE METHODIST EPISCOPAL CHURCH (a Corporation), Plaintiff and Appellant, v. R. F. McCLELLAN et al., Defendants and Respondents. (L. A. 8432.)

Supreme Court of California. May 18, 1928.

In Bank.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Superseding opinion in District Court of Appeal, 258 P. 449.

George H. Moore, of Los Angeles, for appellant.

Everett W. Mattoon, County Counsel, W. Sumner Holbrook, Jr., Edward T. Bishop, and J. A. Tucker, all of Los Angeles, for respondents.

LANGDON, J. This is an appeal from a judgment for defendants, entered after a demurrer to the complaint had been sustained without leave to amend. Plaintiff sought a writ of mandate directed to the supervisors, auditor, and tax collector of Los Angeles county, to compel the cancellation of a tax assessment for the year 1923, against property alleged to be used exclusively for religious worship by plaintiff and necessary for such use. It is also alleged that the district attorney had consented, in writing, that the petition for cancellation of the tax be granted, and that this petition was presented to the supervisors and to the auditor, and "that at all times since the said board of supervisors has refused to direct the auditor to cancel said assessment and tax, and have based their refusal solely on the ground that plaintiff failed to make a return and an affidavit as authorized by section 3611, Political Code," in the time prescribed thereby. It is also alleged that the tax collector is threatening to sell said property for said delinquent taxes. The complaint does not allege that the plaintiff has complied with the requirement of section 3611 of the Political Code. The trial court held that the failure of plaintiff to file with the assessor the report and affidavit required by that section was fatal to its cause of action. The correctness of that ruling is the sole matter to be determined in this appeal.

The legal question involved here has been determined this day by this court in a case involving a similar state of facts with reference to the 1924 tax upon church property. First Methodist Episcopal Church of Santa Monica v. County of Los Angeles, L. A. 9264, 267 P. 703. In that case it was decided that a noncompliance with section 3611, Political Code, does not waive the tax exemption. The holding of that case is conclusive here.

The judgment is reversed.

We concur: WASTE, C. J., CURTIS, J.; SHENK, J.; RICHARDS, J.; PRESTON, J.

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204 Cal. 262

AGNIFILI v. LAGNA. (L. A. 7824.)

Supreme Court of California. May 28, 1928.

1. Judgment 🔑590(4)—Judgment denying recovery of profits lost by prevention from constructing two of four houses contracted for did not bar recovery of amount due and enforcement of lien for work and materials in constructing other houses (Code Civ. Proc. § 1911, and § 1908, subd. 2).

Judgment for defendant in action for profits plaintiff would have made, if not prevented by defendant from constructing two of four bungalows contracted for, *held* not to bar recovery of amount due for work done and materials used in construction of other buildings and enforcement of lien therefor against defendant's property, in view of Code Civ. Proc. § 1908, subd. 2, and section 1911.

2. Judgment 🔑719—Judgment is bar only to extent of matters litigated and determined or properly subject of litigation (Code Civ. Proc. § 1911, and § 1908, subd. 2).

A judgment is a bar in a subsequent suit between same parties only to extent of matters litigated in previous action and determined by judgment or properly subject of litigation therein, under Code Civ. Proc. § 1908, subd. 2, and section 1911.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. Contracts 🔑171(3)—Judgment 🔑593—Contract to build four bungalows for stated sum each held "severable contract," not precluding several recoveries.

Contract to build four bungalows for stated sum was a "severable contract," that is, one susceptible of division into two or more parts, so as to permit recovery for houses constructed, notwithstanding determination in former action that contractor could not recover for two houses he was prevented from constructing by defendant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Severable Contract.]

4. Judgment 🔑740—Plaintiff is not concluded by judgment in former action as to matters in finding not within issues made by pleadings therein.

Plaintiff is not concluded by judgment against him in former action as to matters embraced within finding which was not within issues made by pleadings in such action.

In Bank.

Appeal from Superior Court; Los Angeles County; L. H. Valentine, Judge.

Action by C. F. Agnifili against Antonio Lagna. Judgment for defendant, and plaintiff appeals. Reversed.

Superseding opinion in District Court of Appeal, 260 P. 796.

Culver & Nourse and Paul Nourse, all of Los Angeles, for appellant.

Ernest M. Torchia and Charles Matthews, both of Los Angeles, for respondent.

CURTIS, J. On October 19, 1921, the defendant, Antonio Lagna, entered into a written contract with one J. J. Rue, whereby Rue agreed to erect and build for Lagna four bungalows at Eagle Rock, Los Angeles county, on lots 4, 5, 6, and 7, block 5 of a certain subdivision, for the sum of $2,400 each according to certain plans and specifications, to be paid as follows: $300 when each bungalow is ready for plastering, $300 when the outside is finished, and $1,800 when completed; the owner to do all painting, tinting, and paper hanging for the sum of $140, to be deducted from the contract price. This contract with the written consent of Lagna was assigned to the plaintiff. Plaintiff thereupon began work under said contract, and constructed a bungalow upon said lot 5 and at least partially constructed another upon said lot 6. At this juncture of their building venture a dispute arose between them, and plaintiff ceased to further carry out the contract, claiming that the defendant had failed to make certain payments called for under the contract, alleging that two of said houses had not been constructed; that he was ready, able, and willing to construct them according to the terms of the contract, and that defendant had refused to permit plaintiff to so construct said two houses. In this action against the defendant, plaintiff sought to recover the sum of $999.13. Nine hundred and fifty dollars of said amount he alleged was the profit he would have made by the construction of said two houses had not defendant prevented him from completing his contract, and $49.13 for depreciation in value of certain lumber and building materials, which he had ordered and delivered upon the ground for the purpose of constructing said two houses. In his complaint in said action plaintiff alleged defendant forbade him to proceed with the work under said contract, and, without just cause, refused to allow plaintiff to carry out the terms of said contract, and in an amendment to his complaint plaintiff alleged as a further ground in support of his action against defendant that plaintiff entered into the performance of his contract and continued in the performance thereof until on or about the 16th day of February, 1922, at which time the defendant failed and refused to make the payments due to plaintiff under said contract, and that by reason of such failure plaintiff was compelled to discontinue said work, and that he elected to treat the failure and refusal of defendant to make said payment as a breach of said contract on the part of the defendant. Defendant answered and denied in substance the material allegations of the complaint. The complaint in said action was filed March 14, 1922, and the action was numbered 103798 in the superior court of the county of Los Angeles. Thereafter, and before the above-mentioned action had been tried, the plaintiff filed the present action in which he sought to foreclose a mechanic's lien for the reasonable value of the labor performed and materials furnished in the construction of the first two houses mentioned in said contract, that is, the houses to be constructed upon lots 5 and 6 respectively, mentioned in said contract. The complaint in this action was filed June 13, 1922, and this action is numbered 107330 in said superior court.

Plaintiff alleged in his complaint in the present action that he had completed the construction of the bungalow upon said lot 5 and had performed work and furnished materials in the construction of the bungalow upon said lot 6 of the value of $1,493; that the value of the labor performed and materials furnished entering into the construction of said bungalow upon lot 5 was $2,260 (being the contract price less $140 deducted for painting, etc.); and that defendant had paid on account of the labor and materials entering into the construction of both of said houses the sum of $801 only, leaving a balance due plaintiff for the work and materials furnished on the two bungalows, which were either constructed or were partially constructed on lots 5 and

6, of $2,952. Plaintiff further alleged in his complaint in the present action that the defendant, before said second bungalow was completed, without just or any cause, refused to make the payments due to plaintiff under the terms of said contract, by reason of which plaintiff was compelled to abandon the construction of said house before it was completed. In defendant's answer he alleges that he had paid the whole amount due for the construction of the bungalow on lot 5, except the sum of $10, and that he paid to plaintiff $300 on account of the erection of the bungalow on said lot 6, and that plaintiff without any cause or excuse has failed to erect said bungalow on lot 6, and had abandoned the same. This answer was filed on July 5, 1922. While each of these actions were pending, the first of said actions, or action number 103798, on October 26, 1922, came on for trial and resulted in a judgment in favor of the defendant. In said action the court found that the defendant did not at any time forbid plaintiff to proceed with the work under the terms of said contract; that defendant did not prevent or refuse to allow plaintiff to carry out the terms of said contract, but that plaintiff without sufficient notice to defendant abandoned said work and failed to comply with the terms of said contract. The court further found that defendant had not failed or refused to make any payment due plaintiff under the terms of said contract; that on March 7, 1922, defendant paid to plaintiff $300 on account of the erection of the bungalow on lot 6; and that defendant had not breached said contract. It further found against plaintiff's claim for $49.13 for depreciation of materials delivered on the ground for the purpose of constructing bungalows on lots 6 and 7. The court further found that the cost of constructing the two remaining bungalows would be the sum of $2,600 each, which was in excess of the contract price; that it is not true that plaintiff has been ready, able, and willing to build said houses on said lots, nor has the defendant refused to allow plaintiff to erect said houses. The findings and judgment in action 103798 were filed November 18, 1922, and no appeal was ever taken from said judgment. On February 15, 1923, the defendant served on plaintiff and on the next day filed an answer in the present action in which he reiterated his former answer to the complaint, and in addition thereto he pleaded the judgment in action number 103798 as a bar to the plaintiff's cause of action in the present action. Upon the trial of the present action the trial court held that the judgment in action 103798 was a bar to plaintiff's cause of action in the present action and solely on that ground rendered judgment in favor of the defendant.

[1, 2] In holding that the judgment in action 103798 was res adjudicata in action 107330, and therefore a bar to plaintiff's cause of action therein, we think the trial court was in error. We will hereafter refer to action number 103798 as the first or prior action, and to action number 107330 as the second or subsequent action. In the first action the plaintiff sought to recover the profits which he claimed that he would have made had he not been prevented by defendant from constructing the two bungalows provided for in the contract. In the second action plaintiff sought to foreclose a lien for the reasonable value of the labor and materials entering into the construction of the other buildings mentioned in the contract, one of which was only partially constructed. The court found in the first action that the defendant had not breached his contract, nor prevented plaintiff from constructing the two bungalows described therein, and therefore plaintiff was not entitled to any profits that he might have made had he erected said buildings. The court found that defendant had made certain payments on account of said contract. These matters having been adjudicated in the first action, the judgment therein was conclusive as to them upon the parties to the second action. The court in the first action did not purport to find that defendant had paid plaintiff in full for the work done and materials furnished toward the construction of the two bungalows on lots 5 and 6. Therefore, the judgment in the first action was not a bar to the recovery by plaintiff of such amounts as might be due him for said work and materials, and to the enforcement of his lien for said amounts against the property of defendant. A judgment in an action is a bar in a subsequent suit between the same parties only to the extent of the matters litigated in the previous action and determined by the judgment therein or which were properly the subject of litigation therein. "In order that a judgment in one action may constitute an estoppel against the parties thereto in a subsequent action, it must be made to appear, either upon the face of the record or by extrinsic evidence, that the identical questions involved in the issues to be tried were determined in the former action. * * * By section 1908, subdivision 2, of the Code of Civil Procedure, the effect of a judgment is conclusive 'in respect to the matter directly adjudged,' and, by section 1911, 'that only is deemed to have been adjudged in a former action which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.'" Beronio v. Ventura County Lumber Co., 129 Cal. 232, 236, 61 P. 958, 959, 79 Am. St. Rep. 118.

[3, 4] The court in the first action found that the plaintiff was not entitled to recover anything from defendant by reason of the breach of said contract on account of the two buildings which were not constructed by him, and its judgment therein in so far as it is to be held an adjudication of the right of

the parties thereto must be limited to those rights growing out of the contract to erect the two buildings which the court in the first action was considering. The contract between the parties is a severable contract. That is, it is susceptible of division into two or more parts. In fact, it in reality comprises four distinct contracts, each independent of the others, to construct for a definite amount four separate buildings (Sterling v. Gregory, 149 Cal. 117, 120, 85 P. 305; Pacific Wharf etc. Co. v. Dredging Co., 184 Cal. 21, 192 P. 847). While plaintiff may not recover for the two houses he did not construct, that fact, and its determination by the court in the first action, cannot be held to be any obstacle or bar to his right to recover for the two houses he did construct. It is true the court in the first action found that plaintiff "abandoned the said work and failed to comply with the terms of said contract." This finding, however, was not within the issues as made by the pleadings in said action. Therefore, the plaintiff was not concluded by the judgment in said action as to matters embraced within this finding, and said judgment was not res adjudicata as to said matters. Beronio v. Ventura County Lumber Co., supra.

The judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; RICHARDS, J.; SHENK, J.

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92 Cal. App. 97

GRIDLEY v. SELLECK. (Civ. 5041.)

District Court of Appeal, Second District, Division 2, California. May 21, 1928.

1. Pleading ⟹18—Complaint alleging amount due from third person for merchandise, and attempting to allege cause of action based on guaranty, held demurrable for uncertainty.

Complaint alleging amount due from third person for merchandise, and seeking recovery thereof, and also attempting to allege cause of action based on guaranty limited to an amount less than alleged to be due, *held* demurrable for uncertainty, as being ambiguous and unintelligible as to whether cause of action was based on principal obligation against third person or on alleged guaranty expressly limited by its terms to a smaller amount.

2. Pleading ⟹310—Exhibit attached to complaint cannot supply lack of essential allegations and averments.

Plaintiff cannot rely on exhibit attached to complaint to supply lack of essential allegations and averments therein.

Appeal from Superior Court, Riverside County; Wm. H. Ellis, Judge.

Action by A. G. Gridley against Willard M. Selleck. Judgment of dismissal, and plaintiff appeals. Affirmed.

E. C. Gridley and Harry A. Reese, both of San Bernardino, for appellant.

Fred L. Hamblin, of Riverside, for respondent.

VALENTINE, Justice pro tem. A demurrer to the complaint in this action was sustained, and the plaintiff given ten days to amend her complaint, which she failed to do. After the entry of her default a motion to dismiss the action was made and granted, and judgment of dismissal subsequently entered. From that judgment plaintiff takes this appeal. The demurrer was general and special. The minute order simply recites:

> "This cause came on regularly to be heard on demurrer. Demurrer sustained. Ten days to amend."

The demurrer, among other matters, specifies:

> "That said complaint is uncertain in this: That it cannot be determined therefrom, nor from any part thereof, whether or not the said defendant is being sued upon the principal obligation of the Selleck Auto Company or upon the alleged written guarantee referred to in said complaint," and that the complaint is ambiguous and unintelligible in the same respects.

An examination of the complaint, and particularly paragraphs II, III, V, VI, VII, VIII, and XI, certainly sustains this contention. Paragraph III is as follows:

> "That on or about the 7th day of May, 1915, there was due from the said Selleck Auto Equipment Company, above mentioned, for tires, repair material, pneumatic and solid tires, rubber sundries, goods and material purchased from the said Seamless Rubber Company of New York and included the terms of said contract of guaranty, for the payment of which said contract, marked Exhibit "A" was entered into the sum of $20,552.27."

[1] Paragraphs VII, and VIII of the complaint allege the assignment to the plaintiff by the "Seamless Rubber Company, Inc.," of its "claim and account" against the Selleck Auto Equipment Company, and said Willard M. Selleck, and that there is now due from such company and said Willard M. Selleck the sum of $20,552.27 and interest (and incidentally the prayer of the complaint asks for judgment for that amount), whereas paragraph II of the complaint attempts to allege a cause of action based on a guaranty limited to $20,000; and it appears from the contract of guaranty, "Exhibit A," that the amount of liability is so limited. This alone is sufficiently uncertain, unintelligible, and ambiguous to justify the court in sustaining the demurrer and directing an amendment of the complaint, so that it may be made sufficiently clear and certain.

to defendant whether it means that he is to answer a cause of action based on the alleged guaranty which is expressly limited by its terms to $20,000, or a cause of action based upon goods, wares, and merchandise purchased by the corporation which the plaintiff designates as a cause of action upon a "claim and account" of the Seamless Rubber Company, Inc., against Willard M. Selleck, upon which it is claimed the whole amount of $20,552.27 and interest is due from defendant. Under the pleadings, and particularly paragraphs V, VI, VII, and VIII, the defendant might well assume that plaintiff was intending to allege the latter cause of action against him, but through inadvertence omitted his name in the paragraph which alleges that the goods were sold and delivered.

[2] There are other specifications in the demurrer which it is unnecessary to discuss. Appellant may not rely upon "Exhibit A" attached to the complaint to supply the lack of essential allegations and averments in the complaint. Panter v. Natl. Surety Co., 36 Cal. App. 44, 46, 171 P. 803. In Hayt v. Bentel, 164 Cal. 680, at 686, 130 P. 432, 434, the court says:

> "Recitals in a contract incorporated in a complaint will not supply the want of essential averments in the pleading."

Judgment affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

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91 Cal. App. 743

SMITH v. SMITH. (Civ. 3469.)

District Court of Appeal, Third District, California. May 14, 1928.

1. Appeal and error ⚷484—Supersedeas acts only in staying hand of court and not in undoing anything which has been previously done.

A writ of supersedeas can only be issued to stay further action of court, and acts only in staying the hand of the court, and not in undoing anything which has previously been done.

2. Appeal and error ⚷470—Undertaking complying with statutes held to stay proceedings, notwithstanding trial court's refusal to approve undertaking (Code Civ. Proc. §§ 942, 948).

Where defendant adjudged to pay alimony filed undertaking for stay of judgment in sum double amount which would accrue during period of three years from filing of notice of appeal as required by Code Civ. Proc. § 942, and no proceedings pursuant to section 948 for testing sufficiency of sureties was taken, *held* that undertaking operated as stay of all proceedings on judgment appealed from until its final determination, notwithstanding trial court refused to approve undertaking.

3. Appeal and error ⚷477—On application for supersedeas, court cannot direct discharge of defendant, committed for contempt pursuant to judgment entered before filing of undertaking.

Where, prior to filing of undertaking by defendant adjudged to pay alimony, trial court adjudged defendant guilty of contempt and entered order directing defendant's commitment, *held* that, on application for writ of supersedeas, appellate court cannot enter order requiring defendant's discharge, since it can take into consideration only order made after filing of undertaking which effects a stay of proceedings.

Application for writ of supersedeas by Sidney V. Smith, Jr., prayed to be directed to the Superior Court of Yuba County, Eugene P. McDaniel, Judge, requiring said court to desist from further proceedings in an action by Elaine T. Smith against Sidney V. Smith, Jr., and for an order directing said court to release the applicant from custody of the sheriff. Relief in accordance with opinion.

Alden Ames, of San Francisco, and W. P. Rich, of Marysville, for appellant.

Charles A. Wetmore, Jr., of San Francisco, for respondent.

PLUMMER, J. This cause is before us upon the defendant's application for a writ of supersedeas, and also for an order directing the superior court of the county of Yuba to release the defendant from the custody of the sheriff of said county.

On the 21st day of October, 1927, the superior court of said county entered its order, and on the 24th day of October, 1927, entered a final decree of divorce in the above-entitled cause, by the terms of which order, and also by the terms of said final decree, the above-named defendant was required to pay to the plaintiff the sum of $175 per month as permanent alimony commencing on the 1st day of July, 1927, and continuing thereafter until the further order of said court, and also awarding the plaintiff the sum of $200 as and for counsel fees in said action. On the 3d day of November, 1927, an appeal was regularly taken by the above-named defendant from the order and final decree just referred to herein. The defendant not having paid the monthly alimony specified in the final decree of divorce entered in said cause, proceedings were taken and had for the purpose of punishing the defendant for contempt for failure to comply with said order and final decree, and on the 14th day of November, 1927, the trial court entered an order adjudging the defendant guilty of contempt in not having paid the alimony as required by the final decree entered in said cause and directing that, unless the defendant paid to the plaintiff the sum of $1,075 within five days thereafter, appellant should be committed to the sheriff of the county of Yuba until he should

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

comply with said order. Thereafter proceedings were taken and had in this court for a review of the order of the trial court adjudging the defendant guilty of contempt, and the order of the court so doing was affirmed by this court and the remittitur from this court was filed with the clerk of the superior court of Yuba county on the 23d day of April, 1928. Thereupon, and on said 23d day of April, 1928, the superior court of the county of Yuba made and entered its order directing that the defendant be committed for contempt of said court as hereinbefore referred to. Thereafter, and on the same day, to wit, April 23, 1928, the defendant presented to said superior court a good and sufficient undertaking for a stay of judgment in the above-entitled cause, in the sum of $15,100, conditioned in all particulars as required by section 942 of the Code of Civil Procedure. This undertaking is in double the amount of the sum already accrued, and which will accrue during a period of three years from and after the filing of the notice of appeal herein on November 3, 1927. Upon the presentation of said bond and undertaking to the judge of the superior court of the county for Yuba for approval, approval thereof by said judge was refused, on the ground that an order of arrest of said defendant had previously been issued. The bond and undertaking so tendered by the defendant was then filed with the clerk of said court. Upon the facts which we have briefly summarized, the defendant petitions this court for a writ of supersedeas and an order directing his discharge, as herein stated.

[1-3] As a writ of supersedeas can only be issued to stay further action of the court, and acts only in staying the hand of the court, and not in undoing anything which has previously been done by the court, we have really only one question to decide in the matter now before us, and that is whether the bond and undertaking as given by the defendant acts as a supersedeas in this cause. In the recent case of Smith v. Smith (Cal. Sup.) 256 P. 419, an undertaking covering the costs and the amount of alimony allowed that would accrue during a period of three years from the date the appeal was filed in the superior court and the writ of supersedeas prayed for based upon such facts, the court there said:

> "The defendant's right to stay execution of an order such as we are considering here, pending the determination of the appeal involving the main issue, has been settled in this state since the elaborate consideration given to the subject in the case of Sharon v. Sharon, 67 Cal. 199, 7 P. 456, 635, 8 P. 709. McAneny v. Sup. Court, 150 Cal. 6, 87 P. 1020, is to the same effect, as are the text and authorities noted in 1 Cal. Jur. 952, § 8."

Under these decisions it must be held upon this application that the bond tendered by the defendant and filed with the clerk of said court is sufficient to stay further proceedings in relation to the judgment herein referred to pending the appeal taken therefrom. Section 942 of the Code of Civil Procedure does not require that an undertaking given to stay execution must be approved by the judge of the superior court from whose judgment the appeal is taken. Section 948 of the Code of Civil Procedure provides the procedure for testing the sufficiency of the sureties on such an undertaking. It does not appear that any such proceeding has been taken in this cause, and upon oral argument it was admitted that the undertaking herein is sufficient if the approval of a judge of the trial court is not required. We therefore hold that the undertaking filed in this cause operates as a stay of all proceedings upon the judgment appealed from until its final determination. However, as appears by the text, abundantly supported by authorities, in 2 Cal. Jur. 469, § 221, the stay of proceedings pending an appeal has no retrospective operation, and does not undo or render unlawful any action that has already been taken by the trial court before the supersedeas becomes effective. The action of the trial court adjudging the defendant guilty of contempt, and also the issuance of a commitment thereon preceded the filing of the undertaking herein, and as this court, upon an application for a writ of supersedeas, can only take into consideration orders of the court made after the filing of the bond which effects a stay of proceedings, no order can be made as prayed for requiring the trial court to direct the discharge of the defendant. Whether the filing of the undertaking, as herein referred to, works an abatement of the order committing the defendant under the principle enunciated in the case of Ex parte Overend, 122 Cal. 201, 54 P. 740, can only be decided when this court comes to consider the defendant's petition for a writ of habeas corpus which is now pending.

In view of what we have stated, we simply hold that the defendant herein has given and filed a good and sufficient undertaking staying all proceedings in the case of Smith v. Smith, appealed from as herein referred to, and the order will be that the trial court desist from all further proceedings in relation to said judgment, until the final determination thereof upon said appeal, and until the further order of this court.

We concur: FINCH, P. J.; HART, J.

92 Cal. App. 86

PETRAY v. FIRST NAT. BANK IN BAKERSFIELD. (Civ. 5451.)

District Court of Appeal, Second District, Division 1, California. May 21, 1928.

1. Appeal and error 🔑907(2)—Reviewing court must presume that evidence supports findings, and must construe findings in favor of judgment where evidence is not presented.

Where record on appeal contains none of evidence given at trial, reviewing court must presume that evidence supported the findings, and must construe the findings in favor of the judgment, resolving any uncertainties against the appellant.

2. Banks and banking 🔑117—Cashier of bank authorized to loan depositor's money on good security had no implied authority to himself borrow money on unsecured loan.

Where cashier of bank was authorized to loan depositor's money on good security, cashier had no implied authority from bank to withdraw depositor's money for purpose of making loan to himself, for which he gave only his note without security.

3. Principal and agent 🔑75—Transaction by which agent undertakes to deal with himself may be ratified by principal knowing facts.

Transaction by which agent undertakes to deal with himself in the matter of the agency without the intervention of the principal is merely voidable, and may be ratified by the principal on full knowledge of the facts.

4. Banks and banking 🔑112—Depositor's demand that bank cashier pay note which represented unauthorized loan to himself of depositor's money, and nine months' delay in demanding money from bank, constituted ratification of cashier's act, precluding recovery from bank (Civ. Code, §§ 2309, 2310).

Where bank cashier, authorized by depositor to loan her money on good security, without authority withdrew her money and borrowed the money himself without security and gave note, depositor's conduct in receiving the note with full knowledge of the facts and in demanding payment of principal and interest thereon and delaying nine months in asserting demand against bank constituted ratification of unauthorized act of cashier, precluding recovery against bank as depositor; Civ. Code, §§ 2309, 2310, permitting oral ratification under such circumstances.

5. Principal and agent 🔑175(3)—"Ratification" is equivalent to previous authorization and relates back to time when act ratified was done.

"Ratification" is equivalent to a previous authorization and relates back to time when act ratified was done, except where intervening rights of third persons are concerned.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ratification.]

6. Banks and banking 🔑112—Unauthorized withdrawal by cashier of depositor's money constituted "payment," discharging bank's liability where withdrawal was subsequently ratified by depositor.

Where depositor ratified conduct of cashier of bank in withdrawing money from her account for purpose of loan to himself, the effect of the withdrawal was as if it had been done with depositor's authority, and withdrawal therefore constituted "payment" discharging bank's debt.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Payment.]

7. Appeal and error 🔑931(4)—Express finding of payment in support of judgment was not indispensable where issue was raised by pleadings and payment was proved.

Where issue of payment was raised by answer and conclusion of payment necessarily resulted from evidence, express finding of payment in support of judgment was not required.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by P. E. Petray against the First National Bank in Bakersfield. From a judgment for defendant and an order denying plaintiff's motion to vacate the judgment and enter a new judgment in her favor, plaintiff appeals. Judgment and order affirmed.

Wiley & Harvey and Harvey & Hurd, all of Bakersfield, for appellant.

Emmons & Aldrich, of Bakersfield, for respondent.

SHAW, Justice pro tem. [1] The plaintiff appeals from a judgment in favor of the defendant, and from an order denying her motion that the judgment be vacated and a new judgment in her favor be entered upon the findings. The record upon which both appeals are presented contains the judgment roll and a bill of exceptions showing the proceedings upon the motion but none of the evidence given at the trial. We must therefore presume that the evidence supported the findings, and construe the latter as strongly as their language will permit in favor of the judgment, resolving any uncertainties therein against the appellant. The important facts are set forth in the following findings:

"II. That on the 14th day of September, 1922, there was deposited with defendant to the account and credit of plaintiff the sum of $1,800.

"III. That thereafter on the 8th day of November, 1922, one J. K. Russell, the cashier of defendant, without the knowledge of plaintiff, withdrew from defendant said sum of $1,800, which said sum was charged against plaintiff's account, and said Russell at said time drew and executed his promissory note for said sum in favor of plaintiff payable on demand, and placed said note in a sealed envelope with other papers of plaintiff being held by said defendant for plaintiff for safe-keeping.

"IV. That prior to said 8th day of November, 1922, plaintiff had authorized said J. K. Russell to loan said money of plaintiff 'on good security' for the purpose of making and collecting loans for her, and that at all of said times the said Russell was the duly elected and acting cashier of said defendant.

"V. That on or about the 7th day of March, 1924, plaintiff, at the banking room of defendant, discovered for the first time that there was no loan with security therefor, or that said sum of $1,800 was not to her credit with defendant, and then and there received from defendant said sealed note.

"VI. That thereafter said plaintiff demanded of said Russell payment to her of the interest as provided in said note, and thereafter demanded of said Russell the payment in full of said note and interest, but that no part of said principal sum nor interest thereon has been paid to plaintiff.

"VII. That on the 11th day of December, 1924, said plaintiff demanded of the defendant herein the sum of $1,800, which said sum said defendant has refused and neglected to pay to plaintiff."

Plaintiff argues, in support of her appeal, that by the deposit of her money in the defendant bank, the relation of debtor and creditor was created between her and the bank, that the facts stated in the findings do not amount to a novation by which Russell was substituted for the bank as her debtor, and that hence the bank remains liable to her for the amount of the deposit. We are inclined to regard the two premises of the argument as correct, but the conclusion stated does not follow therefrom. The liability of a debtor may be terminated in other ways than by a novation. Novation was not pleaded in the answer as a defense, and the findings do not indicate to us that the judgment was based thereon.

[2] From the findings it appears that Russell was authorized by plaintiff to loan her money on deposit with defendant "on good security." Nothing is said as to the means by which he was to obtain possession of the money for that purpose. Defendant claims that such authority carried with it the implied power to draw the money from the bank for the purpose of loaning it, and that when Russell withdrew the money this was in effect a payment to plaintiff's authorized agent; while plaintiff contends that, since Russell was defendant's cashier and acted for it in permitting the withdrawal of the money, it is chargeable with notice of all the facts known to him and these facts showed that he was exceeding his authority. But in the view we take of the case we do not find it necessary to pass on these contentions, except the point that Russell's acts were in excess of his authority. If he had any authority at all to withdraw plaintiff's money from her account it was necessarily limited to cases where he did so for the purpose of making a loan on good security. The transaction by which Russell took plaintiff's money from the bank and substituted his note in plaintiff's favor therefor was in form a loan to him in behalf of plaintiff, but it was in excess of his authority when made, for two reasons: First, that as plaintiff's agent he could not deal with himself; second, that the loan so made was not secured at all. He could, therefore have no implied power to withdraw plaintiff's money for that loan.

[3, 4] But such a transaction, by which an agent undertakes to deal with himself in the matter of the agency without the intervention of the principal, is not void, but merely voidable, and may be ratified by the principal, upon full knowledge of the facts. 2 Corpus Juris, 702; Burke v. Bours, 92 Cal. 108, 28 P. 57; Burke v. Bours, 98 Cal. 171, 32 P. 980; Sterling v. Smith, 97 Cal. 343, 32 P. 320; Pacific Vinegar, etc., Works v. Smith, 145 Cal. 352, 78 P. 550, 104 Am. St. Rep. 42. A ratification of the unauthorized act of an agent may be express, but in the ordinary case it need not be so. Where an original authorization for the act ratified may be oral, a ratification can be made by accepting or retaining the benefit of the act, with notice thereof. Civil Code, § 2310. In the case at bar an oral authorization would suffice (Civil Code, § 2309); hence the rule just stated applies to it. The findings show that on March 7, 1924, plaintiff was fully informed of Russell's unauthorized acts, and then received from defendant the note which Russell had made in plaintiff's favor to evidence the loan to himself; that she demanded of Russell payment of the interest and later of the principal of the note; and that, failing to obtain either, she then, nine months after she had received the note, demanded of defendant the sum which Russell had withdrawn from her account. We think from these facts the conclusion necessarily follows that she ratified Russell's acts in withdrawing the money and loaning it to himself. Within the meaning of the rule, the note of Russell must be regarded as a benefit. Of course, without the note plaintiff would be entitled, on a repudiation of the transaction as between herself and Russell, to recover the same amount of money from him; but the evidence to substantiate her case would not be so simple, or so easy to procure and present, and the statute of limitations would be shorter than that applicable to a suit on the note. She therefore obtained a benefit by taking and holding the note. The effect of this conduct on her part was intensified by the delay that ensued before she attempted to take a different position. The situation was one where defendant's interest called for prompt action by plaintiff. If she was satisfied to accept Russell's note and ratify the loan to him, defendant had no further concern with the matter; but if she repudiated the loan and held the defendant on the de-

posit, then the latter would have a claim against Russell for breach of duty as its cashier, and prompt action by defendant on this claim might be necessary for its protection.

[5, 6] A ratification is equivalent to a previous authorization, and relates back to the time when the act ratified was done, except in certain cases where the intervening rights of third persons are concerned; and hence the effect of the ratification here is that the withdrawal of the money in question from plaintiff's account, being made by her authority, amounted to payment, and so discharged defendant's debt to her.

[7] There is, it is true, no express finding of ratification or payment; but the issue of payment was raised by the answer, and since from the probative facts found the conclusion of ratification and payment necessarily results, this is equivalent to an express finding of payment, and is sufficient. Scott v. Symons, 191 Cal. 441, 456, 216 P. 604; Potts v. Paxton, 171 Cal. 493, 153 P. 957.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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92 Cal. App. 132

BLALOCK v. RIDGWAY et al. (Civ. 5954.)★

District Court of Appeal, Second District, Division 2, California. May 22, 1928.

Hearing Denied by Supreme Court July 19, 1928.

1. Statutes 🔑181(1)—Primary rule of statutory construction is to determine Legislature's intent.

A primary rule of statutory construction, to which all others must yield, is to determine the intent of the Legislature, and when this intent is ascertained it will not be departed from if it is reasonably possible to avoid it.

2. Schools and school districts 🔑141(5)—Statute requiring written notice as condition precedent to discharge of probationary school teacher held mandatory and not merely directory (Pol. Code, § 1609).

Provision of Pol. Code, § 1609, that board of trustees of school district cannot discharge probationary teachers unless giving teacher notice in writing on or before 10th day of June, in any year, that services will not be required for ensuing school year, *held* mandatory and not merely directory.

3. Schools and school districts 🔑141(5)—Discharge of probationary school teacher held ineffective; written notice of discharge not having been served in time required by statute (Pol. Code, § 1609).

Where unregistered letter notifying probationary school teacher of dismissal by the board of trustees of the school district was not received by her until June 16, and registered letter to same effect was not deposited until June 23d, *held*, that provisions of Pol. Code, § 1609, requiring written notice on or before June 10, was not complied with, and dismissal was ineffective.

Valentine, Justice pro tem., dissenting.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Application for writ of mandate by Virginia L. Blalock against L. A. Ridgway and others, trustees of the Olive School District, and another. Judgment denying application, and petitioner appeals. Reversed.

Ugene U. Blalock, of Porterville, for appellant.

Leroy McCormick and Walter C. Haight, both of Visalia, for respondents.

THOMPSON, J. The plaintiff filed a petition in the superior court seeking the writ of mandamus to compel the board of trustees of the Olive school district of Tulare county, Cal., to draw a warrant for certain salary alleged to be due plaintiff as a teacher in said school, and directing them to reinstate her as such teacher. Judgment was entered denying the peremptory writ, and this appeal is from that judgment.

The record discloses that appellant was a probationary teacher and acting as the sole teacher of the school during the school year of 1926–1927, ending about May 25, 1927, at a salary of $150 per month for the nine months of the school year. An attempt was made to terminate this employment and not to renew it for the succeeding year. As we view the proceeding, the sole question is whether the attempt was effective, or whether by the provisions of the law appellant was re-employed for the school year 1927–1928.

Section 1609 of the Political Code in its essential provisions provides:

> That boards of education "shall have power and it shall be their duty: * * * Second—to employ the teachers, as provided in part fifth of this section; * * * provided, that no board shall enter into any contract with such employees, other than teachers, to extend beyond the close of the next ensuing school year; except that teachers may be elected on or after May second for the next ensuing school year *and each teacher so elected shall be deemed reelected from year to year except as hereinafter specified;* * * * Fifth— * * * (d) To classify as probationary teachers those persons employed as teachers for the school year, and who have not been classified as permanent teachers, as hereinafter provided, such classification to be made at the time of employment, and thereafter in the month of July of each school year. * * * (i) To dismiss probationary teachers during the school year *for cause only*, as in the case of permanent teachers, except that on or before the tenth day of June in any year the governing board may give notice in writing to a probationary teacher that his services will not be required for the ensuing school

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★Hearing denied by Supreme Court.

year. Such notice shall be deemed sufficient and complete when delivered in person to the teacher by the clerk or secretary of the governing board of the school district or deposited in the United States registered mail with postage prepaid, addressed to such teacher at his last known place of address." (Italics ours.)

And there also follows a provision that in the case of permanent teachers they shall not be dismissed except for cause and then only after a hearing and investigation of the charges.

It appears from the testimony of J. H. Hayes, the clerk of the board of trustees, that on May 23, 1927, the board held a meeting, all members being present, at which it was resolved not to employ appellant for the following year; that on the morning of May 25, 1927, Mr. Hayes informed appellant at his home of this action of the board. During the ensuing two weeks appellant discussed this action of the board with Hayes, the clerk, and members of the board, and circulated a petition or paper among the parents stating that they wanted her; this, she says, was done by her upon the suggestion of a board member that if the parents did want her, that it could be taken care of. On June 8, 1927, a written notice was mailed to appellant in Porterville, where she then lived. Appellant testified she received this letter, and there is no contradiction of her testimony, on June 16, 1927. On June 23, 1927, a registered letter was deposited, directed to the appellant, notifying her to the same effect.

The respondents contend that the court was correct in its finding that the appellant had actual notice and that the provisions of the statute were substantially complied with; that the requirements therein contained for the dismissal of a probationary teacher are directory and not mandatory.

[1, 2] The primary rule of statutory construction to which all others must yield is to determine the intent of the Legislature. San Francisco v. Mooney, 106 Cal. 586, 39 P. 852, and Coulter v. Pool, 187 Cal. 181, 201 P. 120. When this intent is ascertained, it will not be departed from if it is reasonably possible to avoid it. People v. Merrill, 24 Cal. App. 210, 140 P. 1075.

In the case of Owens v. Board of Education, 68 Cal. App. 403, 229 P. 881, the court indicates the legislative intent of the act here under consideration, after stating that the statute is known as the Teachers' Tenure Act and quoting the provisions pertinent to that case, says:

> "Thus a 'probationary' teacher is re-elected and re-employed annually until entitled to classification as a 'permanent' teacher, and the board of education is required to report the employment of such teacher annually to the county superintendent. This, in itself, is sufficient to meet the terms of the statute and the teacher thereby becomes *automatically* classified as a permanent teacher at the end of two years of successful service." (Italics ours.)

Again, the opinion says:

> "This contract terminated with the school year of 1921–22, but was *deemed* continued in force unless, before the 10th of June the board should give the appellant notice in writing that her services would not be required for the following school year." (Italics ours.)

Also the court, after stating that the notice was given as required, says:

> "Nothing appearing from which it could be inferred that *a contract under the tenure act arose.* * * * " (Italics ours.)

It seems to us apparent from this authority and from the language of the act, that the legislative intent is manifest to give assurance to the teaching profession of some degree of certainty in their employment—something akin to civil service in other administrative branches of government. With this intent before us, having in mind that the statute provides that each teacher employed for one year shall be deemed reemployed, except discharged for cause after hearing, or in the case of a probationary teacher, by serving her with a notice in writing on or before June 10th, we conclude that the intent and meaning of the law is as though it read: Permanent teachers cannot be discharged except for good cause after hearing, and probationary teachers cannot be discharged except for good cause after hearing, or by serving them with a written notice on or before June 10th, that their services will not be required for the ensuing year. Service of the written notice shall be made personally or by mailing—and if by mail, shall be complete only when deposited in the mail, provided it is registered. It must be apparent that, except for good cause, the board of trustees could not discharge a probationary teacher on April 1st, let us say, so as to dispense with her services for the remainder of that school year. It must be equally clear that on June 11th they could not dispense with her services except for good cause, for the very obvious reason that the law, operating upon their inaction, has brought into being on that day a new contract for the ensuing year which is just as obligatory upon the board as the one which existed on April 1st. It would follow in logical sequence that the Legislature declared its intention to fix the 10th day of June as the dead line—to make the giving of a written notice before that time the essence of the thing to be done to effectuate the discharge. In such cases the requirements of the statute must be held to be mandatory and not merely directory. People ex rel. McKune v. Weller, 11 Cal. 49, 70 Am. Dec. 754. Another manner of phrasing the effect of the statute is to say that the Legislature has defined the limits of the power or jurisdiction of the board of trustees to discharge a probationary teacher, and this constrains us to declare that its provisions are mandatory. Lewis' Sutherland Statutory Construction, vol. 2 (2d Ed.) § 611; Gleason v. Spray, 81 Cal. 217, 22 P. 551, 15 Am. St. Rep. 47. In the latter case the language of the court is this:

> "When a statute says an act cannot be done unless performed in a certain mode, the inhibition against performing it in any other way would seem to be, in view of the word 'cannot,' meaning an absence of power to be just as strong and complete as when the statute says that an act, unless done in a certain mode, shall not be valid for any purpose."

[3] This completely disposes of the argument that the provisions of the statute are directory merely, for the reason that the Legislature has said in effect that the board "cannot" discharge a probationary teacher except in the mode and manner specified. This they did not do. Oral—informal notice was not sufficient under the law; the written—unregistered notice was not served upon her until received by her on the 16th; and the registered notice was not mailed until after the contract of reemployment had been brought into being by operation of law.

Judgment reversed.

I concur: CRAIG, Acting P. J.

VALENTINE, Justice pro tem. I dissent. It is unthinkable that the Legislature should intend to enact any provision which would make the financial interests of a teacher paramount to the best interests, welfare, and proper education of the school children. The whole system of legislation regulating the educational machinery was based upon consideration of the welfare and best interests of the children as the original and fundamental purpose. The proper regulation of the tenure of office and other rights of the teachers was also properly considered and regulated—but the original purpose and fundamental idea was the consideration of the best interests and welfare of the scholars. In every act of the Legislature relating to education, where the intention is not clearly expressed, it must be assumed that the fundamental purpose and primary object of the Legislature was to consider first this welfare and best interests of the children. Every act of the Legislature attempting to regulate the machinery of the system of education must be construed with this elementary and fundamental purpose and intention in mind. No person incompetent, or an improper teacher, for any reason, should be permitted to teach the children. The Legislature has imposed the duty and responsibility of determining and deciding who are and who are not such qualified teachers upon the trustees of the school board. They have this right, duty, and responsibility, and their decision is final in this regard. It is true that the act under consideration is known as the Teachers' Tenure Act, and that the purpose of the Legislature undoubtedly was to protect the teachers and to fix clearly their rights as to their employment as such; but the teachers are employed as a part of the whole scheme and for the purpose of educating the school children. So that in the instant case we have this situation, if we accept the construction of the statute of the prevailing opinion, that after the board had decided that the appellant should not be reemployed as a probationary teacher, they neglected to register the written notice of such decision which was mailed to her on June 8th, two days before the date fixed in the act, and although she had actual verbal notice of this action of the board two days after it was taken, and on the last day of the school year, nevertheless the appellant may insist upon her right to teach and the school children must be taught for another year beginning the following September by a teacher who has been declared, at least by implication, an incompetent or improper person to teach them. It must not be understood that this implies in any way any reflection upon the appellant in this case personally. The record discloses only a local neighborhood controversy, important, no doubt, to the local persons and factions involved. But the court may not concern itself with such matters and must only consider the principles of law involved.

In the instant case the mandatory act was that the board of trustees must decide whether or not the appellant was qualified as a teacher and should be reemployed for another year. They decided she should not be so reemployed. The record does not disclose why, but the board had the responsibility, the duty, and the power to decide this, and their decision was final. This was the determination of the fundamental question involving the best interests and welfare of the children. After deciding this, the statute imposed on them a further duty—to consider the interests of the teacher by giving her notice of their decision that she was not to be reemployed for the succeeding year, so that she might have ample time to govern herself accordingly and make other arrangements. The Legislature provided two methods of giving this notice—either by written notice served personally, or by written notice sent by registered mail prior to June 10th.

In the instant case appellant had actual verbal notice two days after the action of the board, and a written notice mailed on the 8th of June, which, it must be admitted, would have been a sufficient compliance with the statute if it had been registered. So in the last analysis appellant's cause of complaint as to not having received a notice as prescribed by the statute is that the written notice, mailed to her on June 8th, was not registered. In what respect can she claim to have been misled or damaged? There is no such showing made here. The requirement for the return of a registry receipt would seem to be for the convenience of the board rather than the teacher. Buswell v. Supervisors, etc., 116 Cal. 351, at page 354, 48 P. 226. The case of Owens v. Board of Education, 68 Cal. App. 403, 229 P. 881, cited in the prevailing opinion, has, in my opinion, no application here. In that case no question as to the sufficiency of the notice of reemployment was raised. It was assumed that the notice was sufficient. In the instant case the question of the sufficiency of the notice is the main question involved.

The fundamental principle involved in cases of statutory construction, like the present, as the writer understands it, is: Who did the Legislature intend to protect? And so in the case of Gleason v. Spray, 81 Cal. 217, 22 P. 551, 15 Am. St. Rep. 47, also cited in the prevailing opinion, the court justly and equitably held that the intention of the Legislature was to protect the wife in the enjoyment of her rights in the homestead. In the instant case, the school children are to be first protected in their right to have a competent, properly qualified teacher to teach them, and upon the board of trustees is imposed the right and the duty to decide who is so qualified as such a teacher. After they have discharged this duty, then, in justice to the teacher, they must give her such reasonable and timely notice if they decide she is not qualified (as stated above) as will enable her to make other arrangements. Appellant had such notice in the instant case. The arbitrary date of June 10th for this notice to be given has no significance as a particular date. The Legislature might have fixed June 15th, or June 20th, as an indication of the time which they considered would be reasonable.

The paragraph in the statute which provides the procedure for dismissal contains two sections. In the first sentence it is provided that the board may give notice by June 10th that the teacher's services will not be required. There is no question but that notice was given in due time to appellant. The next sentence of the paragraph provides a method for serving the notice which, if followed, will be deemed sufficient. It might well be argued that the statute does not provide that it is obligatory to give the notice in the manner suggested; nor is it provided that actual notice given in some other manner will not be sufficient, and that it "none the less fully served the purpose for which it was designed." Shorr v. City of Azusa, 38 Cal. App. at page 712, 177 P. 515.

The determination of the teacher's qualification to teach is the fundamental consideration, and this is mandatory; the giving of the notice of this determination is directory. In People v. Lake Co., 33 Cal. at page 492, the court says:

> "The books are teeming with cases in which the court has come to the aid of the Legislature, and by construing one provision of an act as mandatory and another as directory, so as to make them harmonize with the principal purpose of the act, have made its operation possible." McCrea v. Haraszthy, 51 Cal. at page 150; Hart v. Plum, 14 Cal. 148.

In People v. Cook, 14 Barb. (N. Y.) at page 290, the court says:

> "Whether these other provisions of the statute, which have not been strictly observed in this case, are to be regarded as directory, or mandatory or not, must depend upon a sound construction of the nature and object of the requirements."

The judgment should be affirmed.

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92 Cal. App. 156

FAIRBANKS et al. v. MACREADY.★
(Civ. 6273.)

District Court of Appeal, First District, Division 1, California. May 23, 1928.

Rehearing Denied June 21, 1928. Hearing Denied by Supreme Court July 19, 1928.

1. **Appeal and error ⟹1078(1)—Contention contained in appellants' opening brief, but abandoned in closing brief, will not be considered.**

Where contention of appellants in opening brief was abandoned in the closing brief, such contention will not be considered by the appellate court.

2. **Injunction ⟹62(3)—Plaintiffs held not entitled to injunction against alleged violation of private residence restriction in deed, in view of finding showing occupation as residence of house containing five bedrooms.**

In action to enjoin alleged violation of uniform building restrictions contained in deed, plaintiffs *held* not entitled to judgment restricting defendant's use of building to private residential purposes, in view of finding that house is occupied by defendant, his wife, and other members of his household, notwithstanding house contains five bedrooms, since it does not follow that because there are extra bedrooms same are going to be rented.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Frederic G. Fairbanks and another, for themselves and all other similarly situated, against B. MacReady, to enjoin the violation of uniform building restrictions. Judgment for defendant, and plaintiffs appeal. Affirmed.

For modification of opinion, see 268 P. 947.

Joe Crider, Jr., and Denis & Griffith, all of Los Angeles, for appellants.

F. R. McNamee and Luke J. McNamee, both of Los Angeles, for respondent

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★Rehearing denied. Hearing denied by Supreme Court.

KNIGHT, J. This suit was brought to enjoin an alleged violation of certain uniform building restrictions contained in a deed to a lot which formed a part of a tract of land, platted, subdivided, and sold pursuant to a general plan or scheme for the improvement and development of the whole tract. Judgment was entered in favor of defendant, and plaintiffs appeal.

The building restrictions in question provided:

> "That the premises shall be used for residence purposes only; that no apartment house, double house, flat, lodging house, hotel, or any building or structure whatever other than a first-class private residence with the customary outbuildings, including a private stable or garage, shall be erected, placed, or permitted on said premises or any part thereof; that such residence shall cost and be fairly worth not less than $5,000. * * *"

The appeal is taken upon the judgment roll alone, and the main question presented is whether the findings are legally sufficient to support the judgment. The following are the facts as they are established by the findings: The defendant was about to have moved on to the lot acquired by him in said tract an old two-story structure which was in a dilapidated condition and not fairly worth the sum of $5,000, for the purpose of altering and rebuilding the same; and the plaintiffs, claiming that said structure when completed would not be worth $5,000 and would not be a first-class private residence either in construction, appearance, or otherwise, nor in keeping with the other type or character of buildings on said tract, protested in writing to defendant against the same being placed on said lot. The protest was ignored and thereupon plaintiffs commenced this suit, obtained a restraining order, and applied for a temporary injunction. At the time the application for a temporary injunction was heard, however, the trial court found that, notwithstanding said structure was not at that time a first-class dwelling house nor worth the sum of $5,000, it could be converted into a first-class dwelling house and be worth more than $5,000. Upon the grounds mentioned the application for a temporary injunction was denied and the restraining order vacated "without prejudice," however, the court declaring that:

> "Defendant's future work, construction, and alterations upon said lot in connection with said structure so moved onto said lot by them being at his peril should the building when completed not fully comply with the building restriction set up in the complaint herein."

The cause afterwards came on for trial on the merits, and the court found that defendant had altered said structure and prosecuted the construction work to a completion so that said structure at that time was reasonably worth in excess of $5,000, to wit, the sum of $7,500, and did not in any manner violate any of the building restrictions conditions, or reservations imposed by the terms of said deed, but, on the contrary, conformed thereto; and, therefore, judgment was entered in favor of defendant.

[1] Plaintiffs contended in their opening brief that, in the absence of a supplemental answer alleging compliance with the building restrictions between the time the case was at issue and the date of trial, the judgment in defendant's favor is not supported by the pleadings, but this contention was abandoned in the closing brief. Plaintiffs' second contention is that in any event, they were entitled to a judgment restricting defendant's use of the building to private residential purposes, the contention being based upon the following findings:

> "That on some occasions, for short periods, defendant has rented rooms in said structure, *prior to removal*, to relations and friends while defendant MacReady and his family has resided therein. That said building has five bedrooms." (Italics ours.)

[2] Assuming, as plaintiffs claim, that to rent the rooms in said house would constitute a violation of the "private residence" restriction contained in the deed, and would therefore entitle plaintiffs to injunctive relief there is nothing in the findings indicating that since moving said building on to the lot in question defendant rented or that he threatens or intends to rent any of the rooms therein. True, the building contains five bedrooms, but the findings show that the house is occupied by "the defendant MacReady, his wife, and other members of his household," and it may be inferred therefrom that all of said bedrooms are necessary for the convenient use and occupation of regular members of the family and the servants, or for the accommodation of house guests. At any rate, because a dwelling contains one or two extra bedrooms it does not follow that the same are going to be rented. Defendant therefore cannot be enjoined from doing something which he has not threatened to do, nor is in fact doing.

The court further found that the restriction limiting the use of said lots to "first-class" private residences was indefinite and therefore unenforceable, and plaintiffs attack the soundness of this finding. But whether the trial court was right or wrong in its conclusion on that issue becomes immaterial on this appeal, for the reason that, assuming, as plaintiffs contend, that the restriction is valid, the trial court nevertheless found that it was not violated, and therefore in no event were plaintiffs entitled to a judgment.

The judgment is therefore affirmed.

We concur: TYLER, P. J.; PARKER, Justice pro tem.

91 Cal. App. 788

PEOPLE v. MANCHELL. (Cr. 1464.)

District Court of Appeal, First District, Division 2, California. May 17, 1928.

1. Larceny ⚷28(4)—Information stating time, place, and from whom money was stolen held not objectionable for not stating exactly what kind of grand theft was charged (Pen. Code, § 952, and § 950, subd. 2).

In prosecution for grand theft, where information stating time, place, and from whom money was stolen was objected to on appeal as not stating exactly what kind of grand theft was charged in compliance with Pen. Code, § 950, subd. 2, *held*, that objection was without merit, since information complied with section 952, providing that in charging theft it shall be sufficient to allege defendant unlawfully took property of another.

2. Criminal law ⚷1169(2)—Admission of judicial record without establishing it to show flight held not prejudicial, if error, where it was cumulative with testimony (Code Civ. Proc. § 1905).

In prosecution for grand theft, where detective from another state testified to defendant's flight from that state, and judicial record of police court of foreign state was introduced without proving it, as required by Code Civ. Proc. § 1905, *held* that, since oral testimony to show flight and document were cumulative in character, document was not prejudicial, even if admission of it was error; all evidence of what occurred in foreign state being expressly limited by court's instructions to purpose of proving flight.

3. Criminal law ⚷720(8)—Comment of prosecutor on statements by defendant in larceny case held not prejudicial, being made to refute inference of innocence and based on evidence.

In prosecution for grand theft, where prosecutor in argument to jury when commenting on statements made by defendant stated that defendant believed he could talk himself out of it, and that he had lot of luck in some other parts of country talking, *held*, that comment was not prejudicial, being in refutation of any inference of innocence that might be drawn from voluntary character of statements made by defendant to police officers and district attorney based on evidence of activities of defendant elsewhere.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Lee Manchell was convicted of grand theft, and he appeals. Affirmed.

H. L. Meyers, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Waldemar Augustine, Deputy Atty. Gen., for the People.

KOFORD, P. J. Defendant appeals from a judgment of conviction of the crime of grand theft. The appellant was employed by Harley S. Tyler and W. H. Rice, copartners, to manage a water circus which was a part of a Labor Day celebration for the firemen's benefit fund of Fresno in 1927. He was employed on a weekly salary, plus a percentage of profits. He was intrusted with funds for the purpose. At the conclusion of the affair the appellant left for his employer a brief statement of his accounts and a sum of money which purported to be the entire balance in his hands belonging to said Tyler and Rice. Then he left the city, giving a false address. The amount thus left proved to be several hundred dollars short. He was arrested ten days later in Wichita, Kan., on a telegraphic felony warrant from Fresno, but was there booked on a charge of vagrancy and released on a $1,000 bail bond. He forfeited the bail and departed. In October he was located in Birmingham, Ala., where he was arrested and returned to Fresno for trial. The evidence upon which appellant was convicted showed that the particular kind of grand theft of which he was guilty was embezzlement.

The charging part of the information upon which appellant was tried reads as follows:

> "The district attorney for the county of Fresno, state of California, hereby accuses Lee Manchell of a felony, to wit, grand theft, in that the said Lee Manchell on or about the sixth day of September, nineteen hundred and twenty-seven at and in the said county of Fresno, and state of California, unlawfully took the property of Harley S. Tyler and W. H. Rice, consisting of $373.72 in lawful money of the United States, of the value of $373.72 in gold coin of the United States."

[1] Appellant did not demur to the information, but he claims now on this appeal that the information is insufficient in not stating exactly with what kind of grand theft he was charged. He claims this must be done in order to comply with Penal Code, § 950, subd. 2.

The point is without merit. The information states the time, place, and from whom the money was stolen. As to the manner of stealing the money, it is provided in Penal Code, § 952, as amended by St. 1927, p. 1043, that "in charging theft it shall be sufficient to allege that the defendant unlawfully took the property of another." Such an information has been held sufficient under the present code sections. People v. Plum (Cal. App.) 265 P. 322.

[2] For the purpose of proving flight of the defendant, the prosecution called as a witness J. E. Maness, a detective in the police force of Wichita, Kan. He testified that he saw the defendant strap a trunk on his automobile in front of his hotel, then have the gasoline tank filled and the tires tested at a gasoline station, and that on the following day when the defendant's case was called the defendant did not appear. There was also received in evidence at the trial a document made and signed by the judge of the police court at Wichita, Kan. The witness Maness

testified that this document was an original paper which the judge was required to prepare, sign, and transmit to the city attorney for the purpose of enabling a suit to be commenced for judgment upon the defendant's bail bond. He testified to the genuineness of the signature of the judge, and stated that the paper was an original, not copied from anything. This exhibit appears to be a statement of the case of vagrancy against the defendant, showing the steps of the proceeding and that the bail bond had been declared forfeited. At the trial numerous objections were made to the admission of this document in evidence called Exhibit No. 9, but on this appeal appellant confines his argument to the point that the document is a judicial record of a sister state and as such could be proved only by the method stated in Code of Civil Procedure, § 1905. This section states that it may be proved by the attestation of the clerk and seal of such court, if there be a clerk and seal, together with a certificate of the presiding magistrate that such attestation is in due form. Appellant does not cite nor rely on cognate sections of the Code of Civil Procedure, which deal directly with judgments of justice courts of a sister state. Code Civ. Proc. §§ 1921, 1922.

If the proceedings had before the police court in Kansas were required to be proved at the trial as an indispensable part of a cause of action, as where it is claimed to be a binding judgment definitely establishing rights between adverse parties, then this record would call for a decision as to whether the method of proof of a judicial proceeding of a sister state described in section 1905, Code of Civil Procedure, and other sections, is the exclusive method permitted. But this is not such a case. Here the important question is, Did the defendant flee in fear of facing the accusation of crime in California? not what the court did about it after he fled. It has been held that, where a judicial record is offered merely to show that it exists, it may be admitted upon any satisfactory evidence of its identity. Phelps v. Hunt, 43 Conn. 194. The facts and circumstances showing that defendant failed to appear at the trial and showing why he so failed to appear were things that could be testified to by any witness having knowledge of these facts. This was done at the trial by oral testimony independently of the document, Exhibit No. 9. This oral testimony tending to show flight of the accused is also clear enough to make the receipt in evidence of the document cumulative in character, and not prejudicial, even though it should be held to have been error. All the evidence of what occurred in Kansas was expressly limited by the court's instructions to the purpose of proving flight.

[3] The district attorney in his argument to the jury stated:

> "I made him [the defendant] no promise of any kind and he did talk freely. And why? Because he had confidence enough in his gift of gab to talk himself out of it. He had a lot of luck in some other parts of this country talking. When he was in Kansas, and when he was back in Alabama. * * *"

This remark was assigned as prejudicial to the substantial rights of the defendant. The context of the remark shows that it was made in refutation of any inference of innocence that might be drawn from the voluntary character of the statements made by the defendant to the police officers and district attorney. The evidence of the activities of the defendant in Kansas and Alabama made the remark of the district attorney come within the bounds of legitimate argument before the jury. The record also shows that no error occurred by reason of this remark because the assignment was not properly made.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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92 Cal. App 1

EGAN v. PACIFIC SOUTHWEST TRUST & SAVINGS BANK. (Civ. 5138.)

District Court of Appeal, Second District, Division 1, California. May 17, 1928.

1. Brokers 🔑43(3)—Receipt and agreement to sell held not written authorization to broker, required by statute (Civ. Code, § 1624).

In action for real estate broker's commission where broker relied on receipt from broker for deposit given to owner, and on agreement by owner to sell, reciting terms, as constituting written authorization to sell, required by Civ. Code, § 1624, *held*, that such instruments did not comply with statute.

2. Brokers 🔑86(3)—Mere giving of check by purchaser to broker, who turned it over to vendor, did not evidence purchaser's acceptance of vendor's offer to sell.

In action for real estate broker's commission, construing memorandum as agreement on part of vendor to pay broker out of purchase price, mere giving of check by alleged purchaser to broker, who in turn gave it to vendor after indorsement, did not evidence acceptance by purchaser of vendor's offer to sell.

3. Brokers 🔑86(3)—Prospective purchaser held not to have contracted to purchase where only evidence was check, which was insufficient to establish acceptance.

In action for real estate broker's commission, where prospective purchaser testified she was ready, able, and willing to purchase property, but did not testify she ever promised to purchase it from vendor, and there was no evidence of such promise aside from check payable to broker and transferred by her to vendor, which check was never cashed, *held*, that since check was insufficient to establish that offer had been accepted, prospective purchaser had not entered into any contract which would have bound her to complete purchase.

4. Brokers ⚷86(3)—In action for broker's commission, admission of vendor that broker had sold property did not establish sale in absence of authority to make sale or evidence that sale or binding contract was made.

In action for real estate broker's commission, admission of vendor that broker had sold property for her *held* not sufficient to establish sale, in absence of authority to broker to make sale, and in absence of any evidence that sale was ever consummated or binding contract of sale ever made.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by E. S. Egan against the Pacific Southwest Trust & Savings Bank, executor of the estate of Rose E. Davis, deceased, for real estate broker's commission. Judgment for plaintiff, and defendant appeals. Reversed

Martin M. Levering, Jesse F. Waterman, and A. W. Hutton, all of Los Angeles, for appellant.

Fred W. Morrison, of Los Angeles, for respondent.

YORK, J. This is an appeal by defendant from a judgment of the superior court in favor of the plaintiff and against the defendant, as executor of the will of Rose E. Davis, deceased, for the sum of $1,000 found to be due plaintiff for securing for said Davis a purchaser for certain real estate.

The defense is, first, that there was no agreement or memorandum in writing authorizing or employing plaintiff as agent or broker to sell the real estate for said Davis, and, second, that plaintiff did not procure a purchaser ready, able, or willing to purchase the real estate. Plaintiff relies upon two written instruments and certain corroborative evidence.

The instruments are as follows:

"L. A., Cal., Sept. 1, 1923.

"Received of Mrs. E. S. Egan $500.00 (five hundred dollars) deposit on flats 3804–3806 Wall St. Price to be $11,000.00 (eleven thousand dollars). Rose E. Davis."

"L. A., Cal., 1, 1923.

"I agree to sell flats located at 3806–3804 Wall St. Price to be $11,000.00 (eleven thousand dollars). $10,000.00 (ten thousand dollars) net to me. $1,000.00 (one thousand dollars) for Mrs. E. S. Egan, less escrow charges. Agreed $3,500.00 (thirty-five hundred dollars) down. $7,500.00 (seventy-five hundred dollars) first mortgage at 7 per cent. for three years.

"Rose E. Davis."

[1, 2] The first point discussed in appellant's opening brief is the construction of said written instruments, contending that they do not evidence employment of plaintiff as required by section 1624 of the Civil Code. The writings above set forth do not purport to authorize plaintiff to act for said Davis. That it was not so intended is corroborated by the fact that the prospective purchaser, Miss Tracie, was introduced to said Davis by plaintiff several days before the instruments were executed and at a time when it is not contended by respondent that she had any authority to represent said Davis, and any agreement for the sale, if any there was, appears to have been made on the same day as the alleged authority to plaintiff, and the prospective purchaser's check, although appearing to have been signed on the same day, was made prior to the signing of any writing by said Davis, as indicated by reference to it in the testimony in which it is referred to. Construing the memorandum as an agreement on the part of said Davis, it was at most only a memorandum of an agreement to pay plaintiff $1,000, less escrow charges, out of the sum of $11,000, the price for which said Davis had offered to sell the property. There is no evidence that the prospective purchaser ever accepted said proposition of Davis. A mere giving of a check for $500 by Miss. Tracie to plaintiff and plaintiff in turn turning it over to said Davis after indorsement by plaintiff was not sufficient evidence of acceptance by Miss Tracie of the offer of Davis to sell. Gunn v. Bank of California, 99 Cal. 349, 352, 33 P. 1105.

[3, 4] As to the second proposition, the prospective purchaser did not enter into any contract which would have bound her to complete the purchase. Although she says she went once or twice to the "escrow" office, she had no conversation or communication with said Davis about meeting her there. There is no evidence as to the fact of why the transaction was not consummated or whether said *Davis* ever refused to consummate it. Certain it is that said Davis did not make the sale, and she received no money in the transaction or any offer of performance on the part of the prospective purchaser.

There is no evidence as to whether an escrow was ever made or whether any certain escrow office had ever been selected to transact the business. Evidence that said Davis had admitted that plaintiff had sold the property for her is not sufficient to establish that fact in the absence of authority to plaintiff to make the sale or find a purchaser, and in the absence of any evidence that the sale was ever consummated and in the absence of any evidence that any binding contract of sale was ever made.

Although the prospective purchaser testified that she was ready, able, and willing to make the purchase of the property, she did not testify that she ever promised to purchase it from said Davis, and there was no evidence of such promise, aside from the said $500 check payable to plaintiff and transferred by her to said Davis, which check was never cashed and which check in itself was insufficient to establish that said Davis' offer of sale had ever been accepted. There is some indirect evidence that the check was destroyed, but no evidence that it was or was not presented for payment, but the evidence shows that it was never paid by the bank on which it was drawn.

As was said in Gunn v. Bank of California, supra:

> "An agent authorized to sell real estate does not earn his commission by procuring a person to proceed so far as paying a part of the agreed price, but who entered into no obligatory contract of purchase."

See Hicks v. Christeson, 174 Cal. 717, 718, 164 P. 395.

It is corroborated by judicial history that paragraph sixth of section 1624 of the Civil Code was enacted "to prevent the assertion of false claims for compensation by brokers and agents against owners of real estate, which could be done with facility under the former rule." Toomy v. Dunphy, 86 Cal. 639, 642, 25 P. 130, 131.

When a law has been enacted for the purpose of protection against the assertion of unfounded claims, it should be so construed as to effect the object of the enactment. The cases of Patterson v. Torrey, 18 Cal. App. 346, 123 P. 224; Irwin v. Klimper, 56 Cal. App. 434, 205 P. 714; Gunn v. Bank of California, supra; Lindley v. Fay, 119 Cal. 239, 51 P. 333; Mattingly v. Pennie, 105 Cal. 514, 39 P. 200, 45 Am. St. Rep. 87—lend support to both of appellant's contentions.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

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92 Cal. App. 35

HERLIHY v. REILLY. (Civ. 5135.)

District Court of Appeal, Second District, Division 1, California. May 18, 1928.

1. Malicious prosecution 🔑15, 26—To recover for malicious prosecution, plaintiff must show criminal action was instigated through malice and without probable cause.

In order to prevail in actions for damages based on "malicious prosecution," it is incumbent on plaintiff to allege and prove that criminal action, which it is claimed was maliciously prosecuted, was instigated through malice and without probable cause.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Malicious Prosecution.]

2. Trial 🔑295(1)—In determining effect of given instruction, it must be considered with other instructions.

In determining effect of given instruction, it must be considered with all other instructions given by trial court; and, if on reading the whole body of instructions, law is fairly stated without conflict, fact that one instruction fails to contain complete statement of law applicable to case does not present such condition as necessarily to indicate reversible error.

3. Trial 🔑296(2)—Instruction that plaintiff should recover if no probable cause existed for prosecution of criminal action held not misleading because omitting element of malice, in view of other instructions.

Instruction in malicious prosecution action in effect that, if no probable cause existed for prosecution of criminal action against plaintiff, verdict should be for plaintiff, *held* not misleading because omitting element of malice, in view of other instructions that, before plaintiff could recover, it must appear in bringing criminal action against plaintiff that defendant was actuated by malice and without probable cause.

4. Appeal and error 🔑1067—Refusing instruction in action for malicious prosecution that fact that plaintiff was not tried was no evidence of want of probable cause held not prejudicial, where facts regarding plaintiff's guilt of crime changed were introduced.

In action for malicious prosecution, refusing instruction that fact that plaintiff was not tried on charge of disturbing peace and that charge was dismissed against her was no evidence of want of probable cause for prosecution *held* not prejudicial, where all facts with reference to whether defendant in criminal action had actually conducted herself as charged in criminal complaint were introduced in evidence.

5. Malicious prosecution 🔑55—In action for malicious prosecution, under general allegation of damages, plaintiff may recover for injured feelings.

In action for malicious prosecution, under general allegation of damages, plaintiff may be entitled to recover damages for injured feelings.

6. Appeal and error 🔑1004(1)—Unless verdict appears to have been given under influence of passion and prejudice, it cannot be set aside.

Unless verdict appears to have been given under influence of passion and prejudice, it cannot be set aside on appeal.

7. Malicious prosecution 🔑69—$1,000 in action for malicious prosecution for alleged disturbance of peace held not excessive.

Verdict for $1,000 to plaintiff, in action for malicious prosecution of criminal action, in which plaintiff was charged with crime of disturbing the peace by loud and abusive language, quarreling, and traducing to quarrel, and other offensive conduct, *held* not excessive.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action for damages for malicious prosecution by Katherine Herlihy against Juliet Reilly, sometimes known as Juliet Shelby, and also known as Mary Miles Minter. From a judgment for plaintiff, defendant appeals. Affirmed.

O'Melveny, Millikin, Tuller & Macneil, James C. Sheppard, Jr., and John R. Girling, all of Los Angeles, for appellant.

Henry G. Bodkin, of Los Angeles, for respondent.

HOUSER, J. Defendant appeals from a judgment rendered against her for damages in an action based upon her alleged malicious prosecution of plaintiff in a criminal action in which plaintiff was charged with "the crime of disturbing the peace," in that she did "willfully, unlawfully, and maliciously disturb the peace and quiet of the complainant [this defendant] by loud and abusive language, quarreling, and traducing to quarrel, and other offensive conduct."

The first point presented by appellant is that the trial court erred in giving to the jury the following instruction:

> "If from the evidence in this case you believe that, prior to the filing of the criminal complaint in the justice's court of Pasadena township, plaintiff herein had not used loud or abusive language, or quarreled or traduced defendant, Juliet Reilly, sometimes known as Juliet Shelby and Mary Miles Minter, to quarrel, and was not guilty of any other offensive conduct; and if you further believe that said defendant did not fairly present the facts regarding the conduct of plaintiff herein to J. Russell Morton, the justice of the peace of Pasadena township, then I instruct you, as a matter of law, that the defendant did not have, under such circumstances, probable cause for the filing of such complaint, and your verdict must be for the plaintiff."

[1] Appellant first complains of that part of the instruction by which in effect the jury was told that, if no probable cause existed for the prosecution of the criminal action against plaintiff, a verdict should be rendered in her favor. In order to prevail in actions for damages based upon malicious prosecution, the law appears well settled that it is incumbent upon the plaintiff to allege and prove that the action which it is claimed was maliciously prosecuted was instigated through malice and without probable cause. Appellant directs attention to the fact that the questioned instruction omitted the essential element of a finding of malice on the part of defendant, and consequently was an authorization by the trial court for the return of a verdict in favor of plaintiff on a finding of a lack in defendant of probable cause only for the institution of the criminal action.

[2, 3] It is a universal rule of law that in determining the effect of a given instruction it must be considered in connection with all other instructions given by the trial court. In other words, by no one instruction is the entire law of the case required to be stated; but, if upon a reading of the whole body of instructions the law is fairly stated without conflict, the fact that one instruction fails to contain a complete statement of the law applicable to the case does not present such a condition as necessarily to indicate reversible error. 24 Cal. Jur. p. 857 et seq. From the record herein it appears that by at least six separate instructions the jury was told that before plaintiff would be entitled to recover in the action it must appear that, in the bringing of the criminal action against plaintiff, defendant was actuated by malice and without probable cause. In addition thereto, the jury was repeatedly instructed in effect that unless the evidence established the fact that in instigating the criminal action against plaintiff defendant was actuated by wrong motives, that is, by some "evil and sinister purpose"—constituting malice—a verdict must be reached in favor of defendant. It therefore becomes clear that, while the instruction under attack was defective in that in itself it did not contain all the foundational elements necessary to the support of a verdict in favor of plaintiff, nevertheless, when such instruction is read together or in connection with either or all of the other instructions relating to the requisites of a valid verdict in favor of plaintiff, it cannot be said to be so far wrong as to have misled the jury to the injury of the defendant in the action.

The case of Stephenson v. Southern Pacific Co., 102 Cal. 143, 34 P. 618, is illustrative of the principle here involved. Therein the plaintiff recovered damages for personal injuries sustained by her by reason of the negligence of the defendant. The contributory negligence of the plaintiff was an issue at the trial. On the appeal it was urged by the appellant that prejudicial error was committed by the trial court in giving to the jury the following instruction:

> "If the jury believe from the evidence that the defendant was guilty of negligence as charged in the complaint, and that the plaintiff was injured thereby, your verdict should be for the plaintiff, and that whether such negligence appears or is proved by the testimony on the part of the plaintiff or by defendant's own witnesses."

In discussing the effect of the obvious defect in such instruction in its failure to take into consideration the possible contributory negligence of the plaintiff, the court said:

> "* * * This instruction entirely ignores the question of contributory negligence on the part of plaintiff, and is, therefore, not in itself a complete and correct statement of the law, and the defendant insists that the judgment should be reversed for this reason. In answer to this contention it is sufficient to say that the rule is well settled here that instructions are to be read and considered as a whole, and the fact that, when taken separately, some of them

may fail to enunciate in precise terms, and with legal accuracy, propositions of law does not necessarily render them erroneous. 'It is sufficient if all the instructions taken together, and not being inconsistent with each other or confusing, shall give to the jury a fair and just notion of the law upon the point discussed.' [Citing cases.] Tested by this rule, we do not think the particular instruction complained of could possibly have misled the jury."

And, again, after directing attention to other instructions given by the court in which the principle of contributory negligence applicable to the case was announced, the opinion of the Supreme Court continues:

> "It will thus be seen that the jury were over and over again instructed in clear and explicit language that the plaintiff was not entitled to recover unless she was at the time of the accident herself exercising ordinary care to avoid the injury of which she complained, and it is not reasonable to suppose that the jury was misled to the prejudice of appellant because the first instruction omitted to say anything upon the subject of the effect of contributory negligence upon plaintiff's right of recovery."

The syllabus in McFaul v. Madera F. & T. Co., 134 Cal. 313, 66 P. 308, contains the following:

> "An instruction directing the minds of the jury to an inherent defect in the machinery, which the defendant might have discovered by reasonable diligence, and of which the plaintiff was ignorant, and could not discover in the ordinary course of his employment, and predicating recovery thereon, is not misleading, because not comprising every element of recovery, where all of the elements essential to a recovery by the plaintiff were fully set forth in other portions of the charge, which must be construed together with such instruction."

And see, generally, 24 Cal. Jur. p. 861, where the California authorities are cited.

Among other things, it may be noted that the criticized instruction contains the statement that, if from the evidence the jury should find that on the occasion in question the defendant in the criminal action had not used loud or abusive language, or quarreled with or traduced the complaining witness therein to quarrel, or was not guilty of any other offensive conduct, etc., no probable cause existed for instigating the charge against the defendant in the criminal action. The verdict is tantamount to a finding that the defendant in the criminal action was not guilty of any or either of the several charges of misconduct on her part as specified in the instruction. But while such a finding in itself probably would be insufficient as a basis for a conclusion that the criminal action was instigated from malice by the defendant against the plaintiff, when such implied finding is considered in connection with an instruction given by the trial court to the jury that malice might be inferred from the fact (if the jury so found) that the prosecution of the defendant in the criminal action was sought by the prosecutrix, not from a desire on her part that peace and order be preserved, but to satisfy some personal grudge, the conclusion is strengthened that in the verdict the finding is written, at least between the lines, that malice in fact was present in the mind of the prosecutrix in instigating the criminal action which was the basis for the case at bar. In any event, it is most manifest that, had the instruction of which complaint is made contained the specific additional requirement of malice necessary to the maintenance of the action and the support of a verdict for plaintiff herein, no different result would have been reached.

Appellant presents further criticism of the instruction in question, in that the verdict in favor of plaintiff is predicated upon what the jurors believed as to whether prior to the issuance of the criminal complaint defendant fairly presented the facts regarding plaintiff's conduct to the justice of the peace before whom defendant appeared and swore to the complaint in the criminal action, rather than what was the honest and reasonable belief of defendant regarding the alleged criminal conduct of plaintiff. But while from a strict literal construction such instruction may convey the meaning which appellant would attribute to it, when read with other instructions given to the jury its purport is entirely in harmony with appellant's contention of what constitutes the law with reference to the subject-matter of the instruction. At any rate, as heretofore suggested, the point to which appellant refers is so thoroughly and exhaustively covered by other instructions given by the trial court to the jury that, if by any stretch the point in the abstract might be considered as well taken, by reason of such other declarations of the law its force is spent and it becomes of no avail in the premises.

A third objection to the instruction raised by appellant is that by the language contained therein the jury, in accordance with its "belief," was authorized to determine whether the defendant in the criminal action had so conducted herself that in effect she had committed "no breach of the peace." In the main, such objection is subject to the same criticisms as heretofore have been indulged with reference to the other points presented by appellant relating to the alleged frailties of such instruction. But, in addition thereto, the point is not available to appellant because, taken in connection with the whole of such instruction, its apparent meaning is that, if from the evidence the jury believed that as a matter of fact on the occasion in question the defendant in the criminal action did not use loud or abusive language, etc., notwithstanding which the prosecutrix intentionally misrepresented to the justice of the peace that she had done so, no probable cause existed for the issuance of the criminal complaint.

[4] Appellant predicates error on the refusal of the trial court to give to the jury an instruction requested by defendant that:

> "The fact that plaintiff, Herlihy, was not tried on the charge of disturbing the peace and that the charge was dismissed against her is no evidence of want of probable cause for the prosecution."

While the authorities are in conflict, their weight probably is to the effect that such an instruction should be given. However, as the evidence in the instant case discloses the fact that the criminal action was dismissed "upon the motion of the complaining witness," it would seem that, in accordance with the special rule announced in some of the authorities, in such circumstances at least, a dismissal of the action was some evidence going to the merits of the question of probable cause; but in any event, in view of the fact that all the facts with reference to whether the defendant in the criminal action had actually conducted herself as charged in the criminal complaint were introduced in evidence, it is clear that, assuming, without deciding, that the instruction should have been given to the jury, the effect of its refusal could not have been that thereby the plaintiff was awarded a verdict when otherwise the verdict would be in favor of the defendant. In other words, in the circumstances, the refusal of the instruction was not prejudicial to the substantial rights of defendant.

It is also urged by appellant that the evidence was insufficient to support the verdict. It would serve no useful purpose to herein set forth the evidence adduced on the trial of the action. Suffice it to say that, after an examination of the evidence, this court is convinced that it sufficiently meets the requirements of the law to justify the conclusion reached by the jury in its verdict and by the trial court in its judgment thereon.

[5-7] Finally, appellant complains that the verdict in the sum of $1,000 was excessive. Attention is directed to the fact that plaintiff's damage for loss of time only was the sum of $16; but it is clear that such an item would fail to take into consideration possible injury to the feelings of plaintiff occasioned through and by the alleged malicious prosecution. In the case of Shatto v. Crocker, 87 Cal. 629, 25 P. 921, it is ruled that in an action of the nature of that here in question, under a general allegation of damages, the plaintiff may be entitled to recover for injured feelings. In any event, if nothing was allowed by the jury on account of the humiliation suffered by plaintiff by reason of her malicious prosecution, the rule is well established that, unless the verdict appears to have been given under the influence of passion and prejudice, it cannot be set aside. Scott v. Times-Mirror Co., 181 Cal. 345, 366, 184 P. 672, 12 A. L. R. 1007. Taking into consideration the circumstances present at the time and immediately following the arrest of plaintiff, it cannot be said that the verdict was excessive.

The judgment is affirmed.

We concur: CONREY, P. J.; HAHN, Justice pro tem.

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92 Cal. App. 52

VEDDER v. BIRELEY et al. (Civ. 3506.)

District Court of Appeal, Third District, California. May 19, 1928.

1. Evidence ⚷557—Excluding testimony of expert witness, where his answers to questions regarding speed of automobile at time of accident were evasive and unsatisfactory, held not abuse of discretion.

In action for damages for personal injuries alleged to have been caused by automobile, excluding testimony offered by plaintiff concerning experiments made by an expert in an attempt to show rate of speed at which automobile driven by defendant was traveling at time of accident, where answers of expert to other questions were evasive and unsatisfactory, *held* not abuse of discretion warranting reversal.

2. Evidence ⚷553(1)—Excluding expert's answer to hypothetical question whether brakes were properly adjusted on car leaving skid marks continuous on one side and intermittent on other held error.

In action by pedestrian for personal injuries alleged to have been caused by automobile, excluding testimony of expert witness in answer to hypothetical question based on conditions indicated and calling for an answer as to whether brakes on such a car leaving such marks were properly adjusted *held* error, since evidence was pertinent and material on question of condition and adequacy of brakes.

3. Automobiles ⚷246(41)—Instructions in action by pedestrian struck by automobile regarding statutory duty to provide adequate brakes held improperly refused under evidence (Motor Vehicle Act).

In action by pedestrian for personal injuries sustained when struck by automobile, refusing instructions regarding duty to provide adequate brakes and that failure to use reasonable care to comply with Motor Vehicle Act (St. 1923, p. 517) provision regarding brakes would be negligence, as matter of law, *held* error, under evidence showing that car traveled some 93 feet from time brakes were applied until it stopped after hitting tree, and that tires on curb side were flattened out, and that rim of front wheels cut gashes in concrete curb.

4. Automobiles 🔑246(4)—Refusing instruction that greater amount of care was required of motorist than of pedestrian struck held error.

In action by pedestrian for personal injuries sustained when struck by automobile, refusing instruction that defendant and plaintiff were both chargeable with only exercise of reasonable care, but that greater amount of such care was required of defendant at time of accident by reason of fact that he was driving and operating an automobile which was capable of inflicting death or injury upon others on highway *held* error, since motorist was charged by law with higher degree of care than pedestrian.

5. Automobiles 🔑246(4)—Refusing instruction that motorist, striking pedestrian, using busy thoroughfare, was bound to use reasonable care to anticipate presence of others held error.

In action by pedestrian for injuries sustained when struck by automobile, refusing instruction that defendant was bound to use reasonable care to anticipate presence on street in question of other persons having equal rights with himself to be there and that failure on his part to use such reasonable care would be negligence *held* error, where street in question was a busy city thoroughfare and street car had just stopped to permit plaintiff to alight therefrom.

6. Automobiles 🔑246(6)—Instruction that, until motorist saw child struck, he could assume that no one would appear behind street car held erroneous.

In action by pedestrian struck by automobile, instruction that, until defendant saw child, he had right to assume that no one would appear behind street car and that he was not called upon to act until he actually saw that there was somebody there *held* erroneous.

7. Automobiles 🔑164(1)—Motorist seeing street car stop must anticipate some one might appear from behind car and have automobile under requisite control.

Motorist seeing street car stop had duty to anticipate that some one might appear from behind street car and to have his automobile under requisite control, so that if situation demanded it he could slow down or stop within reasonable limits.

8. Automobiles 🔑246(6)—Instruction in effect that, regardless of motorist's negligence before seeing pedestrian, if from that time on he acted with reasonable care, pedestrian struck could not recover held erroneous.

In action by pedestrian for injuries sustained when struck by automobile, instruction in effect that no matter how reckless or negligent defendant may have been prior to time he saw plaintiff, if from that time on he acted with reasonable care, plaintiff could not recover *held* erroneous.

9. Automobiles 🔑159—Where emergency is created by motorist through his negligence, he cannot avoid liability on ground his acts were done in stress of emergency.

Where emergency is created by motorist or where he brought about perilous situation by his own negligence, he cannot avoid liability on ground that his acts were done in stress of emergency.

10. Automobiles 🔑243(7)—Length of skid marks could be considered by jury in determining rate of automobile's speed.

In action by pedestrian for injuries sustained when struck by automobile, length of skid marks could be considered by jury in determining rate of speed.

11. Automobiles 🔑243(7)—Distance car traveled after brakes were applied could be considered by jury in determining rate of speed.

In action by pedestrian for injuries sustained when struck by automobile, fact that car traveled some 90 feet after brakes were applied could be considered by jury as basis for computing rate of speed and amount of control exercised by driver.

12. Trial 🔑194(16)—Instruction that there was no evidence that automobile striking pedestrian was going more than 20 miles an hour held erroneous as charging jury regarding matters of fact (Const. art. 6, § 19).

In action by pedestrian for injuries sustained when struck by automobile, instruction that there was no evidence that automobile was going at more than 20 miles an hour at time of accident, where evidence showed that wheels skidded for 63 feet and that car stopped only after colliding with tree, and other facts showing greater speed *held* erroneous as charging jury with respect to matters of fact, in violation of Const. art. 6, § 19.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action for damages for personal injuries by Genevieve Vedder, by her guardian ad litem, D. G. Vedder, against Frank W. Bireley and another. From a judgment for defendants, plaintiff appeals. Reversed.

Culver & Nourse, of Los Angeles, for appellant.

Edward Winterer, of Los Angeles, for respondents.

TUTTLE, Justice pro tem. This is an action brought by plaintiff, a minor of the age of 7 years, to recover for personal injuries received by her when she was struck by an automobile owned by defendant Bireley and operated by defendant Becker. Trial was had before a jury, and the verdict was for defendants. The appeal is from the judgment rendered upon the verdict.

The accident occurred on the south side of Third street, in the city of Los Angeles, between Norton avenue and Westminster. At the scene of the accident, Third street is approximately 56 feet in width, from curb to curb, and has thereon two sets of car tracks. It is also admitted that Third street, at the point of the occurrence, is a busy thoroughfare, where traffic is restricted to 20 miles per hour.

At Third street there is a jog in Norton avenue, the west curb of the portion of Norton avenue which runs north of Third street being offset approximately 10 feet to the east of the east curb of Norton avenue as it runs south from Third street.

The accident occurred at a point approximately 95 feet east of the east line of Norton avenue as it runs north from Third street.

Just prior to the accident the plaintiff had been a passenger on a street car of the Los Angeles Railway Company, which was west bound on Third street and which had come to a stop to allow the plaintiff, and a little boy escorting her, to alight, with its rear end at a point approximately 90 feet east of the easterly line of Norton avenue as it runs north, and just opposite a driveway, which is shown on Defendant's Exhibit I and on Plaintiff's Exhibits I, II, and III as the second driveway east of Norton avenue. The plaintiff and the boy accompanying her alighted from the rear of the street car, and passed around the rear of the car and south across Third street. At this time the defendant Frank R. Becker was driving the truck in question east on Third street. When the plaintiff got between the two sets of car tracks, she broke away from the boy with her and ran directly across the street and towards the most easterly of the two driveways.

There is some conflict in the evidence as to where the defendant's truck was at the time the plaintiff started to run, but in any event the defendant Becker applied his brakes when at a point opposite the center of the sidewalk running along the east side of Norton avenue as it runs north from Third street, and kept them applied until the truck came to a stop with its front end against a tree which was 93 feet east of the point at which the brakes were first applied. The plaintiff's course was practically due south across Third street to a point in the driveway between the sidewalk and the curb at the south side of Third street. The defendant's course was a diagonal one from a point on or near the west-bound car track to the point of impact, which was in the driveway and just south of the southerly curbed line of Third street.

As a result of the accident plaintiff sustained a fracture of the femur of the right leg and a fracture of the tibia of the left leg, and the soft tissues were torn from the jawbone from the center of the chin along the left side of the jawbone, and sustained a long, disfiguring scar leading from the left-hand corner of her mouth for about 2½ inches diagonally toward the left ear, which scar is permanent.

Appellant seeks a reversal of the judgment upon the ground of errors arising out of the rulings in the matter of evidence, and upon instructions given and refused. We will take these up in the order in which they are presented by appellant.

[1] The court sustained objections to the admission of certain testimony offered by plaintiff concerning experiments made by an expert in an attempt to show the rate of speed at which the automobile of defendants was traveling at the time of the accident. These experiments were made with an automobile similar to the one which caused the injury. The answers of the expert to other questions were evasive and unsatisfactory, and when he was asked by the court as to the ultimate fact in dispute (the distance a Ford car can be stopped in, after brakes are applied and while going 20 miles per hour) he replied, "That depends on the condition of the brakes and condition of the tires." This really was an answer to the question, but, aside from that, the admission of such evidence is largely committed to the discretion of the trial court, and its action will not be reversed on appeal, in the absence of a clear showing of an abuse of that discretion. There is no such showing here. Maris v. Crummey, 55 Cal. App. 573, 204 P. 259. This assignment of error is without merit.

[2] There was evidence that the automobile of defendants left skid marks some 63 feet in length, from the time the brakes were applied until it struck plaintiff. The mark made by the right wheel was solid and distinct, while the marks made by the left wheel were intermittent. It was claimed by appellant that these marks indicated that the brakes were not adequate to promptly check the speed and bring the motor vehicle to a stop. Cal. Motor Vehicle Act 1923, § 94 (St. 1923, p. 545). Witness Langbein, for plaintiff, qualified as an expert in the matter of automobile brakes. He was asked a hypothetical question, based upon the conditions indicated, and calling for an answer as to whether the brakes on such a car, leaving such marks, were properly adjusted. The court rejected the said testimony upon the sole ground that it was immaterial. This was error. The evidence was pertinent and material upon a vital fact in the case, viz., the condition and adequacy of the brakes. The witness had qualified as an expert upon the matter in question, and his peculiar skill and knowledge of such matters, not common to men in general, enabled him to draw an inference as to the condition of the brakes which may have materially aided the jury in an attempt to correctly solve the question before them. Vallejo R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238.

[3] The court refused to give the following instruction, which was requested by plaintiff:

"You are further instructed that the Vehicle Act of the state of California in force and effect at the time of the accident in question further provided in part as follows:

" 'Every motor vehicle operated upon a public highway shall be provided at all times with brakes which shall be adequate to properly check the speed of and to stop such motor vehicle.'

"And you are further instructed that the failure to use reasonable care to comply with said provision of the law would be negligence as a matter of law, and therefore, if you find from a preponderance of all of the evidence that the defendants failed to use reasonable care to have said motor vehicle, operated by them, provided at the time of the accident with brakes which were adequate to promptly check the speed of and to stop said vehicle, and that such failure was a proximate cause of the accident in question, then your verdict must be in favor of the plaintiff, unless you should further find from a preponderance of all of the evidence, and under the instructions of the court, that the plaintiff was also guilty of negligence which was a proximate cause of the accident in question.

"Refused except as given in the instructions of court."

Respondents seek to justify the refusal to give said instruction upon the ground that there was no evidence before the jury upon the question involved therein, to wit, the condition of the brakes upon defendants' automobile. We cannot agree with respondents in their construction of the record in the case. There was evidence that the car traveled some 93 feet from the time the brakes were applied until it stopped, and it only stopped then because it hit a tree. The two tires on the curb side of the car were flattened out, and the rim of the front wheels cut large gashes in the concrete curb, which was struck and jumped before the tree ended the journey. Certainly the jury could very reasonably have drawn the inference from these facts that the brakes on the car were not properly adjusted, and that defendants were therefore negligent in failing to comply with the said provisions of the Motor Vehicle Act. The court, in refusing to submit this issue to the jury, committed error, from which prejudice must inevitably have resulted.

[4] The court refused, on request of plaintiff, to give the following instruction:

"The defendant Becker and the plaintiff were both chargeable with only the exercise of reasonable care, but a greater amount of such care was required of the defendant Becker at the time of the accident in question by reason of the fact that he was driving and operating an automobile, which was capable of inflicting death or injury upon others on the highway.

"Refused except as given in instructions of court."

We believe the learned trial judge erred in failing to give the foregoing instruction. The driver of a motor vehicle is in charge and control of a dangerous instrumentality, capable of inflicting serious and often fatal injuries, and for that reason he is charged by the law with a higher degree or greater amount of care than the pedestrian. Raymond v. Hill, 168 Cal. 473, 143 P. 743; Weihe v. Rathjen Co., 34 Cal. App. 302, 167 P. 287; 42 C. J. 1035, § 780.

[5-7] The court refused to give the following instruction at request of plaintiff:

"You are instructed that the defendant Frank R. Becker was bound to use reasonable care to anticipate the presence on Third street of other persons having equal rights with himself to be there, and that a failure on his part to use such reasonable care would be negligence."

And on the subject-matter gave the following instruction:

"Now, the defendant had a perfect right to travel where he was traveling. If you find that he was traveling on the south track, he had a perfect right to travel there. There was not the slightest negligence in his traveling there on that track, and until he saw the child he had a right to assume that no one would appear behind that street car. He was not called upon to act until he actually saw that there was somebody there. Until he did see, I say he had a right to assume that there would not anybody come from behind that street car."

In our opinion, the court erred in both refusing the instruction offered and in giving the one in lieu thereof. It is unquestionably the rule that the driver of a motor vehicle, particularly when he is using a busy city thoroughfare, must keep a vigilant watch ahead for pedestrians, and particularly at places where the conditions are such that there are special reasons for anticipating the presence of pedestrians. 42 C. J. 909, § 624. The street car had just stopped, in the instant case, to permit plaintiff to alight therefrom. The driver of the automobile saw the street car stop. Under these circumstances, the court, instead of telling the jury that the driver had the right to assume that no one would appear from behind the street car, should have instructed them that it was the duty of the driver to anticipate that someone might appear from behind said car, and to have his automobile under the requisite control, so that, if the situation demanded it, he could slow down or stop within reasonable limits. Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125; Zarzana v. Neve Co., 180 Cal. 32, 179 P. 203, 15 A. L. R. 401; Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066.

[8, 9] Several instructions were given upon the question of imminent peril. They were all to the effect that if the driver of the automobile, *after he first saw plaintiff*, acted as a reasonable and prudent man would act under the circumstances, he was not guilty of negligence. In effect, the jury were told that no matter how reckless or negligent said driver may have been, prior to the time he saw the little girl, if *from that time on* he acted with reasonable care, plaintiff could not recover. Such is not the law. There are certain conditions under which one is excused from adopting cautionary measures which

should otherwise have been taken, and where actions, which under ordinary circumstances would constitute negligence, may be held to be those which a reasonably prudent man would take, under similar circumstances. This is the doctrine of "imminent peril." It is simply stating, in another way, the familiar test as to what conduct will constitute negligence, to wit, Did the party charged with negligence omit to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or did he do something which a prudent and reasonable man would not do, under similar circumstances? "One who, without negligence upon his part, is suddenly confronted with imminent danger or seeming imminent danger, is not required to exercise that degree of care and skill which is required in the commission of an act after careful deliberation; he is required to act only as a reasonably prudent man would act, under similar circumstances." 19 Cal. Jur. 598, § 36. The imminent peril must arise from a sudden emergency, but where that emergency is created by the automobilist, or where he brought about the perilous situation, through his own negligence, he cannot avoid liability upon the ground that his acts were done in the stress of emergency. 42 C. J. 891; Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066.

One cannot shield himself behind an emergency created by his own negligence. The rule can be invoked only by those who are without fault. The vice of these instructions is that they are not predicated upon the further premise that the driver of the car was free from negligence when he first saw the plaintiff. If his brakes were faulty at the time he first saw her, and he was negligent in that respect, and for that reason he struck her, these instructions would permit him to virtually take advantage of his own wrong and secure immunity from liability upon the ground that he was confronted with a "sudden peril." The same reasoning would apply if the driver had been going at an excessive rate of speed, when he first saw plaintiff. These observations must be read in the light of the fact that there was evidence before the jury that the automobile was traveling at an excessive rate of speed, and that the brakes thereon were not properly adjusted. The instructions should not have been given.

[10-12] The court instructed the jury that there was no evidence that the automobile was going at more than 20 miles an hour (the legal limit) at the time of the accident. This was the testimony of the driver of the car, and it was adopted by the court as an undisputed fact in the case. But there was substantial evidence in the record which would have justified the jury in finding that the driver was going at a far greater speed than 20 miles an hour. For 63 feet the wheels of his Ford car skidded over a pavement which was level and not wet, and the course of his vehicle was only brought to a conclusion by contact with a tree which was inside the curb. The curb was badly dented by the wheel rims, as the tires flattened out. The length of the skid marks could be considered by the jury in determining the rate of speed. Briley v. Nussbaum, 122 Kan. 438, 252 P. 223; Tischler v. Steinholtz, 99 N. J. Law, 149, 122 A. 880. In addition thereto, were the other facts and circumstances pointed out. The fact that the car traveled some 90 feet after the brakes were applied, could also have been considered by the jury as the basis for computing the rate of speed and the amount of control exercised by the driver. Ortmann v. Leath Co., 187 Wis. 616, 205 N. W. 397. The Supreme Court of Pennsylvania has very aptly stated, in this connection:

> "Nor do we see that the court erred * * * in permitting the jury to take into consideration, in judging of the speed of the car, the distance which the machine traveled before it came to a stop, after Mr. Lorah was struck. That was an element very properly to be considered. The very purpose in running slowly is to enable the driver to bring the automobile quickly to a halt in case of emergency. The test of control is the ability to stop quickly and easily. When this result is not accomplished, the inference is obvious that the car was running too fast, or that proper effort to control it was not made." Lorah v. Rinehart, 243 Pa. 231, 89 A. 967.

The giving of this instruction was in direct violation of the provisions of our Constitution, which expressly forbids the judge from charging the jury with respect to matters of fact. Const. Cal. art. 6, § 19.

It is obvious and patent that if the foregoing errors had not been committed the outcome of the trial might have been otherwise. Plaintiff was entitled to a fair trial upon the merits of the controversy, and we believe that she was deprived of this.

The judgment is reversed.

We concur: HART, Acting P. J.; PLUMMER, J.

In re ROGERS et al.*

JUDGE v. WARDEN.

(Civ. 6142.)

District Court of Appeal, First District, Division 2, California. May 14, 1928.

Hearing Denied by Supreme Court July 12, 1928.

1. Taxation 🔑734(1)—Error, if any, in sale for tax in excess of amount authorized, held not actionable in proceeding to register lands (Land Title Act).

In proceedings under the Land Title Act (2 Deering's Gen. Laws 1923, p. 3611), for registration of land, where defendant contended that property had been sold for excessive tax, where it appeared that amount collected exceeded amount authorized because allowance for delinquency was too liberal, *held* that error, if any, was not actionable.

2. Taxation 🔑734(7)—Explanatory note appended to delinquent notice held no part of delinquent notice (Pol. Code, § 3764).

In proceeding to register lands, where defendant contended that land was sold for taxes and there was no designation of amount included in sale price in delinquent notice because of contents of explanatory note which tax collector appended to delinquent notice, *held* that explanatory note was no part of delinquent notice as required by Pol. Code, § 3764.

3. Taxation 🔑734(7)—Misrecital of date in explanatory note appended to delinquent notice held not misleading, where correct date appeared several places in notice, since notice was to be read as whole (Land Title Act).

In proceedings to register title to lands under Land Title Act (2 Deering's Gen. Laws 1923, p. 3611), where defendant contended that delinquent notice was void because of mistaken date in explanatory note appended to delinquent list, although correct date was used in several places on face of notice as published, *held* that misrecital contained could have misled no one, since notice was to be read as whole.

4. Records 🔑9(4)—Petitioner held entitled to registration under statute, although he did not have title by adverse possession, where his predecessors did (Land Title Act, § 8).

In proceedings under Land Title Act (2 Deering's Gen. Laws 1923, p. 3611) to register title to certain lands, petitioner, who did not have title by adverse possession, *held* entitled to registration under section 8, where his predecessors in interest did have title by adverse possession.

5. Records 🔑9(4)—Petitioner, holding under tax deed conveying fee, held entitled to registration without reference to adverse possession (Land Title Act).

In proceeding under Land Title Act (2 Deering's Gen. Laws 1923, p. 3611), for registration of certain lands, where petitioner held fee title under tax deed, *held* that he was entitled to registration without reference to adverse possession.

6. Taxation 🔑658(3)—Addenda notice, stating date and hour at which land would be sold by tax collector, which complied with every statutory requirement, held effective (St. 1913, p. 556).

Addenda notice, which quite definitely stated that in tax collector's office, in certain county, on certain day, and at certain hour, tax collector would sell property, which complied with statute in force at that time (St. 1913, p. 556), *held* effective.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

In the matter of the application of C. D. Rogers and others, for registration of certain land under Land Title Act; Barney Judge, petitioner, opposed by Grace P. Warden. From a judgment for the petitioner, the defendant appeals. Affirmed.

Catherine A. McKenna and J. Irving McKenna, both of Los Angeles, for appellant.

James W. Bell, of Los Angeles, for respondent.

STURTEVANT, J. Barney Judge filed a petition to register certain lands under the Land Title Act (2 Deering's General Laws 1923, p. 3611). The defendant, Grace P. Warden, appeared and answered. A trial was had before the trial court sitting without a jury. The trial court made findings of fact in favor of the petitioner. From a judgment entered thereon, the defendant, Grace P. Warden, has appealed under section 953a of the Code of Civil Procedure.

The plaintiff Barney Judge holds a purported tax title. If the tax deed under which he claims is valid, the judgment should be affirmed, otherwise it should be reversed.

[1] The defendant contends that the property was sold for an excessive tax. In making this point, she called to our attention that, for the purpose of aiding the holding of the Panama-Pacific International Exposition, certain amendments to the Constitution were made and certain statutes were enacted authorizing the raising of the sum of $1,250,000 for the fiscal year 1913 by the levy of a direct tax; that prior to making the levy the state board of equalization forwarded its order to the board of supervisors, fixing the rate of 2 mills on each $100 of taxable property of Los Angeles county; that said fraction was adopted by the board of supervisors in computing the rate for state and county taxes for the year 1913, and that thereafter the tax was levied and collected as so computed; that the amount that should have been collected pursuant to the Constitution and the statutes was $1,250,000; that the amount that was actually collected was $1,270,000, and that there was therefore collected $20,000 in excess of the amount required. Dividing $20,000 by the amount of the combined assessment rolls of the state, the defendant

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

ascertains her multiple, and, by multiplying the assessed valuation of the lands in suit by that multiple, she obtains what she claims to be an excessive tax. Thereupon she cites and relies on Boston Tunnel Co. v. McKenzie, 67 Cal. 485, 8 P. 22; Knox v. Higby, 76 Cal. 264, 18 P. 381; Bucknall v. Story, 36 Cal. 67. The cases are not in point. Each one involved an instance where one of the public officers made an error in computing a tax or in setting down on the tax records the amount of the computation. The record before us shows no error. The tax was levied in all respects as required by law so far as this record shows. However, it transpired that the allowance made for delinquency was too liberal, and more money was actually collected than the public officers were attempting to collect. No authority has been called to our attention which supports the contention of the defendant. If the point is good, it probably applies to a majority of the funds for which each annual levy is made. This is so because it can be seen at once that the computation of the body making the levy of an ad valorem tax must at all times be an approximation. It may result in collecting a few dollars too much or a few dollars too little. But the error, if any, is not actionable.

[2] The defendant also contends there was "no designation of the amount in the notice included in the sale price in the delinquent notice of sale for penalties, costs, and interest." The defendant does not contend that the minimum amount set opposite the description is not the correct total of all taxes, penalties, and costs; but her point is based on the contents of the explanatory note which the tax collector appended to the delinquent notice before publishing it in 1914. That explanatory note is no part of the delinquent notice as required by section 3764 of the Political Code. The explanatory note was inserted ex industria by the tax collector for the purpose of showing that certain figures were used to designate money—dollars or cents, as the fact might be. In the case of Bussenius v. Warden, 71 Cal. App. 717, 236 P. 371, the facts before the court showed that the notice of delinquent tax sale did not conform to Political Code, § 3764, but was in violation thereof in this, that it recited that the sale would be made for taxes and costs and did not state that it would be made for "penalties." That error is not presented by the record in the case before us.

[3] The same explanatory note so appended to the delinquent list contained a recital "in the foregoing delinquent tax list for *1912* of the county of Los Angeles." The defendant calls attention to the misrecital of *1912* instead of the true date *1913*, and thereupon she claims that the notice was void. The plaintiff replies that the misrecital was but a typographical error, and that the typographical error appeared on the face of the notice itself. The reply is a sufficient answer. Excerpts from the delinquent notice for 1913 are set forth in the transcript. The correct date is used in several different places on the face of the notice as published. The misrecital contained in the explanatory note, which was also on the face of the notice as published, could not have misled any one. The notice was to be read as a whole. Stuart v. Smith (Cal. App.) 262 P. 348.

[4, 5] The defendant contends that the plaintiff did not have title by adverse possession and that therefore he was not entitled to registration under section 8 of the Land Title Act. However, there is evidence in the record showing that the plaintiff's predecessors in interest did have title by adverse possession. Furthermore, the plaintiff also argues that his tax deed conveyed to him a fee-simple title, and that one who holds a fee-simple title has the right of registration without reference to adverse possession, and he cites and relies on In re Cox, 63 Cal. App. 175, 218 P. 441. That case fully supports him.

[6] In her closing brief, the defendant quotes the caption to the "addenda" notice, and claims the notice was ineffective. Numitor Gold Mining Co. v. Katzer (Cal. App.) 256 P. 464. The point is not well taken. The addenda notice in the instant case is set forth in the transcript. It is worded very differently from the notice which was under consideration in the Numitor Case. Quite definitely it stated that in the tax collector's office in the county of Los Angeles, commencing on July 3, 1919, at 9 a. m., the tax collector would sell the property. Furthermore, it complied in every respect with every call of the statute (Pol. Code, § 3764), as the statute was worded at that time (Stats. 1913, c. 299, p. 556).

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

91 Cal. App. 752

COLLINS v. CALIFORNIA STREET CABLE R. CO. (Civ. 6082.)★

District Court of Appeal, First District, Division 2, California. May 15, 1928.

Hearing Denied by Supreme Court July 12, 1928.

1. Appeal and error ⚷930(1)—Where evidence was conflicting, but verdict favored plaintiff, reviewing court must take facts appearing in testimony most favorable to plaintiff.

Where evidence was conflicting, but jury's verdict favored plaintiff, reviewing court was required, on defendant's appeal, to take facts as they appeared in the testimony most favorable to plaintiff.

2. Street railroads ⚷117(23)—Contributory negligence of pedestrian struck by street car, and shown to have looked in both directions before crossing street, held for jury.

Contributory negligence of pedestrian struck by street car, and shown to have looked in both directions before he crossed the street, and to have taken a position which he assumed to be free from danger, *held* for jury.

3. Negligence ⚷136(9)—As general rule, when reasonable minds might differ on contributory negligence, it is for jury.

The general rule is that, when the question of contributory negligence is one on which reasonable minds might differ, it is one of fact which must be left to the jury, and not one of law for the court.

4. Street railroads ⚷103(2)—Last clear chance doctrine held applicable, where pedestrian was struck by street car whose motorman saw pedestrian in position of danger at point 125 feet distant.

In action for injuries by pedestrian struck by street car, evidence showing that pedestrian assumed a position between the tracks which he kept without change until struck down by street car, and that motorman saw pedestrian in such position, and recognized his danger at a point 125 feet distant, *held* to render last clear chance doctrine applicable.

5. Trial ⚷89—Striking motorman's testimony as to what he thought injured pedestrian was going to do held not error, where testimony was inconsistent with his other testimony.

In action for personal injury by pedestrian struck by street car, ruling striking out motorman's answer to question as to what he thought injured person was going to do when he saw pedestrian in his perilous position *held* not error, where admission thereof would merely have created an inconsistency with motorman's other positive testimony of what he saw and knew relative to pedestrian's peril.

6. Trial ⚷89—In action by pedestrian for injury by street car, striking testimony of frequency of pedestrians safely standing between cars held not error.

In action for personal injury by pedestrian struck by street car while standing between passing cars, ruling striking out testimony of witnesses as to frequency of pedestrians safely standing between passing cars *held* not error, where such was not an issue, and evidence clearly disclosed that injured person was not standing in such position of safety, but that he was standing in the path of the car.

Appeal from Superior Court, City and County of San Francisco; Walter E. Herzinger, Judge.

Action by William W. Kirkham against the California Street Cable Railroad Company, in which, on plaintiff's death, Ethel Collins, as executrix of the last will and testament of William K. Kirkham, deceased, was substituted as plaintiff. Judgment for plaintiff, and defendant appeals. Affirmed.

Wright & Wright & Stetson, of San Francisco (Randell Larson, of San Francisco, of counsel), for appellant.

Gerald C. Halsey and Frederic T. Leo, both of San Francisco, for respondent.

NOURSE, J. Plaintiff sued for damages for personal injuries caused by his being struck by a cable car operated by the defendant. The cause was tried before a jury, and resulted in a verdict for the plaintiff in the sum of $3,335. From the judgment following the verdict, the defendant has appealed upon a bill of exceptions.

[1] Testimony of the eyewitnesses to the accident is somewhat conflicting, but, the verdict of the jury having favored the plaintiff, it is necessary on this appeal to take the facts as they appear in the testimony most favorable to him. Pursuing this course, we find the plaintiff, a man of 71 years of age, was attempting to cross California street at its intersection with Van Ness avenue at about 2 o'clock in the afternoon, passing from the northwesterly to the southwesterly corner; that, before leaving the sidewalk on the northwesterly corner of this intersection, he looked in both directions, and saw an eastbound cable car approaching on the southerly track but did not see any car approaching on the northerly track from the east; that, as he approached the northerly rail of the double tracks of the company, he again looked in both directions, but saw no car approaching from the east. The east-bound car had then stopped at the intersection with Van Ness avenue, and plaintiff walked over to a point between the two lines of track, and stopped approximately at the middle of the standing car, as he was unable to pass behind it, because an automobile which had been following behind this car blocked his passage. Plaintiff stood in this position in a space between the two sets of rails of six feet one inch, but which was narrowed to two feet one inch when cars were passing each other on the two sets of rails. While standing in this position the east-bound car started on its way, and plain-

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★Hearing denied by Supreme Court.

tiff turned his position slightly to the west in order to observe the automobile which was closely following this car. While standing in this position, he was struck by a west-bound car, and thrown violently to the pavement causing the injuries for which he sued.

The theory of the plaintiff is that he thus stood in a position of danger because of the east-bound car having stopped at the intersection and because of the automobile closely following it, and that, while in this position of danger, the defendant's agent operating the west-bound car, though he observed plaintiff's perilous position before he started to cross Van Ness avenue (a distance of 125 feet), nevertheless continued on his way without stopping until after the plaintiff had been struck. It is the theory of the defendant that its agent was not negligent in the operation of his car, and that plaintiff was guilty of contributory negligence, but, in answer to this, the plaintiff argues that the defendant's agent could have avoided the accident if he had endeavored to do so, and that the last clear chance doctrine must be applied.

[2, 3] It is true, as pointed out by appellant, that from the time that the motorman observed respondent he sounded the gong upon his car, and that, as he continued to proceed over Van Ness avenue, he started shouting at the respondent, and continued an "extra loud ringing of the gong." It is in the testimony of appellant's witnesses that the respondent either stepped back or fell back against the west-bound car, but this is contradicted by the testimony of a passenger on this same car who was called by the appellant. It is argued that the respondent must have been struck by the running board of the east-bound car, and thus thrown back in the path of the west-bound car, but there is no evidence in the record to support the argument. On the other hand, the physical facts would show to the contrary as the bruises suffered by the respondent were upon the left side of his left leg and ankle, whereas, if he had been struck by the east-bound car, some bruise would have appeared on his right side. Upon the issue of contributory negligence, the respondent is shown to have looked in both directions before he crossed the street and to have taken a position which he assumed to be free from danger, and the court cannot say that it was his duty to look in any particular direction at any particular moment or that, if he had so looked, he could have escaped from the danger which was approaching. Cases of this kind which depend so much upon the surrounding circumstances are properly left to the jury for the determination whether in view of all those circumstances the party has exercised the care which a reasonable man would have exercised in the same position. The general rule is that, when the question of contributory negligence is one upon which reasonable minds might differ, it is one of fact which must be left to the jury, and not one of law for the court. Erdevig v. Market Street Railway Co. (Cal. Sup.) 264 P. 252; Du Val v. Boos Bros. Cafeteria Co., 45 Cal. App. 377, 380, 187 P. 767.

[4] But the respondent argues that, assuming his contributory negligence, the appellant is nevertheless liable under the last clear chance doctrine. The evidence is that respondent had assumed a position between the tracks which he kept without change until struck down by the west-bound car of appellant, and that appellant's motorman saw respondent in this position, and recognized his danger at a point 125 feet distant. It is a fair inference from all the evidence that the motorman realized that the respondent was not aware of his danger, because, in addition to the usual sounding of the gong on his car, he continued to shout to the respondent to warn him of this danger. The unbroken line of authorities supports respondent's position that the last clear chance doctrine applies "where the injured party by his own negligence has placed himself in a position of danger from which he cannot extricate himself, or of which he is obviously unconscious, and the defendant, seeing or knowing his peril or seeing or knowing facts from which a reasonable man would believe him to be in peril, and being able by the use of ordinary care to avoid injuring the plaintiff in his perilous position, fails to use such care and thereby causes the injury." Arnold v. San Francisco-Oakland T. Rys., 175 Cal. 1, 4, 164 P. 798, 800; Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 521, 74 P. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; Atkins v. Bouchet (Cal. App.) 260 P. 828; Darling v. Pacific Electric Ry. Co., 197 Cal. 702, 707, 242 P. 703; Palmer v. Tschudy, 191 Cal. 696, 700, 218 P. 36; Berguin v. Pacific Electric Ry. Co. (Cal. Sup.) 263 P. 220.

[5, 6] The appellant assigns as error the ruling of the trial court in striking out the answer of the motorman of the west-bound car as to what he thought the respondent was going to do when he saw him standing between the rails, and also the answers of this and another witness that it was a matter of frequent occurrence to see pedestrians standing in safety between the tracks as cars passed going in opposite directions. We see no error in these rulings. The fact that the motorman of the west-bound car gave such vociferous warnings of his approach supported the inference that he knew the respondent was in a perilous position, and likely to be struck by his approaching car, while his statement that he *thought* that the respondent was intending to board the east-bound car merely created an inconsistency with his positive testimony of what he saw and knew. The frequency or infrequency of pedestrians safely standing between the passing cars was, of course, not an issue in the case. The evidence clearly disclosed that the respondent was not standing in this position of safety,

but that he was standing in the path of the west-bound car.

Criticism is made of the action of the trial court in modifying proposed instructions and in refusing to give an instruction proposed by the appellant covering the degree of care required by the respondent in crossing this street. We have examined all these instructions given, as well as those proposed by the appellant and refused, and are satisfied that the jury was fully and fairly instructed, and that there is no error in the record.

Judgment affirmed.

I concur: KOFORD, P. J.

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92 Cal. App. 118

PEOPLE v. LINTON. (Cr. 1543.) *

District Court of Appeal, Second District, Division 1, California. May 22, 1928.

Hearing Denied by Supreme Court July 19, 1928.

Criminal law ⚷730(1)—Improper remarks and questions of district attorney held not ground for reversal, where objections were sustained and objectionable matters withdrawn from jury.

Misconduct of district attorney in making improper statements and asking improper questions *held* not ground for reversal, where in each instance trial judge promptly sustained defendant's objection and instructed jury to disregard the question or remark.

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Samuel Guy Linton was convicted of first degree robbery, and he appeals. Affirmed.

Light & Lane and J. E. Light, all of Glendale, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

HAHN, Justice pro tem. Defendant was found guilty of robbery in the first degree. On his appeal, he urges but one point, and that is the alleged misconduct of the district attorney in making improper statements and asking improper questions on both direct and cross examination.

We have carefully read the record in the case, and have noted particularly the statements and questions criticized. We are agreed with appellant that some of the remarks made by the district attorney, as well as many of his questions, were improper. However, we do not feel that this conduct of the district attorney constitutes reversible error. In every instance where the questions asked or remarks made by the district attorney were objectionable, the learned trial judge promptly sustained the defendant's objection and instructed the jury to disregard the question or remark. In several instances the questions asked or remarks made were invited by the answers of the witness or the questions propounded in direct examination. On the whole, we are satisfied that the emphatic manner of the trial judge in promptly striking out the objectionable matters and concisely instructing the jury to give no heed to them eliminated any element of injury that the defendant might otherwise have suffered. We are justified in assuming that the jury heeded the court's instructions.

It is to be regretted that prosecutors are so often led to such a departure from the proper methods of conduct in the trial of cases that this court is called upon to occupy its time with a review of criticized conduct of this character.

However, we do not feel that the improper conduct of the district attorney in the instant case affected the substantial rights of the defendant. Hence a reversal of the judgment is not warranted.

Judgment affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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91 Cal. App. 763

WEINTRAUB v. SUPERIOR COURT WITHIN AND FOR LOS ANGELES COUNTY. (Civ. 6035.)

District Court of Appeal, Second District, Division 2, California. May 15, 1928.

1. Attachment ⚷12—In action for price of goods sold and equitable relief, right to writ of attachment held not defeated because of application of equitable principles to reach property belonging to sole owner of corporations.

Where in action to recover sum agreed to be paid for goods, wares, and merchandise and for equitable relief, creditor sought to attach property belonging to sole owner of corporations alleging fraud and writ of attachment was issued, *held* that, since goods sold and delivered are subject of actions at law and writs of attachment are available as means of securing property of debtors, incidental application of equitable principles as means of retrieving property subject to attachment did not defeat right of writ itself.

2. Prohibition ⚷3(5)—Prohibition held proper remedy to restrain issuance of order releasing attachment, notwithstanding right of appeal which was inadequate.

Where petitioner sought writ of prohibition to restrain issuance of order releasing writ of attachment and it was contended that he had right of appeal and consequently prohibition was not available, *held* that, since release of subject-matter of attachment pending appeal would strip proceeding of assurance of adequate results, prohibition would be granted.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

3. Prohibition ⚿10(2)—Order to release attachment lawfully levied held in "excess of jurisdiction," warranting issuance of writ of prohibition (Code Civ. Proc. § 1102).

Granting of motion to release attachment lawfully levied, and to which plaintiff was entitled legally under statutes, *held* "excess of jurisdiction," within meaning of Code Civ. Proc. § 1102, warranting issuance of writ of prohibition.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Excess of Jurisdiction.]

Petition by Moe Weintraub for a writ of prohibition to be directed to the Superior Court of Los Angeles County, to restrain the issuance of an order releasing the writ of attachment. Writ granted.

Harry K. Cohen and Eugene L. Wolver, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and S. V. O. Pritchard, Deputy Co. Counsel, both of Los Angeles, for respondent.

CRAIG, J. The petitioner in this proceeding commenced an action in the superior court of Los Angeles county by filing a complaint, which was amended, and, as amended, is made a part of the petition herein, against the California Surety Company, a California corporation; California Surety Company, a Nevada corporation; Fred A. Brun; and unknown defendants designated by fictitious names. The complaint consists of five separate and distinct alleged causes of action. The first count alleges that on or about December 7, 1927, the plaintiff sold and delivered to the defendants certain goods, wares, and merchandise for which they agreed to pay the sum of $392.80, no part of which has been paid. In the second count it is alleged that on said date there was an account stated, that the sum of $392.80 was then found to be due the plaintiff, and that the defendants agreed to pay the same. In the third count the plaintiff avers upon information and belief that the California corporation and the Nevada corporation both comprise the same stockholders, directors, and officers, as to personnel, position, and shareholdings; that they are identical and the same as to business management and all other functions, with the same interests and no separate or other capital. It is also alleged in the third count that the plaintiff at all times believed he was doing business with the Nevada corporation; that Brun, its manager, led him to believe that it was legally doing business in California; that the fact that this was untrue came to plaintiff's knowledge subsequently to the sale and delivery of the merchandise; and that plaintiff has no speedy and adequate remedy at law.

The fourth count alleges upon information and belief that the stockholders of the two corporations have no equity or interest in any stocks of which they are the nominal holders, but that the defendant Brun is the sole and exclusive owner and holder of all of their assets; that Brun is the sole owner of both corporations, that they are insolvent, and the plaintiff is unable to collect the amount due from the Nevada corporation by process of law, but that Brun is solvent and able to pay the same; that in truth and in fact both corporations are the same, and that their obligations are equitably the same.

By the fifth count two promissory notes of "the California Surety Company [Signed] Fred A. Brun," for $100 each, dated, respectively, September 30, 1927, and October 31, 1927, payable to the order of Moe's Printing & Stationery Company, which were assigned to the plaintiff, are set forth in hæc verba. It is further alleged that Brun is the sole owner of both corporations, and the only one at whose individual special instance and request the indebtedness was incurred; that he incurred them in the name of the California Surety Company, and is in fact the person obligated therefor; "that plaintiff was inadvertently made a victim of said fraud practiced upon him by said Fred A. Brun in leading plaintiff to believe that the California Surety Company was a Nevada corporation owning large assets, and that the said defendant Fred A. Brun there and then knew that the said statements so made to plaintiff were false, and that they were made with the intention to defraud plaintiff of the sums complained of."

Judgment is prayed (1) for $392.80; (2) that the California corporation and the Nevada corporation be declared the same, and "that the court pierce the corporate veil of said corporations and declare the obligation of each and all binding upon the other"; (3) "that the said corporations are in truth and in fact the property of Fred A. Brun, and a subterfuge used by him to do business, and that the obligations of said corporations are binding upon him"; (4) for the sum of $200; and (5) for costs and for general relief.

A writ of attachment was issued in said action and levied upon certain property of the defendants, whereupon motion was made to release it upon the ground that the suit was based upon fraud, and was therefore in equity, and that in such event an attachment would not lie. The trial court, after argument and presentation of authorities, announced that the motion would be granted, and the petitioner institutes this proceeding in prohibition, praying that a writ issue restraining the entry and enforcement of an order pursuant to such announcement.

Respondent demurred to the petition for writ of prohibition, assigning as grounds therefor that upon the facts presented by the record the petition does not state a sufficient foundation for the relief sought, and again insisting, in this court, that the original suit is one in equity wherein a writ of attachment cannot legally be issued.

The petitioner relies principally upon the authority of Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 P. 780. It there appeared that a California corporation, entitled the Maryland Dairy Lunch Company, became indebted to the plaintiff hotel company for rent, that it was solvent, and apparently meeting its ordinary and current liabilities; that in January, 1916, its directors conceived the fraudulent scheme of organizing a Nevada corporation, authorized to do business in California, and to which all of the places of business and leasehold rights of the original corporation were sold and transferred, except that for which rent was due to the plaintiff. It was alleged that one M. Schwind was the sole owner and held all of the stock, with the exception of one share each standing in the names of dummy directors; that after said transfer the California corporation was dissolved, so that Schwind then owned and operated the restaurant business maintained and conducted upon the plaintiff's property, but was not a party to the lease, the original lessee was extinct, and both Schwind and the Nevada corporation denied any liability for the obligation upon which suit was brought. The hotel company commenced an action by complaint setting forth these facts, among others, and alleging that said transfer was without consideration, that the purpose of the transfer was to effectuate the continuation of the business of the original corporation under a new name which was in substance and effect but a continuation of the old business, owned substantially by the same persons, for the purpose of defrauding the plaintiff. The prayer of the complaint demanded a temporary injunction restraining the new corporation from disposing of its assets, that the transfer to it of the properties of the California corporation be declared void, that the defendant be charged as holding all of the property subject to the payment of the plaintiff's claim for $3,617.60 therefrom, and that the property be sold for the plaintiff's claim and its costs. A writ of attachment was levied in that action upon said property, and the defendant, without answering, moved to dissolve the attachment upon the ground that the cause of action was not one in which a writ of attachment could issue. It being claimed that the cause of action alleged was one ex delicto for fraud, it was there argued, as here, that the suit was in equity, and that property could not be attached therein. The Supreme Court, in passing upon this question, said:

> "The question here is whether this action is one within the purview of subdivision 1 of section 537 of the Code of Civil Procedure. That subdivision does not contemplate the right of attachment in an action ex delicto for fraud. This statement is in accord with Hallidie v. Enginger [175 Cal. 505, 166 P. 1] supra. The action must be one upon contract, express or implied, for the direct payment of money. If a recovery upon such a contract is the purpose of the suit, so far as the right of attachment is concerned it is immaterial whether the action be regarded as strictly legal or strictly equitable, or partly legal and partly equitable. The subdivision does not in terms prescribe that the action must be one in law, or that it may not be one in equity, or that it may not be one of either law or equity, or of both. Hence it is not necessary in order to uphold the writ of attachment to establish the proposition that the action is either legal or equitable. What must be established is that the action is based upon contract, either express or implied, for the direct payment of money. It is clear that this action addresses itself to both the legal and the equitable powers of the court. But that circumstance will not operate to deny the plaintiff a writ of attachment if he is seeking recovery upon the breach of such contract. It is to be kept in mind that there is no suggestion that fraud entered into the making of the contract. The respective obligations of the parties thereunder were for a time performed and then one of them committed a breach of the contract. So the basis and essence of the action is an executed contract for the direct payment of money, and in order to have satisfied any judgment that may be recovered for such breach the plaintiff sues out a writ of attachment. In order to establish the proposition that the property attached should be responsive to such a judgment the plaintiff invokes certain well-recognized equitable principles. But this does not have the effect of converting the action on the express contract for the direct payment of money into one ex delicto for fraud. Consequently, even if such an action may properly be regarded as partially legal and partially equitable, it will make no difference. The plaintiff is nevertheless entitled to a writ of attachment by virtue of the fact that he is suing for a recovery upon the contract which is the gravamen of the action."

[1] Respondents assert with much force and citation of authority various theories which, were it not for the rule announced in Stanford Hotel Co. v. M. Schwind Co., supra, would require more extended discussion than we deem necessary. They assume that since a suit to "pierce the corporate veils" is an equitable proceeding, that the court had no jurisdiction over accompanying money counts apart from the equity counts, and from this it is argued that "the gravamen of the action is equity, and attachment will not lie." From this it does not follow that to invoke equity principles in an action which addresses itself both to the legal and to the equitable powers of the court alters or restricts the statutory procedure afforded in an action the basis and essence of which is an executed contract for the direct payment of money. Goods sold and delivered, accounts stated, and promissory notes are subjects of actions at law, and writs of attachment are unquestionably available and proper as means of securing to litigants the property of debtors which may be respon-

sive to any judgments recovered in such cases. To hold that incidentally peering through fraud as a means of discovering and retrieving camouflaged property subject to attachment, defeats the right to the writ itself, would deny the substantial relief intended, and fortify subterfuges against legal recourse. The suggestion of such an injustice furnishes its own refutation, which cannot better be expressed than as stated in Stanford Hotel Co. v. M. Schwind Co., supra.

[2] It is contended that petitioner had a right of appeal from an order dissolving a writ of attachment, and so was afforded a plain, speedy, and adequate remedy, and that prohibition is not available in such cases. It is plain that the release of the subject-matter of an attachment suit pending appeal would immediately strip the proceeding of any assurance of adequate results, since the relinquishment of the security might, and in many cases would, render the judgment worthless, even though it should be affirmed upon appeal. This proposition is settled by the following decisions of our appellate courts: Kirby v. Superior Court, 68 Cal. 604, 1 P. 119; Primm v. Superior Court, 3 Cal. App. 208, 84 P. 786; White v. Superior Court, 126 Cal. 245, 58 P. 450; Gloyd v. Superior Court, 44 Cal. App. 39, 185 P. 995.

[3] The only other point which we deem requires decision is the contention that since prohibition is available only to arrest proceedings which are without or in excess of jurisdiction, and will not be invoked to restrain mere error, this court has no authority to pass upon the petition herein. The respondents, however, fail to cite any authority, and we know of none, holding that the granting of a motion to release an attachment, lawfully levied, and to which one is entitled legally under our statutes, would not constitute an excess of jurisdiction. As was said in Broom v. Douglass, 175 Ala. 268, 57 So. 860, 44 L. R. A. (N. S.) 164, Ann. Cas. 1914C, 1155:

> "By 'excess of jurisdiction,' as distinguished from the entire absence of jurisdiction, we understand and mean that the act, though within the general power of the judge, is not authorized, and therefore void, with respect to the particular case because the conditions which alone authorize the exercise of his general power in that particular case are wanting; and hence the judicial power is not in fact lawfully invoked."

Petitioner was entitled to a writ of attachment. Hence, having that right, to deprive him thereof by an order dissolving or releasing it, would be a judicial act in excess of the court's jurisdiction, although it may have had general jurisdiction of the persons and subject-matter of the cause. "When an asserted power is inconsistent with an established right, the power must be denied." Ex parte Alabama Marble Co., 216 Ala. 272, 113 So. 240. Section 1102 of our Code of Civil Procedure provides for writs of prohibition in such cases.

Let the writ issue as prayed.

We concur: WORKS, P. J.; THOMPSON, J.

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92 Cal. App. 127

MATTOCKS v. CLASS A MOTOR CO. et al.

(Civ. 5509.)

District Court of Appeal, Second District, Division 1, California. May 22, 1928.

1. Fraud 🔑58(2)—Evidence that automobile used in making demonstrations had to be repainted warranted jury's finding that car was not new, in purchaser's action for misrepresentations.

In action for fraud in sale of car, where defendant's answer disclosed that the car had been used for demonstration and evidence showed that it had been used in making demonstrations to such extent as to call for repainting, jury was justified in finding that the car was not a new car as represented.

2. Trial 🔑253(7)—Instruction in action for damages for fraud, submitting issues of defendant's representation and plaintiff's reliance thereon, held not erroneous for failure to cover all issues.

Instruction in action for damages for fraud in sale of car, submitting issues as to defendant's representation that car was new and as to plaintiff's reliance upon the representation, *held* not to violate rule requiring instruction which purports to state conditions necessary to verdict to state all of those conditions.

3. Trial 🔑191(1)—Instruction that plaintiff had offered evidence to establish enumerated facts held not misleading as assuming facts.

Instruction that plaintiff had offered evidence to establish matters which court enumerated *held* not erroneous as misleading on ground that jury might assume facts referred to were established.

4. Fraud 🔑62—$725 damages for fraudulent misrepresentations that automobile sold was new held not excessive under evidence.

In purchaser's action for damages for alleged misrepresentations that car purchased was a new car, evidence of reasonable value of car at time of purchase and amount paid therefor *held* to justify award of $725 damages and implied finding as to value of car at time of purchase.

5. Evidence 🔑89—Buyer suing seller for misrepresentations held entitled to prove that sons, present at sale, were ill in another county at time of trial (Code Civ. Proc. § 2061).

Buyer of automobile suing for damages for seller's false representations was entitled to prove that his sons, who were with him at time the car was purchased, were ill in another county, under Code Civ. Proc. § 2061, requiring consideration of evidence according to power of one side to produce and the other to contradict.

6. **Fraud ⚷65(4)—Where purchaser had no previous experience with car, instruction that equal availability of means of knowledge as to car's condition precluded his recovery for fraud held properly refused.**

In buyer's action for seller's misrepresentations in sale of automobile that car was new, refusal of instruction denying recovery in case means of knowledge were equally available to both parties *held* proper, where plaintiff had no previous experience with the car and defendants were familiar with its history and previous use.

7. **Trial ⚷260(1), 261—Refusal of instructions sufficiently covered by instructions given and which contained erroneous statements held not ground for reversal.**

Refusal of instructions requested *held* not ground for reversal, where all essential points were presented to jury by instructions given and where the instructions requested contained erroneous statements.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Charles T. Mattocks against the Class A Motor Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Brittan & Brittan, of Bakersfield, for appellants.

Emmons & Aldrich, of Bakersfield, for respondent.

WOOD, Justice pro tem. Plaintiff purchased a Buick automobile from the defendants on May 11, 1925, for which he paid them in cash the total sum of $925 and "turned in" another automobile for the agreed price of $500. He commenced this action for damages, alleging in his complaint that defendants had made false representations to him at the time of the purchase of the car. He set forth that defendants represented to him that the car was new and unused and in the condition that it was in when shipped by the manufacturer; that these representations were untrue; that the car had been repainted, a bow of the top broken, the upholstery torn, old tubes inserted in the casings, and a radiator installed which was not designed for the car in question. Defendants filed an answer in which they denied that false representations were made. They alleged that the car had been "used as a demonstration car for the said defendants herein" and that plaintiff was informed of the true condition of the car at the time of the purchase. The case was tried with a jury and a verdict rendered in plaintiff's favor fixing the damages at $925. Upon motion for a new trial plaintiff consented to a reduction of the judgment to the sum of $725.

[1] Defendants contend that "in a reading of all the transcript and all the testimony there cannot be found any evidence, that plaintiff introduced, to show 'that said car was not a new car but that in truth and fact it was a used car.'" A careful reading of their answer discloses that defendants did not deny the allegation that the car was not a new car. We find, however, that the answer contains this admission: "That said automobile has (had) been used as a demonstration car for the said defendants herein." Sufficient evidence was introduced by plaintiff to establish all of his allegations on the subject of the defective condition of the car. It cannot be said that a car which had been used in making demonstrations to such an extent as to call for repainting is a new car.

[2] The trial court gave the following instruction:

> "You are instructed, therefore, that the following issues must be determined by you, to wit: (1) Whether or not the said defendants represented and warranted to plaintiff, prior to or at the time of the purchase, that the car was a new or unused car. (2) Whether or not the plaintiff relied upon such representations and by reason of his reliance upon such representations purchased said car as a new one."

It is now contended that some of the issues were not covered in this instruction, resulting in a violation of the rule that if an instruction purports to state the conditions necessary to a verdict, it must state all of those conditions. The instruction under discussion does not purport to cover all the issues; nor does it tell the jury to find in favor of either party in the event they should find any certain facts to be true. The rule mentioned is not violated.

In presenting their next point defendants state in their brief:

> "* * * The court in advising the jury as to what facts the defendants have denied, very improperly omitted to advise the jury that we had denied that the car was a used car, while the court advised the jury that the plaintiff had 'offered evidence' to prove that the car was not a new car."

As above pointed out, defendants did not deny in their answer that the car was a used car. On the contrary, the following appears therein:

> "At said time plaintiff was told that said car had been repainted. * * * Said plaintiff was fully aware of the fact that said car was not in the same condition that it had been received by defendants from the factory."

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[3] In its instructions to the jury the trial court used this language:

> "You are instructed that in this action the plaintiff in the case, Charles T. Mattocks, has offered evidence to establish the following matters."

Then follows an enumeration of several points on which plaintiff introduced evidence. Defendants now contend that "the jury might assume that the evidence of plaintiff as offered would establish those facts set forth in the instruction, whether they actually did or not." While the form of the instruction is not to be commended, is cannot be said that it was inaccurate. The court in effect told the jury nothing more than that evidence had been offered on certain points. This was done for the purpose of stating the issues to the jury. It is not probable that the jury misunderstood the instruction.

[4] It is contended that the evidence was insufficient to justify damages in the sum of $725. Plaintiff testified that the reasonable value of the car at the time he purchased it was "around six or seven hundred dollars." He paid $1,425 for it in cash and property. It cannot be said that the implied finding that the car was of the value of $700 at the time of its purchase is not sustained by the evidence.

[5] Two sons of the plaintiff were with him at the time the car was purchased. Plaintiff testified that at the time of the trial they were ill in a county other than the one in which the trial was conducted. The court did not err in admitting this testimony. Section 2061, Code of Civil Procedure, makes it the duty of the court to instruct the jury on proper occasion "that evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict." Plaintiff had the right to prove that the boys were unable to be present in order to answer the argument that might possibly be presented that he had the power to produce stronger evidence than he actually produced.

[6] Defendants complain of the refusal of the trial court to give to the jury the following instruction:

> "You are instructed, that the plaintiff in this action cannot recover unless he was deceived by the alleged representations, and if the means of knowledge are at hand equally available to both parties, and the subject of purchase is alike available to both parties, and the subject of the purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities he will not be heard to say he has been deceived, unless he was induced by the trick or misrepresentation of defendant not to make such inspection."

The court did not err in refusing this instruction. It cannot be reasonably argued that "the means of knowledge" concerning the condition of the car were "equally available to both parties." Plaintiff had had no previous experience with the car, but defendants were familiar with its history and knew that it had been used for demonstration purposes and had been repainted. He could discover that old tubes had been placed within the casings only by removing the tires from the wheels. It would be unreasonable to require him to do so.

[7] Defendants complain of the refusal of the trial court to give several other instructions. All the essential points of law governing the case were presented to the jury by the instructions given in a manner as favorable to defendants' contentions as they could rightfully demand. Moreover, the court was justified in refusing these instructions on the ground that certain correct statements of the law were coupled with statements which were clearly erroneous.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

91 Cal. App. 746

SUNSET LUMBER CO. v. SMITH et al.

(Civ. 6087.)

District Court of Appeal, First District, Division 2, California. May 15, 1928.

1. Mechanics' liens 🔑315—Sureties on bond guaranteeing contractor's performance of contract, requiring him to furnish labor and material, held liable on all claims for labor or materials.

Where contract required contractor to furnish labor and material, and to complete work free from liens, bond guaranteeing that contractor would perform all obligations of contract made obligators thereon liable in full for claims of all persons performing labor on, or furnishing material to be used in, work.

2. Mechanics' liens 🔑313—Contractor's bond becomes part of the contract, and sureties become parties thereto.

Building contractor's bond, guaranteeing performance of building contract, becomes part of contract to which sureties on bond become parties.

3. Mechanics' liens 🔑313—Building contractor's bond must be considered with contract as constituting indivisible contract.

Building contractor's bond, guaranteeing performance of all conditions of contract, must be construed as indivisible part of contract.

4. Mechanics' liens 🔑315—Building contractor's bond, guaranteeing performance of contract free of liens, held to inure to benefit of parties providing materials and furnishing labor (Code Civ. Proc. § 1183).

Building contractor's bond, guaranteeing performance of all conditions of building contract free of liens, inured to benefit of third parties providing materials and furnishing labor, even if it did not by its terms state it was for benefit of such persons, as required by Code Civ. Proc. § 1183.

5. Mechanics' liens 🔑315—Sureties on building contractor's bond, guaranteeing performance of contract free of liens, held liable to extent thereof for labor and materials.

Sureties on building contractor's bond, guaranteeing performance of all obligations of contract free of liens, were liable to extent of bond for payment for labor and materials used in construction.

6. Mechanics' liens 🔑315—Purpose of building contractor's bond is not alone to protect owner of property, but to protect persons providing labor and furnishing material.

Purpose of building contractor's bond, guaranteeing performance of contract free of liens, is not alone to protect rights of owner of property on which buildings are being erected, but also to protect rights of, or serve as indemnity to, persons providing materials and furnishing labor.

7. Mechanics' liens 🔑315—Persons furnishing contractor with materials or labor held entitled to proceed on contractor's bond (Civ. Code, § 1559).

Under Civ. Code, § 1559, permitting person for whose benefit contract is expressly made to enforce it, persons furnishing contractor materials or labor which were not paid for were entitled to proceed on bond guaranteeing performance of all obligations of contract free from liens.

8. Mechanics' liens 🔑315—Liability of sureties on contractor's bond is limited to amount of bond.

Liability of sureties on bond of building contractor, guaranteeing performance of all obligations of contract free of liens, is limited to amount of bond.

9. Mechanics' liens 🔑313—Statute held not to require building contractor's bond to recite that persons furnishing labor and materials may sue thereon (Code Civ. Proc. § 1183; Civ. Code, § 1559).

In view of Civ. Code, § 1559, providing that contract made expressly for benefit of third person may be enforced by him, Code Civ. Proc. § 1183, providing that contractor's bond shall by its terms be made to inure to benefit of those performing labor or furnishing materials, does not require that bond itself shall recite that persons furnishing contractor with labor or material may sue thereon, but only states legal effect of bond.

10. Mechanics' liens 🔑313—Contractor's bond held substantially to comply with statute (Code Civ. Proc. § 1183).

Building contractor's bond, guaranteeing performance of all obligations of contract filed by owners, *held* substantially to comply with Code Civ. Proc. § 1183, and to make owners liable to those furnishing material and labor to contractor only to extent of amount due from owners to contractor.

Appeal from Superior Court, Santa Cruz County; H. C. Lucas, Judge.

Action by the Sunset Lumber Company against E. Porter Smith, consolidated with seven other actions of similar character. From a judgment for plaintiff limiting its lien on certain property, it appeals. Affirmed.

Louis Oneal and Maurice J. Rankin, both of San Jose, for appellant.

J. L. Smith, of San Francisco, for respondents.

PRESTON, P. Justice pro tem. The appellant, Sunset Lumber Company, a corporation, brought this action to foreclose a lien upon the property of respondents, Charles Locke Paddon and Evalynne D. Paddon, for building materials furnished by it and used in the construction of a dwelling house owned by said respondents in the city of Watsonville.

This action was consolidated with seven other actions of a similar character, and tried by the court without a jury, and the court rendered judgment in favor of appellant and against the contractor, E. Porter Smith, for $4,345.26, the full amount of appellant's claim, but limited the lien of appellant to $2,484.02, upon the ground that there remained unpaid from said respondents Paddon and wife, the owners of the property, to E. Porter Smith, the contractor, only $4,202.05, and that, as the owners had filed a bond with the contract, the liability of said owners to appellant was limited to its proportion of the $4,202.05, due from the owners to the contractor. Appellant appeals from the said judgment limiting its lien to $2,484.02, and claims that it is entitled to a lien for the full amount of its claim, to wit, $4,345.26, for the reason that the bond furnished and filed with the original contract is not the bond required by section 1183 of the Code of Civil Procedure.

Therefore, the sole question presented by this appeal is whether the bond in question meets the requirements of the statute.

The bond in question was made a part of the original contract between the owner and contractor, and filed with the contract in the office of the county recorder of the county of Santa Cruz, and is in the words and figures following, to wit:

"As a part of the same transaction with the foregoing contract, we, the undersigned, hereby undertake and guarantee that E. Porter Smith, the contractor named therein, will fully and faithfully keep and perform all the obligations thereof in his part to be performed, and will deliver said building fully completed within the time therein specified, free from all liens and claims of any persons performing labor thereon or furnishing materials therefor, or both. The liability of the surety is hereby fixed in the sum of four thousand seven hundred and ninety-five and no/100 ($4,795.00) dollars."

[1] It is first contended that this bond is not conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in the work. The contract provides that the contractor will furnish necessary labor and material, and will perform and complete certain work, free from all liens, and the sureties *guarantee* that the contractor will perform all of the obligations of the contract, including the one just mentioned. From these provisions of the contract and bond appellant argues that it does not follow that the contractor *must pay in full the claims of all persons furnishing material to be used in said work.* We think this contention untenable.

It is true that neither the bond itself, nor the contract, says *the contractor will pay for all labor and materials required to construct said building*, but said contract does provide that:

> *"The contractor agrees to furnish labor and material * * * required and perform and complete in a workmanlike manner, free from any and all liens and claims of artisans, material men, subcontractors and laborers thereon.* * * *"

The contract also provides that, in the event said contractor, at any time during the progress of the work, fails, refuses, or neglects for a period of five days to furnish and provide material and workmen to finish the work, the owner shall have power to furnish same and deduct the expenses from the amount of the contract price, and the bond, which is a part of the contract, provides:

> "We, the undersigned, hereby undertake and *guarantee* that E. Porter Smith, the contractor named therein, will fully and faithfully keep and perform all the obligations thereof in his part to be performed."

Therefore it is perfectly clear to us that the language of the contract sufficiently implies that the obligation was imposed upon the contractor, E. Porter Smith *to pay* for all material enumerated in the contract, and furnish all labor necessary to do the work, and, when the bondsmen guaranteed that the contractor "will fully and faithfully perform all the obligations of the contract," they guaranteed that the contractor would pay for the labor and materials that were used in the construction of said building, and would furthermore perform the other things required of him under the contract. Certainly, this interpretation was the intent and purpose of all the parties to the contract and bond. It would be an unreasonable and strained construction to place upon a contract, such as this, to say that the contractor agreed to furnish all labor and material and construct a dwelling house for the owners for $9,585, and to furnish the owners a bond guaranteeing to do all this, and then say, "This does not mean that the contractor was *to pay* for the labor and materials." If the interpretation as contended for by appellant be correct, then what was the contractor to do for the $9,585?

When a contractor agrees to furnish all labor and material and build a house for $9,585 within a given time, free of all liens, it certainly means that the contractor, and not the owner, is *to pay* for all labor and material; otherwise, in this case, the owners would be paying the contractor $9,585 for absolutely nothing.

Callan v. Empire State Surety Co., 20 Cal. App. 483, 129 P. 978, 981, was an action brought by the owner against the sureties of the contractor to recover moneys paid out to discharge claims for labor and materials after abandonment by the contractor, and it was there definitely decided that a similar clause in a building contract obligated the contractor not merely to furnish, but *to pay* for, the labor done and materials furnished.

The case of Fickling v. Jackman et al. (Cal. Sup.) 265 P. 810, involved a similar contract, and there the following language was used in a contract: "The contractor will furnish all labor and materials necessary for the erection and completion of the buildings," which is almost the identical language used in the contract in the case at bar, and the court held that this was an obligation on the part of the contractor to pay for all materials used and labor done in the erection of the buildings. See, also, Fuller v. Alturas School District, 28 Cal. App. 609, 153 P. 743.

[2-4] Appellant next contends that said bond is not by its terms made to inure to the benefit of persons who furnished materials to be used in the work described in the contract, nor does said bond by its terms give the claimant a right of action to recover upon said bond in any suit brought to foreclose its lien. These contentions are based upon certain provisions of section 1183 of the Code of Civil Procedure, which provides when a bond is given it shall "by its terms be made to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in the work described in said contract so as to give such persons a right of action to recover upon said bond in any suit brought to foreclose the liens provided for in this chapter or in a separate suit brought on said bond. * * *"

It is argued that the bond in the case at bar does not comply with the foregoing statutory provisions, and is only a bond to indemnify and hold harmless the owners against liens. It is elementary that a bond such as the one under consideration, given to guarantee the execution of a contract, according to its terms, becomes a part of such contract, and to that contract the sureties become parties, the same as though they had actually made and executed the contract itself. Therefore, in interpreting the language of the bond, we must do so by treating the contract and the bond as constituting an indivisible contract. Fuller v. Alturas School District, supra. Construing the bond in question by this rule, there is no escape from the conclusion that the same was not given for the sole benefit of the owners, but that it was intended to inure as well to the benefit of third parties providing materials and furnishing labor to be used in the construction of said building.

[5] We have already determined that the contract imposed the obligation upon the contractor to pay for all labor and materials that went into the construction of said building, and the liability of the sureties, being coextensive with that of the contractor, the sureties are likewise liable to the extent of their bond for the payment of labor and materials that were used in the construction of said building.

[6] As stated in Callan v. Empire State Surety Co., supra, the very purpose of such a bond is not alone to protect the rights of the owner of the property upon which buildings are being erected under building contracts, but also to protect the rights of or serve as indemnity to persons providing materials and furnishing labor in the construction of such buildings.

[7] Section 1559 of the Civil Code provides:

> "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

It follows, therefore, that the appellant, or any other person who furnished to the contractor materials or labor which have not been paid for, are entitled to proceed against the sureties on said bond for the recovery of the amounts due them.

[8, 9] The liability of such sureties is, of course, limited in said bond to $4,795. Said bond does in legal effect, therefore, by its terms, actually inure to the benefit of persons who furnished material or performed labor in the construction of said building, and also entitles them to sue the sureties direct. Section 1183 of the Code of Civil Procedure does not provide that said bond itself recite that fact; it only states the legal effect of such a bond.

The appellant cites the case of Terry v. Southwestern Building Co., 43 Cal. App. 366, 185 P. 212. That case is of no assistance; the bond in that case contained an express provision that "no right of action shall accrue upon or by reason hereof to or for the use or benefit of *any one other than the obligee herein named*, and that the obligation of the company is and shall be construed strictly as one of suretyship only."

[10] We think the bond, which is a part of the contract, is in substantial compliance with section 1183 of the Code of Civil Procedure, and that the trial court was correct in limiting the lien of appellant's judgment.

Judgment affirmed.

We concur: STURTEVANT. J.; NOURSE, J.

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91 Cal. App. 715

ROBERTSON v. WEINGART et al.★
(Civ. 3510.)

District Court of Appeal, Third District, California. May 11, 1928.

Hearing Denied by Supreme Court July 9, 1928.

1. Innkeepers 🔑10—It is hotel keeper's duty to keep premises in condition reasonably safe for guests.

The general rule is that it is hotel keeper's duty to keep his buildings and premises in a condition reasonably safe for his guests.

2. Innkeepers 🔑10—Evidence held to support finding that hotel keeper failed to maintain stairway railing and air shaft gate in reasonably safe condition.

Evidence that gate, opening on deep air shaft with concrete bottom, and constituting part of hotel stairway handrail, would not catch or remain closed, *held* to support trial court's finding, in action for death of guest falling into shaft, that hotel keeper failed to maintain railing and gate in condition reasonably safe for guests.

3. Evidence 🔑58—Trial judge could presume, in absence of contrary evidence, that hotel guest, killed by fall into air shaft, was in ordinary health, and not subject to fits.

In action against hotel keeper for death of guest falling into air shaft opening off stairway, trial judge had right to presume, in absence of evidence to contrary, that decedent was normal person, in ordinary health, and full possession of senses and faculties, and not suffering from fits or any other physical infirmity or disability.

4. Innkeepers 🔑10—Evidence held to support finding that air shaft gate gave way because of insufficient locking device, causing death of guest relying thereon as part of stairway handrail.

In action against hotel keeper for death of guest, evidence *held* to warrant finding that decedent grasped or relied on gate of air shaft opening off stairway as part of handrail to assist her in ascending, and that such gate, because of insufficient locking device, gave way, causing her to fall into shaft.

5. Innkeepers 🔑10—Negligence of hotel guest, killed by fall into air shaft, in relying on insecurely fastened gate as part of stairway handrail, cannot be presumed (Code Civ. Proc. § 1963, subd. 4).

It cannot be presumed that hotel guest, killed by fall into air shaft opening off stairway, was negligent in grasping or relying on gate, which was insecurely locked, as part of handrail, in view of presumption, under Code Civ.

★Hearing denied by Supreme Court.

Proc. § 1963, subd. 4, that she used due and ordinary care to avoid injury.

6. Appeal and error 🔑931(1)—Evidence must be reviewed in light most favorable to support judgment and all reasonable inferences favorable to appellee indulged, where appellant's theories are but opposing inferences.

Where appellant's theories as to cause of death sued for are at most but opposing inferences, evidence must be reviewed in light most favorable to support judgment, and all inferences reasonably possible therefrom favorable to appellee must be indulged by appellate court.

7. Appeal and error 🔑1010(1)—Evidence 🔑597—Circumstantial evidence need not exclude every other reasonable conclusion to sustain finding which will be set aside only on clear showing of no sufficient substantial evidence to support it on any hypothesis.

Circumstantial evidence in civil cases need not exclude every reasonable conclusion other than that arrived at by jury in order to sustain finding, but, to set aside verdict for insufficiency of such evidence, it must clearly appear that there is no sufficient substantial evidence to support it on any hypothesis.

8. Negligence 🔑134(2)—Connection between negligence and injury may be shown by circumstantial evidence.

The connection between negligence and injury need not be made by an eyewitness or direct testimony, nor actually demonstrated, but may be shown by circumstantial evidence, like any other facts.

9. Appeal and error 🔑1011(1)—Trial court's fact finding on conflicting evidence cannot be disturbed, where supported by substantial evidence.

Trial court's finding on conflicting evidence as to whether decedent was intoxicated at time of injury cannot be disturbed by appellate court, where supported by substantial evidence.

10. Appeal and error 🔑1039(13)—That hotel guest's death might have been caused by air shaft gate remaining open held not to warrant reversal for variance between pleading and proof, where court found on substantial evidence that gate was maintained in defective condition as alleged in complaint.

That death of hotel guest, falling into airshaft opening off stairway, might have been caused by gate remaining open, *held* not to warrant reversal of judgment against hotel keeper on ground of variance between pleading and proof, where there was substantial evidence to support trial court's finding that defendants negligently, carelessly, and wrongfully maintained stairway railing, air shaft gate, and locking device in defective condition, as alleged in complaint.

11. Trial 🔑396(1)—Court's findings need not follow precise language of pleading.

It is not essential that the court's findings follow the precise language of the pleading; the question being whether the truth or falsity of material allegations can be demonstrated therefrom.

12. Appeal and error 🔑931(1)—Appellate court must liberally construe trial court's findings in support of judgment.

The trial court's findings must be given a liberal construction in support of the judgment by the appellate court.

13. Appeal and error 🔑1071(6)—Court's failure to find that decedent brushed lightly against air shaft gate as alleged held harmless, in view of finding that she relied on gate as part of stairway railing.

That court failed to find in precise language of complaint, that hotel guest, killed by fall into air shaft when gate gave way, "brushed lightly against the gate," *held* harmless to defendant, where court found that decedent relied on stairway railing and gate which was part thereof in passing along stairway; such reliance being ultimate fact found.

14. Death 🔑57—Testimony as to wife's earnings held admissible under general allegation of damages in husband's action for her death.

In husband's action for death of wife, testimony as to decedent's earnings was admissible under general allegation of damages as proof of loss of her services; being element of damages naturally and necessarily resulting from act complained of.

15. Appeal and error 🔑1032(2)—Appellant must show that erroneous admission of testimony was prejudicial, unless prejudice necessarily results.

Appellant, seeking reversal on ground of erroneous admission of testimony, must not only convince reviewing court that trial court erred, but must show that ruling complained of was prejudicial in its effect and result, unless prejudice necessarily results from nature of evidence itself.

16. Trial 🔑165—Every favorable inference and presumption from evidence must be considered in plaintiff's favor on motion for nonsuit.

Every favorable inference fairly deducible, and every favorable presumption fairly arising, from evidence produced, must be considered in favor of plaintiff on motion for nonsuit.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by William R. Robertson against Ben Weingart and others. Judgment for plaintiff, and named defendant appeals. Affirmed.

H. W. Kidd, W. O. Schell, Harold Larson, and Ingall W. Bull, all of Los Angeles, for appellant.

John B. Haas and John D. Home, both of Los Angeles, for respondent.

TUTTLE, Justice pro tem. This action was brought by plaintiff to recover damages for the death of his wife through the negligence of defendant. The case was tried before the court, and judgment was rendered in favor of plaintiff. The appeal is taken, under the "alternative method," from said judgment.

For some time prior to March 2, 1924, the decedent had been a duly registered guest at a hotel in Los Angeles, then operated and leased by Ben Weingart, sole appellant herein. As such guest she occupied a room on the fourth floor of the hotel. Plaintiff was her husband, and, while he did not live at the hotel, he visited her frequently, and often stayed overnight there. The elevator in the building was not in running order at the times herein mentioned, and could not be used, so the only access decedent had to her room was by means of a stairway. Prior to her death decedent suffered from a physical defect, in that her right ankle was stiff, due to a prior accident. She walked with an impediment, up and down stairs. She always wanted support going up and down stairs, on account of her stiff ankle. The stairway has a number of turns as it ascends. At such turns the treads of stairs are V-shaped. Upon the one turn with which we are here concerned there is located an air shaft, some 27 inches wide, and extending back 36 inches. Across the open side of this shaft is a handrailing and gate. The top of the gate is a continuation of the said handrail. This shaft is some 17 feet deep, and it opens directly upon the stairway, and extends to the ceiling. The gate opens inward and toward the air shaft, and is hung on ordinary hinges. A small spring "catch" was attached to the gate, for the purpose of keeping it closed.

On Sunday, March 2, 1924, decedent had been in company with her husband for practically the entire day. She returned to the hotel at about 11:30 p. m.; her husband leaving her at the door. She called at the hotel office, and conversed with the woman in charge there, and used the telephone located in a booth in said office. She then proceeded to ascend the stairway already described, on her way to her room on the fourth floor. She failed to appear on Monday, and a search for her was instituted by her husband. Two days were spent in an endeavor to locate her. On Wednesday one of the employees of the hotel suggested to plaintiff that he examine the said air shaft. The body of decedent was found at the bottom of said shaft. She had been dead several days. Her skull was fractured, and her injuries were such as would cause instantaneous death. Her injuries could have been caused by the body falling against a hard object.

The complaint alleged that decedent was a guest at said hotel; that the only means of access to and egress from her said room was by said stairway. It then described the stairway, air shaft, and gate in detail. The negligence of defendant is charged in the following language:

> "That on said 2d day of March, 1924, and at all times herein mentioned, said gate did not automatically close in a locked position, but swung in a partially closed position without locking and without being fastened in any manner whatsoever; that said spring catch was small, weak, and ineffectual to securely lock said gate in place, and was ineffectual to prevent the gate from swinging open upon pressure being applied to said gate from the stairway side; that at all times herein mentioned the said defendants and each of them, and their agents and servants, negligently, carelessly, recklessly, and wrongfully maintained the said railing, gate, and locking device in said condition, all of which was unknown to the said Rose Robertson."
>
> "VI. That on the 2d day of March, 1924, at or near the hour of 12 o'clock p. m. on said day, and while the said Rose Robertson was a guest in said hotel, the said Rose Robertson, relying upon the said railing, gate, and locking device, as aforesaid, as a protection against falling over off and from the said stairway into the said air shaft, while passing along said stairway, brushed lightly against the said railing and gate, and that thereupon, and by reason of the small, weak, and ineffectual locking device on said gate, and by reason of the defective condition of the railing, gate, and locking device, and by reason of the careless, negligent, reckless, and wrongful conduct of the said defendant, and each of them in so maintaining the said railing, gate and locking device, and not otherwise, the said gate gave way, thereby precipitating and causing the said Rose Robertson to fall off the said stairway and through the said gateway and down the said air shaft to the bottom of the said air shaft, a distance of about 17½ feet, and causing the said Rose Robertson to strike the cement floor at the foot of the air shaft."

The findings of the trial court followed the language of the complaint, except that there was no finding made that "while passing along said stairway (decedent) brushed lightly against the said railing and gate." The finding on these facts reads as follows:

> "Said Rose Robertson (decedent) relying upon said railing and gate therein, a part of said railing, as protection against falling off and over into said air shaft from said stairway, passed along and on said stairway; that said gate gave way and opened into said air shaft because of the negligent manner in which the railing, gate, locking device and spring hinges were maintained by the said defendant, Ben Weingart, thereby precipitating and causing the said Rose Robertson to fall off the said stairway and through the said gateway and down the said air shaft to the bottom of said air shaft, a distance of approximately 17½ feet, and caused said Rose Robertson to strike a cement floor at the foot of the said air shaft and causing said Rose Robertson to suffer severe and painful injuries —and that from said injuries the said Rose Robertson died on the 2d day of March, 1924."

The principal ground of appeal relied upon by appellant is the insufficiency of the evidence to support the findings which we have just quoted.

[1, 2] The cause of action in this case is predicated upon the negligent manner in which defendant maintained the railing and gate in question. We are satisfied that there was substantial evidence to support this finding. Edwin L. Oker, detective lieutenant and

witness for plaintiff, testified that he examined the gate on the day the body was found (some three days after decedent disappeared); that the gate looked to be closed. As he arrived at the gate, he leaned lightly against it; it went open; that he found the gate would not close, unless it was slammed exceedingly hard; the catch wouldn't catch; he procured a strap, and strapped the gate tight, so it couldn't come open any more. The gate would always come to and even with the balcony, but the catch would not catch. It would come into position and become closed, but it would only be hanging on the hinges. Officer W. H. Thompson, witness for plaintiff, testified that, when he went to the hotel to take the body out, on March 5th, the gate was unlatched; it would not catch good; would not catch when he slammed the gate; it would not catch good, so that left the gate so that it was liable to come unhooked any time; he examined the gate just to try to catch it so anybody else would not fall through it. In view of the fact that the top of this gate was a continuation of the handrail for use of those who needed assistance in ascending, and that the gate opened directly off the stairway upon a shaft 17 feet deep, and concreted at the bottom, the duty devolved upon the defendant to keep said gate in a reasonably safe condition. Was the trial court justified in concluding that, under the circumstances narrated, defendant was guilty of negligence? The answer to this question depends upon the degree of care which a hotel keeper owes to one who is his guest. The general rule is, that it is the duty of a hotel keeper to keep his buildings and premises in a condition reasonably safe for his guests. 32 C. J. p. 562. See, also, Goldstein v. Healy, 187 Cal. 206, 201 P. 462. Applying the principle stated, the finding of the trial court was based upon substantial evidence to support it. A gate which would not "catch" or remain closed, and which opened upon a pit 17 feet deep, with a concrete bottom, and which gate was a part of the hand rail on the stairway, was a veritable death trap, and the maintenance of the premises in this condition could very well be held a breach of the duty which the hotel keeper owed decedent.

[3-6] Conceding that the finding of the court upon the question of negligence might find support in the record, appellant earnestly contends that there is an entire absence of any evidence showing a causal connection between such negligence and the death of plaintiff's wife. He enumerates some eight other theories as to how the decedent might have met her death, all of which he states are more probable than the one advanced in the complaint. The case of Puckhaber v. Southern Pacific Company, 132 Cal. 363, 64 P. 480, is relied upon by appellant as sustaining his position in respect to the failure to show that defendant's negligence caused the injury alleged. In that case a man was found dead one morning upon the tracks of the defendant railroad company. There was no question but what he had been mutilated by a train. It was proved that on a previous morning a train of defendant backed over the place where the body was found, and there was no red light upon the rear of the train. A verdict for plaintiff was reversed; the court holding that there was an entire lack of causal connection between the negligence of defendant and the death of decedent. The verdict, the court stated, rested upon a foundation created by a mere guess. Applying the language of the case last cited to this one, appellant contends that, "for aught it appears, deceased may have fallen in a fit," and thus precipitated herself down the air shaft. The trial judge had a right to presume, in the absence of evidence to the contrary, that decedent was a normal person in ordinary health and in full possession of all the senses and faculties with which the Creator endowed her. It must be presumed that decedent, in passing along the stairway, used due and ordinary care and precaution to avoid injury to herself. Code Civ. Proc. § 1963, subd. 4; Ross v. Railways Co., 47 Cal. App. 753, 191 P. 703. While no one saw her when she fell to her death, the court may reasonably and justly have inferred that, on the night in question, as she passed along the stairway, she grasped or relied upon the gate as part of the handrail to assist her in ascending or descending, and that the gate, by reason of the insufficient locking device, gave way and sent her to her death. We must bear in mind that there was evidence that deceased had a stiff ankle, and required support going up or down stairs. Every alternative theory brought forward by appellant as to the cause of death is based either upon the assumption and presumption that decedent was either negligent or suffering from some physical disability. There is no proof in the record to sustain these contentions. Negligence is never presumed under such circumstances, nor can it be presumed that decedent was suffering from "fits," or any other physical infirmity or disability. The various theories advanced by appellant upon the cause of death are at most but opposing inferences, and the evidence under such circumstances must be reviewed in the light most favorable to support the judgment, and all inferences reasonably possible from the evidence favorable to plaintiff must be indulged in by this court. Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 26 A. L. R. 123.

[7, 8] Where certain findings of the trial court in a civil case are based upon circumstantial evidence, what rule shall a reviewing court on appeal follow, when an attack is made upon the sufficiency of such evidence to sustain such findings? Appellant contends the rule to be that:

> "If other conclusions may reasonably be drawn as to the cause of the injury from the facts in

evidence than those contended for, the evidence does not support the conclusion sought to be drawn from it"—citing Wilbur v. Emergency Hospital, 27 Cal. App. 755, 151 P. 155.

The same rule is declared in Estate of Wallace, 64 Cal. App. 107, 220 P. 682, with reference to which the Supreme Court, in denying a rehearing, expressed its disapproval, and referred to the correct rule as stated in a number of other cases decided by that court. The rule referred to by the Supreme Court was applied in the case of Chalmers v. Hawkins, 78 Cal. App. 733, 248 P. 727, and we quote it:

> "As the rule is stated in other jurisdictions, circumstantial evidence in civil cases, in order to be sufficient to sustain the verdict, need not rise to that degree of certainty which will exclude every reasonable conclusion other than that arrived at by the jury."

Our Supreme Court has stated the rule to be that, before the verdict can be set aside upon appeal, upon the ground of the insufficiency of the evidence which is circumstantial in its nature, it must be clearly made to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusions reached by the court below. People v. Tom Woo, 181 Cal. 315, 184 P. 389. The principle contended for by appellant is more applicable as a rule to guide a jury in its deliberations upon the facts than it is a rule to guide the appellate court in passing upon the sufficiency of the evidence. Peters v. McKay, 136 Cal. 73, 68 P. 478. The connection between negligence and injury is not one that is required to be made by an eyewitness or by direct testimony, nor must actual demonstration of such connection be made. The connection may be shown by circumstantial evidence in the same way that any other fact may be proved. Ross v. Railways Co., 47 Cal. App. 753, 191 P. 703. Reviewing the evidence in the light of the correct rule which we have stated, and conceding that the evidence may not exclude every supposition or theory to the contrary, we nevertheless hold that the conclusions reached by the trial court in respect to the manner of death find reasonable support in the evidence, and that our inquiry is there terminated. Taylor v. U. S. Fid. & Guar. Co. (Cal. App.) 260 P. 898; Gjurich v. Fieg, 164 Cal. 429, 129 P. 464, Ann. Cas. 1916B, 111.

[9] It is contended that the evidence is insufficient to support the finding that decedent was not intoxicated at the time of the injury. Her husband testified that she had been with him all the day preceding the night when she disappeared, and that she was not intoxicated when he left her at 11:30 p. m., when she entered the hotel. An employee of appellant testified that, when she saw decedent a few minutes afterward, in the office of the hotel, decedent was intoxicated. This is merely conflicting evidence, and the conflict was resolved in favor of respondent. There was substantial evidence to support this finding, and we are precluded from disturbing the same.

[10] Appellant complains that the proof does not conform to the facts pleaded in the complaint. On the question of negligence there was ample evidence to justify the court in finding that the gate and railing were maintained in a defective condition. Here again appellant indulges in several theories of his own to show that the injury might have been caused by the gate remaining open; hence there was a variance between pleading and proof. The answer to this is that the court upon substantial evidence found otherwise, and, as we have indicated, such conclusions cannot be disturbed. The cases cited by appellant on this question are those where there is an entire absence of any testimony to support the negligence where specific acts are pleaded. In the instant case, it is charged in the complaint that "defendants negligently, carelessly, and wrongfully maintained said railing, gate, and locking device in said condition." There was substantial evidence to support a finding as to the truth of this allegation, and we are not called upon to analyze the various theories suggested by counsel. The fact that there was other evidence which, if it had been adopted by the court in its finding, might have occasioned a variance between pleading and proof, is of no concern. We see no merit in this contention.

[11-13] The complaint alleged that decedent brushed lightly against the gate. No finding is made in this precise language, but the court finds, in the language of the complaint, that decedent, *relying upon the railing and the gate, which was a part thereof,* passed along the stairway and said gate gave way. It is not essential that findings follow the precise language of the pleading. The question is, Can the truth or falsity of the material allegations be demonstrated therefrom? Frascona v. L. A. Ry. Corp., 48 Cal. App. 135, 191 P. 968. The ultimate fact to be found was, Did decedent rely upon said gate and railing in passing along the stairway? There was no direct evidence that she brushed against the gate, but there were facts from which the court could infer that she relied upon the gate. The cases cited by appellant, including the Frascona decision mentioned, supra, involve the findings in respect to *negligence*, and they refer to the injustice done the opposing party where some particular act of negligence is alleged, and some entirely different act is attempted to be proved. That prejudice may result from such a situation, we have no doubt. In the instant case the allegation thus omitted from the findings is not on the question of negligence, but is merely a probative fact connected with the details of the occurrence. The ultimate fact found by the court was that plaintiff *relied* upon the gate and railing. The findings must be

given a liberal construction, in support of the judgment, by an appellate court, and it is inconceivable, that any harm could have been done to defendant by reason of the failure of the court to follow the precise language of the pleading.

[14] Error is urged in the admission of testimony by plaintiff as to the earnings of his wife. Such evidence was clearly admissible under a general allegation of damages, as proof of the loss of services of the deceased wife. It was an element of damages which naturally and necessarily resulted and flowed from the act complained of (8 Cal. Jur. p. 887), and was not required to be specially pleaded.

[15] Numerous other assignments of error are made with reference to the admission of testimony. We have examined them with care, but can find no valid objection to the rulings made thereon by the learned trial judge. Moreover, appellant has neglected and failed to point out wherein he was prejudiced by such rulings. If an appellant seeks a reversal upon such grounds, not only must he convince the reviewing court that the trial court erred, but he must go further, and show that the ruling complained of was prejudicial in its effect and result. While there may be occasions where, from the nature of the evidence itself, prejudice in its admission must necessarily result, the record here does not permit of the application of that principle.

[16] As to the order denying the motion for nonsuit, the action of the court was proper, in the light of the testimony of plaintiff as summarized, supra. There was substantial evidence tending to prove the facts necessary to make out plaintiff's case. Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered in favor of plaintiff upon such a motion. Boyle v. Coast Improvement Co., 27 Cal. App. 714, 151 P. 25.

The judgment is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

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91 Cal. App. 738

VALLEY BANK v. HILLSIDE PACKING CO. (Civ. 4758).

District Court of Appeal, Second District, Division 2, California. May 14, 1928.

1. Chattel mortgages ⊂⇒136—Rights of mortgagor's creditors and subsequent purchasers are superior to mortgage lien on crop removed through mortgagee's consent or lack of diligence (Civ. Code, § 2955 et seq., and § 2972, modifying St. 1850, p. 267, § 17, as amended by St. 1856, p. 87).

Under Civ. Code, § 2972, modifying St. 1850, p. 267, § 17, as amended by St. 1856, p. 87, and Civ. Code, § 2955 et seq., lien of crop mortgage is not lost through tortious removal of crop without mortgagee's act, permission, or carelessness, nor when possession thereof uninterruptedly succeeds period of protection by recordation, but rights of mortgagor's creditors and purchasers subsequent to removal are not inferior to mortgage lien if crop is removed through mortgagee's consent or lack of reasonable diligence to protect his rights after harvest.

2. Chattel mortgages ⊂⇒157(2)—Burden was on crop mortgagee to rebut presumption of extinguishment of lien by showing that crop was removed without its consent (Civ. Code, § 2972).

Removal of crop from land constituted prima facie extinguishment of lien of mortgage thereon, under Civ. Code, § 2972, and burden was on mortgagee to rebut such presumption by showing that removal was without his knowledge and consent, and hence tortious.

3. Chattel mortgages ⊂⇒219—Removal of crop, with mortgagee's consent, to packing house of company, and sale thereof extinguished mortgage lien (Civ. Code, § 2972).

Removal of fruit crop from land with consent of mortgagee bank, which took no steps to protect its lien, to packing house of company which applied proceeds of sale thereof, with mortgagor's consent, to extinguishment of loan made by such company for purpose of packing and hauling crop, freed crop and proceeds from mortgage lien, except as between original parties to loan, under Civ. Code, § 2972.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Valley Bank against the Hillside Packing Company. Judgment for plaintiff, and defendant appeals. Reversed.

Avery J. Howe, of Lindsay, for appellant.

STEPHENS, Justice pro tem. This action was tried before the court without a jury, judgment was entered in favor of the plaintiff, and defendant appeals. To the appeal plaintiff has not seen fit to respond, either orally or by brief.

Anna R. Close and Hattie N. Peckham borrowed $1,000 from plaintiff on a promissory note and secured such note with a mortgage on an orange crop. This was duly recorded. The mortgagors subsequently received advances from the defendant (appellant here) in different sums, amounting in all to $504.43. Concerning these advances appellant's secretary and bookkeeper testified:

> "We loaned Mr. and Mrs. Close the sums of money in order to pick and haul their crop. We advanced altogether $504.43. * * * We did not know that there was any crop mortgage upon this fruit, and it was with that understanding that the fruit was delivered to the house. * * * My understanding at that time was that the crop was clear, and that the advances would be made as a first lien."

We are not informed as to the nature of this claimed lien, nor of facts which would enable us to determine whether it was a lien at all. The fruit was delivered to defendant's packing house and sold, bringing a net return of $727.29; $505.48 of this was applied in cancellation of the sums advanced, leaving the sum of $221.81 subject to the order of court. It appears indisputably from the evidence that the respondent bank, after loaning the money, authorized the delivery of the crop to any packing house, leaving the selection thereof and the circumstances of the handling of the fruit with the mortgagors.

Appellant contends that the crop mortgage lost its vitality when the crop was removed from the premises, and that, therefore, the judgment is wrong and should be reversed.

[1] As this subject has been fruitful of much litigation and lack of clear understanding, it is perhaps justifiable that the history of the crop mortgage law should be sketched here.

The first Legislature of the state enacted the following:

> "No mortgage of personal property hereafter made shall be valid against any other persons than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee." Stats. 1850, c. 114, § 17.

Under this statute no crop mortgage was good save between the parties thereto, unless legal title to the land upon which the crop was growing was transferred to the mortgagee.

The statute was amended in 1856 (St. 1856, p. 87) by adding to the original section a proviso as follows:

> "Provided, that a mortgage upon growing crops, executed, acknowledged and recorded, like mortgages upon real estate, shall be valid as against third parties without such delivery of possession, but the lien of such mortgage shall cease as against subsequent purchasers, unless possession of such crops, when harvested, be delivered to the mortgagee, as required in other cases of mortgage of personal property."

Thus the requirement of possession by mortgagee is modified by the substitution of a recorded mortgage until the harvest of the crop.

In 1872 the subject of crop mortgages was carried into the Code (section 2955 et seq., Civ. Code), and all mortgages were thereafter void, except as between the parties, unless recorded.

In 1878 section 2972 of the Civil Code was enacted:

> "The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of mortgagor."

It will be seen that this section broadens the effectiveness of the lien. Under it a crop lien complying to Code requirements is good as against the world, so long as the crop remains on the land (the farm) on which it was grown—even after harvest or conversion to other products. It follows logically that if the crop happen to be removed through no act or permission or carelessness of the mortgagee it has been removed tortiously, and therefore no legal rights should be gained or lost through such act. Accordingly, in Martin v. Thompson, 63 Cal. 3, and Wilson v. Prouty, 70 Cal. 196, 11 P. 608, the Supreme Court took this step by deciding that the lien under section 2972, Civil Code, is not lost through a tortious removal of the crop.

Again, it follows that the rights of creditors of the mortgagor and purchasers subsequent to removal should not be inferior to the lien if the crop has been removed through consent or lack of reasonable diligence of the mortgagee to protect his rights after harvest. Accordingly, as in the case of Horgan v. Zanetta, 107 Cal. 27, 40 P. 22, the court said that when the crop was removed from the premises the "mortgage had prima facie been extinguished," and, in determining that it had actually been extinguished in the cited case, the court remarked:

> "It does not appear that the mortgagee used any care or diligence in looking after the crop when harvested, or paid any attention to the grain until after it had been attached, which was about a month and a half after Murphy commenced to harvest it, and nearly a month after [the owner] had removed it from his land."

To the same effect is Ramsey v. California Packing Corporation, 51 Cal. App. 517, 201 P. 481. This case is surprisingly like the instant case.

Another contingency has arisen which also has been met by the courts. When the crop is harvested it must be cared for, and few farms are equipped to care for crops in the interim from harvest to use or sale. The mortgagor's removal without consent of the mortgagee would be tortious. Consent that he may do so would extinguish the mortgage lien. But originally possession of a chattel was required to be and remain in the mortgagee or become extinguished. Recordation of the mortgage was substituted for possession so long as the crop remained on the ground, and no longer. When met with this situation the courts, through sound reason, decided that when the possession of the chattel uninterruptedly succeeds the period of protection by recordation, the lien is not to be extinguished. See Summerville v. Stockton Milling Co., 142 Cal. 529, 76 P. 243, and Crosby v. Fresno Fruit Growers' Co., 30 Cal. App. 308, 158 P. 1070.

[2, 3] In the instant case the removal of the crop from the land constituted a prima facie extinguishment of the lien of the mortgage, and, as stated in Ramsey v. California Packing Corporation, supra:

> "It rested upon the mortgagee, if he would still enjoy the benefit of his mortgage security, to rebut that presumption by showing that the

crops were removed without his knowledge and consent and that it was, therefore, a tortious removal."

Or, as stated in the same case on the next succeeding page:

> "This agreement [in the instant case the consent to remove to any packing house] amounted in practical effect to a substitution of the personal obligation of the mortgagors for the security of the mortgage."

Here the money was advanced by appellant and the debt incurred while the fruit was on the ground. So far the mortgage, being recorded, was ahead of it. However, the fruit was removed and sold by the mortgagor under permission of the mortgagee, but not under the name or direction of the mortgagee, and the receipts were paid to appellant, who, with the mortgagor's consent, applied sufficient thereof to extinguish the loan made for the purpose of picking and hauling the crop. It is clear that the application of the money to appellant's loan was after the fruit had left the lands upon which it had grown, and that this removal, being with the consent of the mortgagee bank and without its having taken any steps to protect its mortgage lien, freed the fruit from the mortgage incumbrance. It follows that the money received therefor was released from the operation of the lien as well, except as between the original parties to the loan.

Judgment reversed.

We concur: WORKS, P. J.; THOMPSON, J.

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92 Cal. App. 141

McCAIN v. BURCH. (Civ. 3504.)

District Court of Appeal, Third District, California. May 22, 1928.

Judgment 🔑256(7)—Portion of judgment requiring payment of attorney's fees as condition precedent to cancellation of void note and mortgage held void as without issues.

In action by wife against attorney to cancel mortgage where court found that note and mortgage were fraudulent and void and given without consideration, *held*, that portion of judgment that plaintiff's husband employed defendant as attorney and that there was due from plaintiff to defendant certain sum as attorney's fees, and requiring plaintiff to pay such fees as condition precedent to cancellation of note and mortgage, was void as being without support in the finding and as an attempt to adjudicate matter which was not embraced within the issues.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action to cancel mortgage by Belle McCain against Charles E. Burch, wherein defendant filed a cross-complaint. From portion of judgment in her favor containing certain conditions, plaintiff appeals. Modified and affirmed.

W. Jefferson Davis and Schoonover & Winnek, all of San Diego, for appellant.

Wright & McKee, of San Diego, for respondent.

TUTTLE, Justice pro tem. This is a suit brought to cancel a certain mortgage given by appellant and her husband to respondent, and covering the separate property of appellant. Judgment was rendered canceling said mortgage, upon certain conditions being complied with. The appeal is from that portion of said judgment which contains said conditions, and is based upon the judgment roll.

The following allegations appear in the complaint: That respondent was the attorney for the husband of appellant George McCain, now deceased; that said McCain was in financial difficulties, and said attorney advised appellant that in order to protect her real property from her husband's creditors, she mortgage the same to him; that at this time appellant was the sole owner of certain real property which is described in the mortgage; that pursuant to said advice of said attorney, appellant executed the mortgage in question to him. The amount of said mortgage was $15,000, and it was given to secure the payment of a note dated August 11, 1922; that said note and mortgage were obtained by respondent through undue influence and without consideration; and that the execution of said documents was procured by respondent wrongfully and fraudulently and with intent to defraud appellant. Cancellation of said instruments is prayed for.

Respondent filed an answer admitting the execution of said instruments, but denying all the other allegations of the complaint. He also filed a cross-complaint, praying for a foreclosure of said mortgage. The answer alleged that the note and mortgage were given as security for the amount due respondent on account of legal services, and costs advanced in connection therewith.

The court found that the note and mortgage were obtained without consideration and under undue influence. It further found, however, that appellant's husband employed respondent, during the month the said instruments were executed, as his attorney, and that there was due from appellant to respondent the sum of $3,500 as an attorney fee and $235 costs advanced by him, making a total of $3,735. As conclusions of law, the court "decides" that appellant is entitled to judgment against respondent, requiring him to surrender to appellant the said note, and

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

is entitled to have the said mortgage released of record, "and that as a condition precedent to the surrendering up of said note and the releasing of said mortgage, said plaintiff and cross-defendant shall pay to the said Burch, within 60 days of date of judgment herein, the sum of $3,500 attorney's fees, and the further sum of $235 disbursements made by the said defendant and cross-complainant Charles E. Burch for and on behalf of said plaintiff and cross-defendant Belle McCain, making a total sum of $3,735, without interest and without costs."

Judgment was thereupon entered as follows:

> "Now, therefore, by reason of the premises, it is ordered, adjudged, and decreed that the plaintiff and cross-defendant, Belle McCain, is entitled to a judgment against the defendant and cross-complainant, Charles E. Burch, requiring the said defendant and cross-complainant, Charles E. Burch, to surrender unto said plaintiff and cross-defendant the promissory note and mortgage described in the findings of fact and conclusions of law herein, and is entitled to have the said mortgage released of record in the county recorder's office of San Diego county, Cal., provided, however, that as a condition precedent to the right of the plaintiff to have the said note and mortgage surrendered, canceled, and released, the said plaintiff and cross-defendant, Belle McCain, shall pay to the said defendant and cross-complainant, Charles E. Burch, within 60 days from the date of the entry of judgment herein, the sum of $3,500 as attorney's fees due from the said Belle McCain to the said Charles E. Burch, and the further sum of $235 disbursements made by the said Charles E. Burch for and on behalf of the said Belle McCain, or a total of $3,735 without interest; and it is further ordered, adjudged, and decreed that if said sum of $3,735 be not so paid to the defendant and cross-complainant within 60 days from the time of the entry of judgment herein, that said amount, to wit, $3,735 shall be and is hereby adjudged to be a lien upon all the right, title, and interest of the said Belle McCain in and to the following described property situated in the city of San Diego, county of San Diego, state of California, to wit: Lots 1, 2, and 3 in block 4 of Nutt's addition to the city of San Diego according to the map thereof on file in the county recorder's office of San Diego, California—and if not so paid, that execution issue therefor.
>
> "It is further ordered, adjudged, and decreed that in the event the said sum of $3,735 is paid to the said Charles E. Burch within 60 days from the entry of the judgment herein, that he shall be forever debarred from foreclosing the said mortgage as prayed for in his cross-complaint herein."

The portion of the judgment appealed from commences with the words "provided, however," and continues to the end thereof.

No appearance on this appeal is made by respondent. Appellant contends that the judgment is not supported by the findings. We are in accord with this view. The court found expressly that the note and mortgage were fraudulent and void and then proceeded to treat them as valid when, in the judgment, they are used by respondent as a weapon to force appellant to pay the debt of her husband to the attorney who was found guilty of such fraud. The court found that the husband employed said attorney. This is a very unusual situation, where the court finds the attorney secured the note and mortgage through fraud practiced upon appellant, and yet refuses to give her a cancellation to which it found she was entitled, until she paid a certain obligation which arose out of matters which were not in issue in the case. The attorney fee could not have been part of the consideration for the note, because the court found the note was given without consideration. It will be noted that the judgment only forbids foreclosure in the event the said attorney's fee is paid within 60 days from the entry thereof. In other words, if appellant did not pay said sum within said time, respondent could proceed to force payment of a mortgage which the court had found void, and which was procured through his own fraud.

Indulging in every intendment in favor of upholding the judgment, the pleadings do not disclose any allegations which could give rise to the issue on the question of the attorney fee rendered under an employment with appellant's husband, who was deceased when the complaint was filed herein. It might have been litigated under the guise of a consideration for the mortgage, but the court expressly found that the note and mortgage were executed without consideration. This carries with it an implied finding that respondent was not entitled to an attorney fee in connection with the transaction in question, for he expressly alleges in his answer that the said attorney fee and costs were due him as a consideration for the execution of said mortgage.

The question as to the effect of a provision in the judgment which is not within the legal issues, is clearly discussed by Preston, J., in the case of Baar v. Smith (Cal. Sup.) 255 P. 827, where it is held that so much of the judgment as attempts to adjudicate such issues is null and void. That case is also authority upon the question as to the extent the trial court is bound and limited by the pleadings, in rendering its judgment. The language of the learned justice in the case last cited is peculiarly appropriate to the matter under consideration here, and we quote therefrom:

> "If such provisions [in the judgment] could be sustained, pleadings could be dispensed with altogether. A litigant under such laxity could receive benefits or injuries that he could not expect or anticipate until the chancellor, without restraint of any kind, announced the length of his own foot."

The portion of the said judgment referred to is without support in the findings. Los Angeles Brewing Co. v. Klinge, 7 Cal. App.

550, 95 P. 44. It also attempts to adjudicate a matter which was not embraced within the issues. Baar v. Smith, supra.

The judgment is modified by striking therefrom that portion thereof appealed from, appellant to recover her costs on appeal.

We concur: HART, Acting P. J.; PLUMMER, J.

PODRAT et al. v. OBERNDORFF et al.★ (Civ. 6166.)

District Court of Appeal, First District, Division 2, California. May 18, 1928.

Rehearing Granted June 15, 1928.

1. Chattel mortgages ⚷249—Assignee of chattel mortgage had option after default to sell mortgaged property under power of sale or foreclose in usual manner (Civ. Code, §§ 2986–3011, and §§ 2967, 3011).

Assignee of chattel mortgage on default had option to proceed to sell mortgaged property as a pledge under power of sale, pursuant to Civ. Code, §§ 2986–3011, or to foreclose chattel mortgage in the usual manner in a court of equity in accordance with sections 2967, 3011, notwithstanding only power conferred by chattel mortgage in event of default was power of sale.

2. Chattel mortgages ⚷249—Mortgages ⚷390—Lien creditor may disregard power of sale conveyed by mortgage or trust deed and elect to foreclose mortgage in manner provided by law.

Where a power of sale is conferred by a mortgage or trust deed, the authorized power of sale is not the only method of satisfying the lien which is created, for such power of sale is merely cumulative remedy, and lien creditor may disregard power of sale and elect to foreclose mortgage in a court of equity in manner provided by law.

3. Contracts ⚷127(1)—Attempt on part of contracting parties to deprive court of general jurisdiction to foreclose mortgage is utterly void.

Any effort on part of contracting parties to deprive a court of equity of its general jurisdiction to foreclose mortgages by means of incorporating in instrument terms to that effect is utterly void, as an unwarranted interference with ordinary course of judicial procedure.

4. Chattel mortgages ⚷283—Mortgages ⚷486—Failure of decree foreclosing chattel mortgage and trust deed to preserve equity of redemption held not error (Civ. Code, § 2903).

Failure of decree foreclosing chattel mortgage and trust deed to preserve right of redemption *held* not error, since under Civ. Code, § 2903, when a sale is duly consummated pursuant to power conferred in chattel mortgage or transfer duly made pursuant to terms of trust deed, all equity of redemption is foreclosed and grantor or mortgagor is thereby divested of entire interest in title.

5. Appeal and error ⚷843(2)—Right to foreclose chattel mortgage or trust deed by procedure in equity becomes moot after payment of judgment.

Question relative to right to foreclose chattel mortgage or trust deed containing specific power of sale pursuant to law of pledges by means of ordinary procedure in equity became moot after judgment was fully paid and satisfied, except as to items of attorney's fees and taxes.

6. Appeal and error ⚷843(1)—Court will not consider points raised on appeal which have been settled and become moot.

Where certain points raised on appeal are settled and have become moot, court will not consider them, but will devote its attention to remaining points in controversy.

7. Chattel mortgages ⚷290—Attorney's fees held improperly allowed, where agreement therefor in chattel mortgage did not contemplate services for foreclosing mortgage in court of equity (Code Civ. Proc. § 1021).

Where agreement contained in chattel mortgage with power of sale relative to payment of counsel fees did not contemplate services for foreclosing mortgage in court of equity, such fees were improperly allowed, since allowance of attorney's fees, under Code Civ. Proc. § 1021, depends entirely on contract between parties.

8. Chattel mortgages ⚷290—Mortgages ⚷581(5)—Reasonable attorney's fees may be allowed, where provision therefor is stipulated, but amount left blank.

Where a provision in mortgage for attorney's fees is stipulated, but amount is left blank, a reasonable fee may be allowed; but, in absence of stipulation for payment thereof, there can be no recovery.

9. Chattel mortgages ⚷283—Mortgages ⚷490—Amount paid by mortgagee as taxes held erroneously allowed on foreclosure, where complaint failed to allege any sum was so paid.

Where complaint in action to foreclose chattel mortgage and trust deed failed to allege that any sum for taxes was paid by plaintiffs, allowance in decree of item paid for taxes was erroneous, since question of taxes did not become an issue in trial of case.

10. Appeal and error ⚷1170(1)—Constitutional provision eliminating reversal for defect of pleadings, except when it accomplishes miscarriage of justice, did not dispense with pleadings or evidence on material issue (Const. art. 6, § 4½).

Const. art 6, § 4½, providing that judgment shall not be reversed for any defect of pleading, except when such defect accomplishes a miscarriage of justice, *held* not to dispense with either pleadings or evidence on a material issue, as being only intended to remedy defective pleadings and improper admission or rejection of evidence.

★Superseded by opinion 271 P. 755.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by Abner Podrat and others against Oscar Oberndorff, Carrie Belle Watson, Findlay Watson, and others. Judgment for plaintiffs, and defendants Carrie Belle and Findlay Watson appeal. Modified and, as modified, affirmed.

Walters & Mauk, of Los Angeles, for appellants.

Max Schleimer, of Los Angeles, for respondents.

THOMPSON, Justice pro tem. This is an appeal from a decree foreclosing a chattel mortgage and also a trust deed given to secure a loan.

October 1, 1923, for value, the defendant Oberndorff executed his note for $8,000 in favor of the appellants Carrie Belle and Findlay Watson, payable in installments of $200 each month. This note was secured by chattel mortgage on the furniture of the Plaza Hotel at Whittier Cal. November 17, 1923, this note and chattel mortgage were assigned to the respondents. The appellants, who were husband and wife, at the same time executed and delivered to the respondents their promissory note for $7,800 secured by a trust deed on lot 18, block 29, of the original city of Whittier, as collateral security for the payment of the note and chattel mortgage first mentioned. As a part of the same transaction the appellants and respondents executed an agreement imposing certain conditions with respect to the obligations incurred by the foregoing instruments, for the default of which the foreclosure of both the chattel mortgage and trust deed heretofore mentioned were authorized. In the event of foreclosure, the agreement specified that appellants would refund any taxes which the respondents were compelled to pay pursuant to said transaction. The appellants defaulted in the payment of several installments of the first-mentioned note. After demand, this action was commenced in a court of equity to foreclose the chattel mortgage and the trust deed. Judgment was rendered in favor of the respondents for $5,900 and interest, together with $517.67 attorney's fees and $140.04 taxes.

The appellants contend that (1) the respondents had no authority to foreclose the chattel mortgage in the ordinary equitable proceeding, since the only power conferred by the chattel mortgage, in the event of default, was for the mortgagee to seize the property and sell it pursuant to division 3, pt. 4, tit. 14, c. 3, of the Civil Code, as a pledge; that (2) the trial court erred in allowing attorney's fees and taxes, and that (3) the decree failed to preserve appellants' right of redemption.

[1-4] The chattel mortgage provided that:

> "If the mortgagor shall fail to make any payment as * * * provided, then the mortgagee may take possession of the property, using all necessary force so to do, and may immediately proceed to sell the same in the manner provided by law, and from the proceeds pay the whole amount of said note specified, and all costs of sale, including counsel fees not to exceed ——— per cent. upon the amount due. * * *"

In the event of default, a power of sale may be conferred by the mortgage upon the mortgagee or upon any other person. Section 2932, Civ. Code. This power of sale conferred upon a mortgagee is deemed to be a part of the security for which the mortgage is given, and may be transferred to another by assignment. Section 858, Civ. Code. Upon default in the payment of any installment of the note, as assignee of the chattel mortgage, the respondents had the option to proceed to sell the mortgaged furniture as a pledge under the power of sale pursuant to division 3, pt. 4, tit. 14, c. 3, of the Civil Code, or to foreclose the chattel mortgage in the usual manner in a court of equity. Section 2967 of the Civil Code provides that:

> "A mortgagee of personal property * * * may foreclose the mortgagor's right of redemption by a sale of the property, made in the manner and upon the notice prescribed by the title on 'pledge,' or by proceedings under the Code of Civil Procedure."

And with respect to the foreclosure of the right of redemption of a pledge, section 3011 of the Civil Code provides:

> "Instead of selling property pledged, as hereinbefore provided, a pledgee may foreclose the right of redemption by a judicial sale, under the direction of a competent court. * * *" Donohoe v. Gamble, 38 Cal. 340, 99 Am. Dec. 399.

So, also, where a power of sale is conferred by a mortgage or trust deed, the authorized power of sale is not the only method of satisfying the lien which is created, for this power of sale is merely a cumulative remedy. The lien creditor may disregard the power of sale and elect to foreclose the mortgage in a court of equity in the manner provided by law. 3 Jones on Mortgages (8th Ed.) 745, § 2234; also page 802, § 2295; Cormerais v. Genella, 22 Cal. 116; Fighiera v. Radis, 180 Cal. 660, 664, 182 P. 418; Cortelyou v. Vogel, 51 Cal. App. 785, 788, 197 P. 968; 5 Cal. Jur. 112, § 53. Any effort on the part of the contracting parties to deprive a court of equity of its general jurisdiction to foreclose mortgages by means of incorporating in the instrument terms to that effect is utterly void as an unwarranted interference with the ordinary course of judicial procedure. Guaranty Trust Co. v. Green Cove Railroad Co., 139 U. S. 137, 142, 11 S. Ct. 512, 35 L. Ed. 116; Sauter v. First Nat. Bank (C. C. A.) 8 F. (2d) 121; Brown v. Denver Omnibus & Cab Co. (C. C. A.) 254 F. 560, 569;

Farmers' L. & T. Co. v. Bankers', etc., Tel. Co., 44 Hun (N. Y.) 400, 406. The equitable foreclosure of the trust deed and chattel mortgage in the manner pursued in the present case was therefore proper in spite of the power of sale conferred by the chattel mortgage. Nor was there error in failing to provide in the decree for an equity of redemption. When a sale is duly consummated pursuant to the power conferred in a chattel mortgage, or a transfer has been duly made pursuant to the terms of a trust deed, all equity of redemption is thereby foreclosed, and the grantor or mortgagor is thereby divested of his entire interest and title. Section 2903, Civ. Code; Wright v. Ross, 36 Cal. 414; Frese v. Mutual Life Ins. Co., 11 Cal. App. 387, 396, 105 P. 265; Bell Mining Co. v. First Nat. Bank of Butte, 156 U. S. 470, 15 S. Ct. 440, 39 L. Ed. 497.

In support of their contention that a court of equity had no jurisdiction to foreclose a trust deed or chattel mortgage which contained a direct power of sale as in the present case, the appellants rely upon the cases of Koch v. Briggs, 14 Cal. 256, 73 Am. Dec. 651; Herbert Kraft Co. v. Bryan, 140 Cal. 73, 73 P. 745; and Galusha v. Meserve, 58 Cal. App. 174, 208 P. 348. Neither of these cases are authority in conflict with the foregoing well-established rule to the effect that a specific power of sale conferred by a trust deed or a chattel mortgage, and the ordinary equitable procedure of foreclosure, are mere cumulative remedies, either of which may be pursued in foreclosing a lien. It is true that the statement is made in these cases that an ordinary suit to foreclose a trust deed will not lie. But this declaration was not necessary to the determination of either of these cases, and is dicta having been inadvertently made, and conflicts with the uniform trend of American authorities. In the Koch Case above cited the purchaser of the real property, which was sold pursuant to a power of sale conferred by a trust deed, brought an action in ejectment for the possession of the property. A demurrer was sustained upon the ground that the complaint failed to demand a judicial foreclosure of the trust deed as a mortgage. Final judgment was entered upon this ruling. On appeal the judgment was reversed. The question of whether a trust deed could be foreclosed as a mortgage was not involved in that action. In the Herbert Kraft Case cited by appellants, an action was brought on a promissory note. In a cross-complaint which was filed in that action, the defendant alleged that a sale of property occurred under the provisions of a trust deed, the proceeds from which sale he claimed he was entitled to credit on his promissory note. On motion of plaintiff, the allegations respecting the sale were stricken from the cross-complaint. These allegations were held to be immaterial to the action. The question of the proper method of terminating the lien created by the trust deed was not there involved. On appeal the judgment of the lower court was affirmed. The expression of the court that "on such an instrument, a suit for foreclosure will not lie," was not necessarily involved. Likewise, in the Galusha Case above cited, a suit was brought to set aside a deed executed pursuant to a power of sale conferred by a trust deed. The validity of the sale under the trust deed was the only issue involved in the action. It was not necessary to determine whether a foreclosure of mortgage might also have been a proper method of procedure. The court inadvertently approved the foregoing quotation from the former cases without the necessity of so doing. In the case of Bell Mining Co. v. First Nat. Bank of Butte, 156 U. S. 470, 15 S. Ct. 440, 39 L. Ed. 497, Mr. Justice Field, who also wrote the opinion in the Koch Case, supra, nullified the objectionable language used in the former case when he says at page 477 (15 S. Ct. 443):

> "The power of sale in the indenture, whether we call it a deed of trust or a mortgage, does not change its character as an instrument for the security of the indebtedness designated, but it is an additional authority to the grantee or mortgagee, and if he does not choose to foreclose the mortgage by any of the ordinary methods provided by law, he can proceed under the power added for the sale of the property, to obtain payment of the indebtedness. The insertion of a power of sale does not affect the mortgagor's right to redeem so long as the power remains unexecuted and the mortgage is not, as it may be, foreclosed in the ordinary manner, but when a sale is made of the interest of the mortgagor, his right is wholly divested, embracing his equity of redemption."

The facts of the Bell Mining Case, supra, were almost exactly like the facts of the Koch Case. Mr. Justice Field here recognizes the legal right to terminate the lien created by a trust deed by a sale either as a pledge or by foreclosure.

[5, 6] Moreover, so far as the general question of the right to foreclose a chattel mortgage or trust deed containing a specific power of sale pursuant to the law of pledges by means of the ordinary procedure in equity is concerned, that has become moot in the present case for the reason that the briefs of the respective parties disclose the fact that the judgment has been fully paid and satisfied by the appellants, except as to the items of attorney's fees and taxes. In response to this charge, the appellants admit in their closing brief that:

> "We were compelled to pay the amount of the judgment, except attorney's fees and taxes."

If certain points raised on the appeal are settled and have become moot, the court will not consider them, but will devote its attention to the remaining points in controversy. 2 Cal. Jur. 804, § 472, and cases there cited.

[7] Attorney's fees were, however, improperly allowed in the present case for the reason that the agreement contained in the chattel mortgage to pay counsel fees did not contemplate services for foreclosing the mortgage in a court of equity.

The allowance of attorney's fees depends entirely upon the contract between the parties. 3 Cal. Jur. 683, § 84. Section 1021 of the Code of Civil Procedure provides:

> "The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties. * * *"

[8] The only contract for the payment of attorney's fees in the present case is found in the language of the chattel mortgage heretofore quoted, which provides that, in the event of default, the mortgagee may take possession of the property and proceed "to sell the same in the manner provided by law (as a pledge) and from the proceeds (of such sale) pay the whole amount of said note, ———, including the counsel fees not to exceed——— per cent. * * *" Where a provision for attorney's fees is stipulated, but the amount is left blank, a reasonable fee may be allowed. 3 Jones on Mortgages (8th Ed.) 514, § 2059; Alden v. Pryal, 60 Cal. 215. If there is no stipulation in the mortgage for the payment of counsel fees, they cannot be allowed. 3 Jones on Mortgages, supra, 215, § 2059; 5 Cal. Jur. 109, § 50; Fell v. Frierson, 171 Cal. 351, 153 P. 229; Sichel v. De Carrillo, 42 Cal. 493; Boob v. Hall, 107 Cal. 160 40 P. 117. In the case last cited it is said:

> "Neither the prayer in the complaint for its allowance nor the averment of the amount which would be reasonable can supply the necessity of a direct averment that an attorney's fee had been agreed to be paid by the mortgagor."

If, however, the fees are provided for in the note, although they are omitted from the mortgage, under proper pleadings, they may still be allowed. Worth v. Worth, 155 Cal. 599, 102 P. 663; National Bank of California v. Mulford, 17 Cal. App. 551, 120 P. 446. But attorney's fees will not be awarded in a foreclosure suit unless proper averments authorizing the same are incorporated in the pleadings. 19 Standard Ency. of Proc. 1056.

The specific question involved in the present case is whether a contract to allow attorney's fees for the *seizure and sale* of personal property under a chattel mortgage will authorize the allowance for the performance of entirely different service, to wit, the foreclosure of the mortgage. The respondent claims that the language of the chattel mortgage implies that attorney's fees were contracted to be paid for services performed in satisfaction of the mortgage lien, by whatever procedure this end was accomplished. No case is cited in support of this claim. On the contrary, it is said in 3 Jones on Mortgages, supra, at page 520:

> "Under a provision in a power of sale for an attorney's fee in case of foreclosure by (seizure and sale) no allowance can be made if the mortgage is foreclosed in chancery instead." Van Marter v. McMillan, 39 Mich. 304; Sage v. Riggs, 12 Mich. 313; Hardwick v. Bassett, 29 Mich. 17.

In the case of Brown & Parler v. Kolb, 92 S. C. 309, 75 S. E. 529, it is said:

> "The mortgage provided that on default, the mortgagee might seize and sell the property, and that upon the sale 'he shall apply the proceeds of such sale, after deducting all expenses and charges, including attorney's fees, toward the payment and discharge of the indebtedness,' etc. Under a similar contract, it was held in Walker v. Killian, 62 S. C. 482, 40 S. E. 887, that the mortgagee could not claim the fees if he foreclosed by action and not by seizure under the power."

The judgment in this last-mentioned case was modified by striking out the amount allowed for attorney's fees. Upon the foregoing authorities, we are of the opinion that the counsel's fees were improperly allowed in the present case.

[9] So, also, the item of $140.04, paid by respondents for taxes, was erroneously allowed, for the reason that the complaint failed to allege that any sum for taxes was paid by the respondents. The question of taxes was not an issue in the trial of the case. In the case of Brichetto v. Raney, 76 Cal. App. 232, 245 P. 235, relied on by respondents in support of this contention, it appears that the complaint there alleged the authorization which was contained in the mortgage to reimburse the mortgagee for any taxes paid by him, together with the fact that he had incurred the expense by so doing, and a prayer for reimbursement.

[10] The respondents contend that the question of the allowance of attorney's fees and of taxes is not reviewable, since the appeal is based solely upon the judgment roll, and since the evidence is not before this court for consideration. And, furthermore, the respondents assert that under article 6, § 4½, of the Constitution, a judgment may not be reversed for any defect of pleadings, except when such a defect accomplishes a miscarriage of justice, citing Etienne v. Kendall (Cal. App.) 258 P. 435 [opinion adopted by Supreme Court, see 259 P. 752]. But the facts of that case were entirely different from those in the case at bar. In the present case the record discloses the fact that there was no contract to support an allowance of counsel fees, and no pleading upon which to base an allowance for refunding taxes. The constitutional provision relied upon by respondents was intended to remedy *defective*

pleadings, and the improper admission or rejection of evidence. It is not intended to supply authority to dispense with either pleadings or evidence upon a material issue. Such a construction would be destructive of all rules of pleading and procedure. People v. Schiaffino, 73 Cal. App. 357, 360, 238 P. 725.

For the foregoing reasons, the judgment is modified so as to eliminate the allowance of $517.67 attorney's fees and $140.04 taxes. As so modified, the judgment is affirmed. The appellants will recover their costs of appeal.

We concur: KOFORD, P. J.; NOURSE, J.

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92 Cal. App. 20

DAVIS et al. v. BROWN. (Civ. 3520.)

District Court of Appeal, Third District, California. May 17, 1928.

1. **Automobiles 🔑244(37)—Finding that driving car at excessive speed in tunnel causing it to skid and strike another car, was cause of injury to passenger, held sustained (Motor Vehicle Act, § 113, subd. (a).**

In action for personal injuries sustained by passenger when automobile driven into tunnel, proceeding on wet and slippery pavement down grade, skidded when brakes were applied and struck another car, evidence *held* to warrant jury in coming to conclusions that collision resulted from negligent operation of automobile, and that, if driver had not been propelling same at rate of speed which was dangerous under conditions, collision would not have occurred, by reason of Motor Vehicle Act, § 113, subd. (a), St. 1923, p. 553, providing that no person shall drive any vehicle on public highway at such speed as to endanger life, limb, or property of any person.

2. **Appeal and error 🔑1170(9)—In passenger's action for injuries, instruction, though erroneous, held not prejudicial to defendant, who was negligent (Const. art. 6, § 4½).**

In passenger's action for injuries sustained in automobile collision, instruction that car in which passenger was riding had "necessarily to turn out," though erroneous, because there was no testimony that defendant claimed he had to turn out, *held* not prejudicial, where defendant was negligent in driving down grade in tunnel, on wet slippery pavement, at excessive speed, especially in view of erroneous instructions which were favorable to defendant, by virtue of Const. art. 6, § 4½.

3. **Automobiles 🔑168(1)—That driver of car, driven at excessive speed, did all in his power to stop car, does not relieve owner from charge of negligence.**

Fact that driver of car, being driven at excessive speed, does all in his power to stop car and to avoid collision, after discovering car in front of him, does not relieve owner from charge of negligence.

4. **Automobiles 🔑242(1)—Inference of negligence in operating car on wet slippery pavement down grade in tunnel, at excessive speed, held warranted.**

In action for personal injuries sustained while riding in automobile, where accident occurred while car was being driven down grade on wet, slippery pavement in tunnel, at excessive speed, *held* that inference of neglect in operating car was warranted.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by George Davis and another against E. B. Brown for damages for personal injuries. Judgment for the plaintiffs, and the defendant appeals. Affirmed.

W. I. Gilbert and B. P. Gibbs, both of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondents.

PLUMMER, J. The plaintiffs had judgment for personal injuries suffered by the plaintiff Nora Ellen Davis arising from an automobile collision between an automobile controlled and managed by the defendant, in which the said Nora Ellen Davis was riding, and a certain other automobile, known as and called in the testimony the "Chevrolet." The judgment also covered the costs and expenses incurred by the plaintiff George Davis. From this judgment the defendant appeals.

The complaint alleges, and the answer admits, that the defendant E. B. Brown, during all the times mentioned in the complaint, was doing business under the fictitious names of Brown's Auto Tours and Brown's Pierce Arrow Auto Tours; that the business so conducted was owned individually by the defendant. The complaint also alleges that on January 14, 1925, while the plaintiff Nora Ellen Davis was riding in an automobile as a guest of the defendant, and which automobile was owned and operated by him, northerly on north Broadway, and while traveling northerly through a certain tunnel known as the North Broadway tunnel, the defendant, through his agents and employees, so negligently operated the automobile in which plaintiff was riding that it collided with a certain other automobile then and there driven by one Mrs. E. W. Smith, which automobile was traveling southerly in said tunnel. The answer denies that the automobile was owned by the defendant, but does admit that it was being operated and controlled by the defendant, and was being driven by a chauffeur employed by the defendant. The answer further denies that the plaintiff Nora Ellen Davis was riding as the guest of the defendant.

While it is alleged in the complaint that the plaintiff Nora Ellen Davis was riding as a guest of the defendant, and denied in the answer, the facts show that the said Nora Ellen Davis was really riding as a passenger for hire in the automobile controlled and operated by the defendant. The legal status of the parties involved is clearly shown by the statement of facts contained in the appellant's opening brief, from which we take the following excerpts:

> "The accident occurred January 14, 1925, at about 11:30 a. m. in the North Broadway, tunnel which is situate between Temple street and Sunset boulevard, in the city of Los Angeles, and runs in a northerly and southerly direction. The automobile involved in the accident was a seven-passenger Lincoln sedan, and had been hired out by the defendant, together with the driver, to a real estate firm which was engaged in the business of selling lots in a new addition. The passengers of the car, including the plaintiff, were prospective purchasers and guests of this real estate firm, and had been picked up at their homes in different parts of the city for the purpose of being transported to the new real estate tract."

The record discloses that after the tour had commenced it was discontinued on account of rain, and the different persons carried in the car were being conveyed back to their respective homes at the time of the collision. It appears that, when the Lincoln sedan had traveled about one-fourth of the way through the tunnel, the driver thereof suddenly applied the brakes in an attempt to prevent colliding with a car in front of him, and in so doing, swung to the left in front of a Chevrolet car traveling in the opposite direction, and the collision occurred which resulted in the injury to the plaintiff Nora Ellen Davis. No issue is raised as to the amount of the judgment. The points relied upon by the appellant are, first, that the verdict is contrary to the evidence; second, that the proof discloses no negligence on the part of the defendant; third, that the court erred in its instructions to the jury.

The testimony of the driver of the Lincoln sedan is to the effect that he entered the tunnel from the south, driving in a northerly direction; that his speed was about 14 or 15 miles an hour; that, when he was about a quarter of the way through, all at once a Ford car loomed up ahead of him, spinning around crosswise of the tunnel; that it had been raining and water had been carried into the tunnel by the traffic; that the pavement was very slippery; to prevent striking the Ford he applied his brakes, thereby immediately causing the rear of his own car to skid around sidewise to the left, and that his car was struck by a Chevrolet, which was on the west side of the tunnel traveling in a southerly direction; that the sedan was struck toward the rear end on the left-hand side where the plaintiff Nora Ellen Davis was sitting; that he did not attempt to pass any other car in the tunnel, and was at all times on the right-hand side of the road until he applied his brakes, at which time his own car skidded sidewise, and the rear portion thereof went past the center of the road.

The plaintiffs' version of the accident, and as supported by their witnesses, is to the effect that the Lincoln sedan entered the tunnel traveling at a speed estimated from 20 to 25 miles per hour; that the sedan was pulled to the left as if to pass a car in front, and then the driver suddenly pulled the front of the car back to the right, causing his car to skid and slide sidewise to the left of the tunnel and to crash into the Chevrolet car, which was approaching from the south. The width of the portion of the tunnel used by vehicles, as referred to, is 30 feet and 6 inches. There is some testimony to the effect that there would be room for the sedan to have gone between a car in front of it and a car traveling in the opposite direction on the other side of the tunnel.

[1] After summarizing the testimony and argument to the effect that it was not sufficient to show negligence on the part of the driver of the Lincoln sedan, the appellant makes this statement:

> "Taking the highest estimate of the plaintiff and her witnesses, it will doubtless be conceded that the rate of speed of defendant's car did not exceed the limit fixed by the Motor Vehicle Act."

This statement evidently refers to subdivision 7 of section 113 of the Motor Vehicle Act (St. 1923, p. 554), as it read prior to the amendment adopted in 1927. The record in this cause, however, does not support appellant's contention in this particular. The Motor Vehicle Act does not fix any definite number of miles per hour at which speed a driver may propel an automobile and escape responsibility on the claim that he is not exceeding the speed limit designated at so many miles per hour in the act. The first subdivision of section 113 of the Motor Vehicle Act provides:

> "Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person."

This subdivision applies, irrespective of whether the automobile is being driven at 15 miles per hour, 20 miles per hour or 40 miles per hour, as the statute now reads. (St. 1927, p. 1436). If the circumstances under which the automobile is being driven requires that it be propelled at a rate less than 15 miles an hour, then any rate of speed in excess of that which the circumstances permit as safe or reasonable in order to protect life, limb or property would be unlawful. In this case the testimony shows that as the automobile entered the tunnel it was proceeding on a down grade which had become wet and slippery by reason of the falling rain, and under such circumstances the driver of the Lincoln sedan was required by the Motor Vehicle Act to drive at a careful and prudent speed and not at a speed which would endanger life, limb, or property of the persons of any of his passengers. If, under such conditions, driving at a rate of 15 miles per hour, the car was likely to skid upon the application of its brakes and crash into cars moving in the opposite direction, such a rate of speed would be unlawful, and the jury would have a right to consider that under the circumstances the driver of the car was not exercising reasonable and proper care or having due regard to the traffic or surface of the highway on which he was traveling. The testimony leaves somewhat in doubt the question as to whether the Lincoln sedan had its headlights burning, but, assuming that the driver of the Lincoln sedan had turned on the lights, in accordance with his statement that "he usually turned on the lights," the conclusion would necessarily follow that he was driving into the tunnel at a rate of speed which, under the conditions, prevented him from having control of his car so that he could stop within the distance that other objects in the tunnel ahead of him could be seen by the use of such headlights.

The testimony of the plaintiff Nora Ellen Davis was to the effect that the Lincoln sedan was traveling between 20 and 25 miles per hour going into the tunnel and at the time when they caught up with a line of cars going in the same direction through the tunnel; that the Lincoln was pulled to the left as if to pass the car in front, and then suddenly slowed down and pulled back to the right, when the car began to skid sidewise and skidded over to the left side of the tunnel and crashed into another car.

The testimony of Mrs. Smith, who was driving the Chevrolet with which the Lincoln collided, is to the following effect: There seemed to be a complete line of cars on each side so far as this witness could see. When she was about half way into the tunnel, she saw a car pull out of line and come toward the west side or side of the tunnel on which she was driving, and, as the car got part way across, it seemed to be going back into line. At that time the rear end of the Lincoln started to skid and came toward the Chevrolet. This witness testified that the Lincoln skidded about 100 feet, and hit the front of her car; that her car was standing still at the time; that she was driving a Chevrolet sedan; that the collision pretty nearly demolished the Chevrolet, the radiator was all smashed, front axel broken, all the tires completely ruined, both fenders broken off, and the body of the car was out of alignment. This witness testified that she saw the driver of the Lincoln turn out as if to start around a car in front traveling on the left thereof.

The witness Hazel Curran, also a passenger in the Lincoln sedan, testified that the accident occurred somewhere near the center of the tunnel; that she was sure that they were not going slow; that there was a line of cars coming on the opposite side of the tunnel. This witness testified that she would say that the Lincoln attempted to pass the line of cars in front, and then the driver tried to get back into line again, and, as he did so, the car skidded and crashed into the car coming toward the Lincoln; that it did not seem to her that the Lincoln slowed down any; that the driver of the Lincoln turned to the left and then turned to the right and the car skidded.

The witness Mrs. McKay testified that she was a passenger in the Lincoln sedan; that they were traveling northerly through the tunnel, approximately half way through; that the driver of the Lincoln pulled out as if to pass some machine ahead of him going northerly in the same direction, and then started to pull back into the line of traffic, and the car skidded; that her opinion was that the Lincoln was going quite fast.

A witness by the name of Balderson, who was in the tunnel at the time, testified that the Lincoln appeared to pull to the left and then back into line again; that he had driven cars for quite a while, observed different kinds of cars; that he would judge the Lincoln was traveling between 20 and 25 miles an hour when it turned out of the line of traffic and back in again; that the Lincoln skidded about 100 feet before it struck the Chevrolet, driving it up against the curb and back into the car in which the witness was riding; that the Chevrolet was driven back between 40 and 50 feet.

On the part of the defendant, there was testimony to the effect that the Ford car skidded and bumped into a car in front of it. The Ford car was traveling at a speed of between 10 and 15 miles per hour. The driver of the Lincoln testified that he did not see anything ahead of him; that all at once a Ford car loomed up ahead; it was spinning around in the tunnel; when the Lincoln skidded and was hit by the other car, the end of it was over on the left-hand side going north; that there was no car ahead for him to pass; that he did not attempt to pass any other car in that tunnel; that he did not have skid chains on his car. As to the use of headlights, the driver testified

> "I may have put my lights on; I usually do; I would say I did; I have good headlights. It might have been the length of this courtroom from me when I first saw the Ford. (The courtroom then in use was 55 feet in length.) I don't believe I would be able to state how fast I was going at that time. I didn't see a line of cars in front of me going down the road. I might have had my brakes on these three car lengths, I think I testified, in skidding endwise.

I saw it was impossible to avoid hitting the Ford in front of me. Then I clamped my brakes on and put the car in second gear. That is when I skidded sidewise in the tunnel."

The foregoing excerpts and also summary which we have given of the case we think establishes that there was sufficient testimony to support the verdict and to warrant the jury in coming to the conclusion that the collision resulted from the negligent operation of the Lincoln sedan, and that, if the driver of the Lincoln sedan had not been propelling the same at a rate of speed which was dangerous under the conditions presented, and at a rate of speed which rendered it impossible for him to control the same, the collision would not have occurred.

Has a miscarriage of justice resulted by reason of any alleged erroneous instructions given by the court? Before considering this question, we may refer to two sections of the Civil Code. The complaint would apparently make applicable section 2096 thereof, which reads:

> "A carrier of persons, without reward, must use ordinary care and diligence for their safe carriage."

While the facts as disclosed by the testimony and as set forth by the appellant would make section 2100 of the Civil Code applicable, which reads:

> "A carrier of persons for reward must use the utmost care and diligence for their safe carriage," etc.

The testimony which we have set forth certainly justified the jury in coming to the conclusion that the driver of the Lincoln sedan did not use the utmost care and diligence in the management of the car or in controlling its speed when entering the tunnel on a down grade when the pavement was wet and slippery.

[2-4] The instruction complained of, after quoting a portion of the Motor Vehicle Act specifying on which side of the highway automobiles shall be driven, uses the following language:

> "In this case there is a conflict in the testimony as to whether the defendant was endeavoring to pass another automobile or not. Plaintiffs claim that he was. The defendant claims that he was not, but that an automobile suddenly was, some way or other, placed across the highway, and that it was unavoidable, and he necessarily had to turn out. It is for you to determine which, if either of those things is true."

There is no testimony to the effect that the defendant claimed that he "necessarily had to turn out." There is testimony to the effect that his car did turn out, and that it skidded to the left after application of the brakes. The driver of the Lincoln sedan did testify that a collision with the car in front of him was unavoidable unless he applied his brakes, and the testimony we think shows very clearly that the Lincoln sedan was turned out of the line of traffic. Whether it was turned out for the purpose of avoiding the collision with the car in front, or whether it was turned out as a result of the sudden application of the brakes thereon, is really immaterial to any conclusion that might be reached by the jury in this case. It is probable, and it is a reasonable inference from the testimony, that, after the driver of the Lincoln sedan discovered the imminent danger of a collision with the car in front of him, he did everything which he then and there knew to avoid such a collision. Whatever the cause, it was the skidding of the Lincoln sedan that resulted in the collision with the Chevrolet on the opposite side of the tunnel. Whether it was the turning of the Lincoln sedan out of the line of traffic moving northward, and turning back again, or the sudden application of the brakes that caused the car to skid, resulting in the collision, even though urged as important by appellant, does not appear to us to be a matter out of which prejudicial error might arise, in view of the fact that, had the car been driven at a sufficiently low rate of speed to enable the driver to control the same within the radius of his vision, assuming that the headlights were burning, no collision would have occurred. A wet pavement down grade in a tunnel certainly calls for the exercise of a degree of care that must be measured only by the circumstances and conditions presented, and not by any limited mileage per hour set forth in the Motor Vehicle Act, as being a lawful rate of speed under the conditions mentioned in subdivisions 4, 5, 6 and 7 of section 113 of said act. The first subdivision of said section 113 of the Motor Vehicle Act only applies to this case.

A careful reading of all the instructions given by the trial court to the jury in this cause shows that the defendant was not only not prejudiced, but was given the advantage of two instructions which, under the circumstances, we think erroneous. Among other things, the trial court instructed the jury in the following language:

> "If you should find that, at the time and place of the accident, any automobile immediately preceding the automobile in which plaintiff was riding, suddenly slackened its speed or stopped, or attempted to stop, and in doing so skidded out of the line of traffic in the direction in which the automobile, in which plaintiff was riding, was being driven, and that thereafter the driver of the car in which plaintiff was riding, did all in his power to avoid a collision, then he was not guilty of negligence, and your verdict would have to be against the plaintiff and in favor of the defendant."

This instruction is directly in line with the instruction condemned by the Supreme Court in the case of Rush v. Lagomarsino, 196 Cal.

309, 237 P. 1066, where the court instructed that, if the defendant did all in his power, after discovering the presence of the plaintiff, to avoid injuring him, he was not guilty of negligence. In the instruction just quoted, the court excludes from the jury all consideration of the fact as to the Lincoln sedan being driven into the tunnel at an excessive rate of speed under the conditions presented, and at such a rate of speed, under the conditions presented, that the driver thereof could not exercise reasonable control thereof or take the necessary precautions or do the necessary things to avoid coming into collision with other automobiles that might be using the tunnel at the same time. The fact that the driver of the Lincoln sedan may have done all that could have been done in attempting to stop his car, and to avoid a collision after discovering the car in front of him, by no means relieves the defendant from the charge of negligence. If the Lincoln sedan, at the time of the discovery of the Ford car in front of it, was traveling at an excessive rate of speed under the conditions presented, the fact that he did all he could to stop under conditions which his driving had rendered it impossible for him to stop, instead of relieving the defendant, subjects him to the charge of negligence, and justifies the conclusion of the jury that the negligence and the manner in which the Lincoln sedan was being driven proximately caused the injury of the plaintiff Nora Ellen Davis. Again the court instructed the jury that:

> "The mere happening of the accident in which plaintiff sustained injuries, if any, is not the slightest proof that the driver of the defendant's automobile was guilty of negligence."

The instruction, of which the foregoing is a part, is directly contrary to the holding in the cases cited in Brown v. Davis (Cal. App.) 257 P. 877. In the Davis Case it was held that, in an action for the death of an invited guest resulting from overturning of a car while in exclusive operation and control of the defendant, the presumption of defendant's negligence arose from such overturning, though only ordinary care needs to be exercised by the carrier of persons without reward under the Civil Code, section 2096. The court, in the Davis Case, cites a large number of cases showing that, where an accident occurs and a passenger is injured, which ordinarily would not occur if reasonable care were exercised, proof of the circumstances of the accident and the exclusive control of the car by the defendant raises the presumption of negligence, and that such a presumption is evidence in the case. In the case at bar, we think the circumstances disclosed by the testimony surrounding the accident amply warranted the inference of the negligent driving of the car being operated by the defendant. In Mansfield v. Pickwick Stages, 68 Cal. App. 507, 229 P. 890, in an opinion written by Justice Langdon, we find the following:

> "Proof of the derailment of a train, or of an automobile leaving the highway and going into a gulch, or other similar accident calls for an explanation by the defendant or a possible inference of negligence upon its part."

See, also, Morris v. Morris (Cal. App.) 258 P. 616.

In the instant case the defendant has had the benefit of two instructions which were more favorable than that to which he was entitled, against which there is offset the slightly erroneous instruction complained of and assigned as prejudicial herein. The two instructions cited as more favorable to the appellant than they should have been are not material herein only in so far as they are cited to show that the trial court was endeavoring to give the defendant a fair and impartial trial, and, as we have just shown, taken as a whole, the instructions were more favorable to the defendant than they should have been. Under such circumstances there is no ground for urging prejudicial error. Section 4½ of article 6 of the Constitution is a complete answer to the appellant's contentions.

The judgment is affirmed.

We concur: FINCH, P. J.; BARTLETT, Justice pro tem.

92 Cal. App. 100

NICOLAI v. PACIFIC ELECTRIC RY. CO. (two cases). (Civ. 6187.) *

District Court of Appeal, First District, Division 1, California. May 22, 1928.

Rehearing denied June 20, 1928. Hearing Denied by Supreme Court July 19, 1928.

1. Negligence ⚷83—Plaintiff's negligence, resulting in inescapable danger, and defendant's knowledge and realization thereof and clear chance and failure to avoid injury are essential to invoke "last clear chance" doctrine.

Elements essential to invoke "last clear chance" doctrine are that plaintiff was negligent and present as result in dangerous situation, from which she could not escape by exercising ordinary care, and that defendant was aware of her danger, realized or ought to have realized her inability to escape therefrom, had clear chance to avoid injuring her by exercise of ordinary care, and failed to avoid accident by use of such care.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

2. Negligence ⚷83—Plaintiff need not show physical impossibility of escape to invoke last clear chance doctrine.

To invoke the doctrine of last clear chance, plaintiff need not show that her inability to es-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

cape from threatened injury was a physical impossibility.

3. Negligence 🔑83—Last clear chance doctrine applies where plaintiff is unaware of danger, but she must exercise ordinary care after becoming aware thereof.

The last clear chance doctrine applies where plaintiff is unable to escape danger because wholly unaware of it, but having become aware thereof she must thereafter exercise ordinary care for her protection.

4. Negligence 🔑83—Test of last clear opportunity to avoid accident is whether defendant only retains power to prevent accident.

The test of last clear opportunity to avoid accident is whether, when both plaintiff and defendant have been guilty of negligence causing accident, plaintiff has ceased to have any power to prevent it and defendant still retains power to prevent it by exercise of ordinary care.

5. Street railroads 🔑114(19)—Evidence in action for damages from collision between automobile and street car held to justify application of last clear chance doctrine.

In action for damages to automobile and injury to occupant in collision with street car, evidence that motorman negligently operated car in excess of ordinance speed, that automobile driver negligently failed to pull in toward curb and stop between parked automobiles to allow car to pass, but drove into dangerous pocket from which he could not extricate himself by exercising ordinary care, and that motorman saw automobile constantly from moment it entered street until impact occurred and also observed parked automobiles which prevented it from turning off track just before collision, *held* to justify application of last clear chance doctrine.

6. Negligence 🔑83—One seeing another in dangerous position is not excused by dullness from realizing danger.

A person who sees another in a dangerous position may not rely on dullness to excuse him from realizing danger and must use reasonable diligence in analyzing situation; knowledge of danger being imputed where circumstances are such as to convey to mind of reasonable man fact that another is in position of peril.

7. Street railroads 🔑114(19)—Evidence held to support finding that motorman exercising ordinary care, could have avoided collision by applying brakes immediately after becoming aware of automobile's perilous position.

In action for damages to automobile and injuries to occupant in collision with street car, evidence *held* sufficient to support jury's conclusion that motorman could have avoided accident in exercise of ordinary care by applying brakes immediately after becoming aware of automobile's perilous position abreast of parked automobile, but negligently failed to do so.

8. Street railroads 🔑117(35)—Whether motorman negligently failed to avail himself of last clear chance to avoid collision with approaching automobile held for jury.

Whether street car motorman, after becoming aware of approaching automobile's dangerous situation abreast of parked automobile, negligently failed to avail himself of last clear chance to avoid collision by applying brakes immediately *held* a question of fact for the jury.

9. Street railroads 🔑103(3)—"Concurrent negligence" rule held inapplicable, where driver of automobile struck by street car used every reasonable effort to escape from dangerous pocket, into which he negligently drove.

Street railway company *held* not relieved from liability for damages to automobile and injuries to occupant under rule of "concurrent negligence," where driver of automobile used every reasonable effort to escape from dangerous pocket abreast of parked automobile immediately after negligently driving into it; such rule applying where injured party's negligence continues contemporaneously and actively with that of other party up to very moment of injury.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Concurrent Negligence.]

10. Negligence 🔑83—Last clear chance doctrine applies only where defendant actually saw plaintiff in position of imminent peril.

Before the doctrine of last clear chance may be applied, it must appear that defendant actually saw plaintiff in a position of imminent peril, and it is not enough that he could have seen him in such position, but for remissness on defendant's part.

11. Trial 🔑296(4, 5)—Instruction using words "could have seen" in dealing with motorman's knowledge of automobile's dangerous situation held not prejudicial error, in view of his admissions and other instructions.

In action for damages to automobile and injury to occupant thereof in collision with street car, last clear chance instruction, using words "could have seen" in dealing with element of motorman's knowledge of automobile's dangerous situation, *held* not prejudicial to defendant, where motorman admitted actually seeing automobile on track and driver endeavoring to extricate himself from dangerous position, and element emphasized by objection to instruction was substantially covered by instructions given at defendant's request.

12. Trial 🔑296(4, 5)—Instructions that automobile driver's negligence could not be imputed to passenger held not erroneous, if omitting reference to latter's contributory negligence, in view of other instructions.

In action for damages to automobile and injuries to occupant thereof in collision with street car, instructions that automobile driver's negligence could not be imputed to such occupant, if she was a passenger and had no control over driver, *held* not erroneous, if omitting any reference to her contributory negligence, in view of other instructions, proposed by defendant, supplying such element, and court's instructions fully covering all phases of law of negligence.

Appeal from Superior Court, Los Angeles County; Harold Louderback, Judge.

Actions, tried together, by Lillian M. Nicolai and Wilhelmina Nicolai, respectively, against the Pacific Electric Railway Company. Judgments for plaintiffs, and defendant appeals. Affirmed.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for appellant.

Tanner, Odell & Taft, of Los Angeles, for respondents.

KNIGHT, J. As a result of a collision between a street car owned and operated by appellant and a coupé automobile belonging to Miss Wilhelmina Nicolai and driven by one Cropper, in which her mother, Mrs. Lillian M. Nicolai, was riding, the latter was injured and the automobile was damaged; and separate actions were brought for the recovery of damages, one by Mrs. Nicolai on account of the personal injuries she sustained, and the other by Miss Nicolai for the damages to her automobile. The complaint in each action charged that the collision was caused wholly by the carelessness and negligence of the defendant, its agents and servants, in the operation of its street car. The actions were tried together before a jury, and Mrs. Nicolai was awarded a verdict for $2,500 as compensation for her injuries, and Miss Nicolai was awarded $420.75 for the damages to her automobile. From the judgments entered on these verdicts the defendant has appealed. Besides charging the jury upon the subjects of negligence and contributory negligence, the trial court instructed upon the doctrine of the last clear chance, and appellant seeks a reversal of the judgments mainly upon the grounds that the evidence is insufficient to support the verdicts and that the instructions given upon the doctrine of the last clear chance do not correctly state the law upon that subject.

The accident happened on West Fifth street, San Pedro, about 7 o'clock in the evening, midway in the block between Pacific avenue on the east and Grand avenue on the west. West Fifth street extends east and west. It is 40 feet wide between curbs and 600 feet long between the intersecting avenues above mentioned. Along the northerly side thereof appellant maintains a single track over which its east-bound cars are operated against the west-bound vehicular traffic properly using that side of the street; and the northerly rail of said track is laid only 11 feet 8 inches from the northerly curb, so that there is not enough space for automobiles traveling westerly on that side of the street to pass between automobiles parked along the northerly curb and the street car. At the time of the accident there was one automobile parked along the northerly curb in front of a laundry about 160 feet westerly from Pacific avenue, and two others were parked a little farther along on the same side, in front of a dyeing and cleaning establishment. Opposite the westerly line of said establishment there is a telephone pole which stands embedded in the curb, approximately in the middle of the block, 290 feet from Pacific avenue. The street car and the coupé entered the block at about the same time from opposite directions, and the impact occurred nearly opposite the telephone pole.

The circumstances showing the manner in which the collision occurred were established mainly by the testimony of Mrs. Nicolai, the motorman, and a man named Quinn, who was following in an automobile next behind the Nicolai coupé at a distance of 50 or 60 feet, in a position to observe what happened. Cropper was not a witness, being out of the state at the time of the trial, and his testimony was not taken by either side. The testimony of the witnesses mentioned was to the effect that the coupé, after having entered West Fifth street from Pacific avenue, traveled along the right half of the street until it was in front of the laundry. It then turned onto the street car track in order to pass the automobile parked at that point, and continued to travel toward Grand avenue until it reached a point opposite the automobiles parked in front of the dyeing establishment. Whether it pulled off the track to the right between the automobile parked in front of the laundry and those parked in front of the dyeing establishment is disputed; but it would seem to be immaterial, so far as the application of the doctrine of the last clear chance is concerned, whether it did or did not, because up to the time it reached a point opposite the automobiles parked in front of the dyeing establishment its position was not dangerous, the driver of the coupé having had ample opportunity to turn off the track and stop anywhere between the laundry and the dyeing establishment. When it came abreast the automobiles parked in front of the latter establishment, however, it was clearly in imminent peril of being struck by the street car, because it was directly in front of the on-coming car, which was approaching at a rate of speed between 30 and 35 miles an hour, according to respondents' witnesses, and the driver of the coupé was unable to turn off to the right on account of the two automobiles parked at that point. He therefore tried to extricate himself from his dangerous position by suddenly turning to the left as if intending to pass the street car on the left or southerly side, but instantly discovered that the street car was being paralleled on that side by an automobile traveling at the same rate of speed. He then diverted his course quickly to the right, endeavoring by this final effort to reach the curb by passing between the on-coming street car and the last parked automobile in front of the dyeing establishment, but before the rear end of the coupé cleared the track it was struck by the street car, thrown against the telephone pole, and crushed. The evidence further shows that Cropper evidently saw the street car as it approached some distance beyond the point of the collision because it was lighted, its bell was clanging, and it was observed by both Mrs. Nicolai and Quinn; and the motorman admits that he saw the coupé when it entered West Fifth street, that its maximum speed did not exceed 20 miles an hour, and that he watched it constantly as it came toward him until the collision occurred.

[1-4] "The elements of the doctrine of last clear chance, which must be present in any given case in order to warrant the invocation of that doctrine," says the Supreme Court in the case of Darling v. Pacific Electric Railway Co., 197 Cal. 702, 242 P. 703, "are these: (1) That the plaintiff has been negligent. (2) That as a result thereof she was present in a situation of danger from which she could not escape by the exercise of ordinary care. (3) That the defendant was aware of her dangerous situation and realized, or ought to have realized, her inability to escape therefrom. (4) That the defendant then had a clear chance to avoid injuring her by the exercise of ordinary care. (5) That the defendant failed to avoid the accident by the use of ordinary care. It is not required of the plaintiff to show that her inability to escape from the threatened danger was a physical impossibility. The doctrine applies equally if she be wholly unaware of her danger and for that reason unable to escape it. Whenever she becomes aware of the danger, however, she must thereafter exercise ordinary care for her protection [citing cases]. The test of the last clear opportunity of avoiding the accident is whether, when both plaintiff and defendant have been guilty of negligence causing the accident, the plaintiff has ceased to have any power to prevent it and the defendant still retains the power of preventing it by the exercise of ordinary care."

[5] Measuring the evidence of the present case by the foregoing rules of law, it is sufficient in our opinion to justify the application of the doctrine above mentioned. It tended to show at the outset that Cropper and the motorman were both guilty of negligence. The latter was negligent in operating the street car in excess of 20 miles an hour in violation of the law of the municipality, and Cropper was doubtless negligent in not pulling in toward the curb and stopping somewhere between the automobile parked in front of the laundry and those parked in front of the dyeing establishment, so as to allow the street car to pass, instead of attempting in the face of the fast approaching car to travel beyond the automobiles parked in front of the dyeing establishment before the street car reached that point; and manifestly by thus maneuvering the coupé Cropper negligently drove into a dangerous pocket from which he was unable to extricate himself by the exercise of ordinary care, although, as shown, he made every effort to do so. When the coupé was driven abreast of the first automobile parked in front of the dyeing establishment, the motorman was evidently aware of the dangerous situation and realized or ought to have realized Cropper's inability to escape therefrom, because he admits having seen the coupé constantly from the moment it entered West Fifth street until the impact occurred, during which time he sounded the bell continuously as a warning. He also observed the automobiles parked along the northerly curb in front of the dyeing establishment which obviously prevented the coupé from turning off the track in that direction, and he saw Cropper attempt to turn first to the left and then to the right in his efforts to avoid being struck by the car.

[6] As held in a number of cases, where a person sees another in a position which is in fact dangerous, he may not rely upon dullness to excuse him from not realizing the danger of the position (Basham v. Southern Pacific Co., 176 Cal. 320, 168 P. 359); and if he sees the dangerous situation he must use reasonable diligence in analyzing the same (Starck v. Pacific Electric Ry. Co., 172 Cal. 277, 156 P. 51, L. R. A. 1916E, 58), knowledge of danger being imputed where the circumstances are such as to convey to the mind of a reasonable man that the plaintiff is in a position of peril (Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 P. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85).

[7] The remaining question, then, to be considered on this branch of the case, is whether or not there is any evidence in the record supporting or tending to support the conclusion reached by the jury that the motorman, after becoming aware of the danger, could have avoided the accident by the exercise of ordinary care, but negligently failed to do so. We think there is. In this connection the testimony discloses that when the coupé was driven into its perilous position abreast the automobile parked in front of the dyeing establishment, at which time the motorman became aware of the danger, the street car was still 35 or 40 feet distant from the coupé, and although there is no evidence to prove that it was possible to bring the street car to a complete standstill within 50 feet, even if traveling, as the motorman claims, at a speed of only 18 miles an hour, it is reasonable to believe from all the circumstances present that if immediately upon becoming aware of the danger the motorman had applied the brakes, which were in perfect working order, and reversed the power, he could have retarded the speed of the street car sufficiently to have allowed the coupé to reach its objective and turn off the track to the right in safety between the street car and the automobile parked in front of the dyeing establishment, because the front left corner of

the street car barely caught the left rear end of the coupé as the coupé was clearing the track. The motorman claims that he did apply the brakes and reverse the power instantly upon observing the coupé coming abreast of the automobile parked in front of the dyeing establishment, but evidence was adduced from which the rational conclusion may be drawn that such was not the case, and that he waited until just a fraction of a second prior to the impact before taking any measures whatever to stop the car or lessen the speed, which, of course, was then too late to be of any effect. In this regard two of the passengers on the street car testified that the collision followed instantly after the brakes were applied; and it was also shown that even after the car came to a standstill, 135 or 140 feet beyond the point where the motorman claimed he applied the brakes and reversed the power, it started a retrograde movement, which fairly indicated that the brakes had not been properly set. Furthermore, the testimony of the motorman was to the effect that, even though the street car were traveling 30 miles an hour, it could be brought to a complete stop within 90 feet by the proper application of the brakes; consequently, if, as he says, he did apply the brakes and reverse the power when he first saw the coupé come abreast of the automobile parked in front of the dyeing establishment, the street car doubtless would have stopped within approximately 90 feet, even assuming it to have been traveling at the maximum speed of 30 miles an hour, as testified to by respondents' witnesses; whereas the fact is, as stated, that it ran on for a distance of approximately 140 feet before it came to a standstill.

[8] In any event, the situation revealed by the evidence adduced on the entire case presented a question of fact for the jury to determine; that it, whether the motorman, after becoming aware of the danger, negligently failed to avail himself of the last clear chance to avoid the accident; and the jury having by its verdicts declared that he was thus negligent, it is our conclusion that there is substantial evidence to sustain its verdicts.

[9] The situation presented is not one which may be disposed of under the rule of concurrent negligence, where the negligence of the injured party continues contemporaneously and actively with that of the other party to the accident, up to the very moment of the injury (Young v. Southern Pacific Co., 189 Cal. 746, 210 P. 259), because the evidence shows beyond question that immediately after Cropper drove into the dangerous pocket he used every reasonable effort to escape therefrom.

[10, 11] In dealing with the element of the motorman's knowledge of the dangerous situation, one of the instructions given uses the language: "*Could have seen* or did see the driver of the automobile upon the railway track, or crossing the same in a dangerous position," etc. (italics ours); and appellant assigns the use of the italicized words as error. As held in the cases cited by appellant, before the doctrine of the last clear chance may be given application it must appear that the defendant actually did see the plaintiff in a position of imminent peril, and it is not enough that he could have seen the plaintiff in such position but for remissness on his part. Here, however, the motorman admitted that he actually saw the coupé on the track and that he also saw the driver thereof endeavoring to extricate himself from his dangerous position, the motorman's testimony being in part as follows:

> "When I first saw it, they came and turned west on Pacific avenue into Fifth, and I saw it all the time after that as it came towards me and I went towards it. When I first saw it, it came about 150 feet with the left wheel about 6 inches over the south rail. I saw it attempt to to turn to the left and then attempt to turn to the right."

And, as already pointed out, the situation was such that he ought to have realized the driver's inability to escape therefrom. Moreover, the particular element of the doctrine of the last clear chance which appellant emphasizes by his objection to the instruction was substantially covered in two instructions given at the request of appellant, designated in the record as "D-31" and "D-44"; which, in part, read as follows:

> "* * * If such person's inability to get off the track is not known to the motorman *until* he is so close that he cannot stop before striking such person, the motorman is not guilty of any negligence, and in such case there can be no recovery against the railway."

And:

> "* * * It it not the motorman's duty in such a situation to slow down or stop his car merely because he sees an automobile some distance away approaching the car nor *until he sees* or in the exercise of ordinary care, should conclude *that it would go upon the track or fail to drive off the track. If he then uses ordinary care to avoid the accident, that is all that is required of him.*" (Italics ours.)

For the reasons stated, it would seem that the instruction of which appellant complains could not have operated to appellant's prejudice.

Instructions "P-10" and "P-17," to which appellant also objects, do not relate to the doctrine of the last clear chance, but pertain to the issue of ordinary negligence. The latter instruction which appellant particularly stresses in effect stated that the rules announced therein were to be given effect, "provided, of course, that contributory negligence is not also established as defined in these instructions." Furthermore, part of the premise appears to have been inadvertently omitted from this instruction, which so impaired its meaning that it cannot be said that the jury was misled by it.

[12] By virtue of respondents' instructions "P-40" and "P-41" the jury was charged that if it believed that Mrs. Nicolai was a passenger and had no control over the driver of the coupé, then the negligence of the driver, if any, could not be imputed to her. Appellant contends that said instructions omitted any reference to contributory negligence on the part of Mrs. Nicolai, and that, therefore, they are erroneous. If such construction can be placed upon the instructions referred to, the omitted element was supplied in others proposed by appellant, notably instruction "D-42." Moreover, the charge of the court consisted of 49 separate instructions, covering some 27 pages of the printed transcript, most of which related to the subject of negligence, and 35 of them were proposed by and given at the request of appellant without modification. It would seem, therefore, that the jury was fully instructed on all phases of the law of negligence.

Each judgment is affirmed.

We concur: TYLER, P. J.; PARKER, Justice pro tem.

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92 Cal. App. 110

UNITED DREDGING CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 6241.)

District Court of Appeal, First District, Division 1, California. May 22, 1928.

1. Admiralty 🔑21—Industrial Accident Commission had jurisdiction in proceeding for compensation for death of deck hand on dredger operating in navigable waters.

Industrial Accident Commission *held* to have jurisdiction in proceeding for death of helper and deck hand employed on dredger operating in navigable waters as a result of drowning while engaged in duty of transporting employees back and forth from dredger to shore; such labor being not so directly connected with navigation and commerce that to permit rights of parties to be controlled by local law would interfere with essential uniformity of general maritime law.

2. Master and servant 🔑405(4)—Evidence as to exact manner in which deceased met death held to sustain award.

Evidence in proceeding before Industrial Accident Commission for compensation for death of deck hand and all-round man on dredger relative to exact manner in which deceased met his death *held* sufficient to sustain award as not based on speculation.

3. Master and servant 🔑405(1)—Award of compensation may be based on circumstantial evidence.

An award of compensation may be based on circumstantial evidence, probabilities established by evidence supporting inferences in favor of employee, and inferences may support award.

4. Master and servant 🔑417(9)—Provision for interest being separable from award of compensation, proceedings need not be remanded on annulling order as to interest.

Clause of order by Industrial Accident Commission granting interest on award being separable from award of compensation, it is unnecessary on annulling order providing for interest to remand proceedings for further action by commission.

Certiorari to review an order of the Industrial Accident Commission.

Original application for certiorari by the United Dredging Company and another to review an order of Industrial Accident Commission awarding compensation to Ollie Kopke as surviving widow of Joseph Kopke, deceased employee. Award affirmed in part, and in part annulled.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioners.

G. C. Faulkner, of San Francisco, for respondents.

TYLER, P. J. Certiorari to review an award of the Industrial Accident Commission. In a proceeding filed with such commission against United Dredging Company and its insurance carrier, the Ocean Accident & Guarantee Corporation, Ollie Kopke alleged that she was the surviving widow of Joseph Kopke, an employee of petitioner dredging company, and that her husband, while employed by such company as an electrician's helper, fell off a barge upon which he was working and was drowned. Petitioners herein appeared by answer, and denied the jurisdiction of the commission, alleging in effect that at the time of his death deceased was a member of the crew of a vessel afloat in navigable waters, and that the case was one under admiralty jurisdiction. They further denied that the death arose out of and in the course of the employment. Hearing was had, and it appeared in evidence that the deceased, who was 22 or 23 years of age, was employed as an electrical helper, deck hand, and all-round man on a dredger operated by United Dredging Company, which was dredging in the navigable waters of San Francisco Bay, and particularly in that part known as Richmond Inner Harbor. The dredger was operating in water varying in depth from 21 to 31 feet and was proximately 700 feet from the shore. The dredger was anchored, and was used to suck up the bed of the bay and pump it on the adjacent land. From one corner of the dredger, in the direction of the shore, there ran a line of pontoons, on which lay a pipe through which the dredgings were pumped. On the day the employee met his death he had gone to work about 8 o'clock in the morning, and he was due to quit about 4:30 p. m. Part of the duties of the deceased were to take the men employed on the barge back and forth from the dredger to the shore. The skiff used by the deceased for this purpose was tied on the side of the first pontoon. In order to reach the skiff from the dredger, it was necessary to walk a distance of about 12 feet along a 14-inch plank, which was fastened to the dredging pipe running from the dredger to the first pontoon. On the day in question, Kopke was directed by one Sundeen, his immediate superior, to prepare the boat to take him and another employee to shore. Sundeen remained in the engine room changing some of his clothes, and, when he arrived upon deck, he discovered Kopke missing. The last seen of him alive was when he was leaving the engine room going outside to the outer part of the dredger. At that time he was walking toward the skiff. Investigation was made, and a cap was noticed floating on the water. Further search resulted in the finding of the body about midnight. It was in evidence that death was caused from drowning. On the 28th day of September, 1927, the commission made and entered its findings and award, wherein it granted to respondent Ollie Kopke a full benefit of $4,596 against petitioners herein, and specially found that the accident occurred as follows:

> "While proceeding to get ready a skiff which, under order of a superior, he was to row ashore from the dredger upon which he was employed, he accidentally fell overboard into deep water and was drowned."

[1-4] Thereafter petitioners asked for a rehearing, in which it was particularly set forth that the facts showed without contradiction that the case was one within the jurisdiction of admiralty; that the deceased was a member of a crew of the vessel, and therefore subject to that jurisdiction, and not to the jurisdiction of the Industrial Accident Commission. This petition was denied, and the present proceeding followed. The same contention is here made as was made before the commission. We are of the opinion that the question of jurisdiction in cases of this character has been definitely settled by recent decisions of our Supreme Court. The labor which deceased was performing at the time he met his death was not so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law, as it was local in character. Alaska Packers' Ass'n v. I. A. C., 200 Cal. 579, 253 P. 926; Id., 48 S. Ct. 346, 72 L. Ed. —; Oakland v. I. A. C., 198 Cal. 273, 244 P. 353; London Guarantee & Acc. Co. v. I. A. C. (Cal. Sup.) 265 P. 825. Nor is there any merit in the further claim that the award is based on speculation; there being no evidence to show the exact manner in which deceased met his death, or that anything arising out of the employment proximately caused it. An award may be based upon circumstantial evidence. Probabilities established by the evidence support inferences in favor of the employee, and inferences may support the award. The commission was therefore entitled to draw the inference from the facts proved that deceased accidentally fell overboard and met his death from drowning. And, finally, petitioners claim that the award is illegal because of the fact that it carries interest charges. No objection was made to the award in this particular upon rehearing; the point being raised for the first time in this proceeding. However, as the interest clause is separable from the award of compensation, it is unnecessary to remand the proceedings for further action by the commission. Pacific Indemnity Co. v. I. A. C. (Cal. Sup.) 261 P. 987.

The award of compensation is affirmed. The order providing for interest is annulled.

We concur: PARKER, Justice pro tem; KNIGHT, J.

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92 Cal. App. 94

OLIVER et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

(Civ. 6009.)

District Court of Appeal, Second District, Division 2, California. May 21, 1928.

1. Criminal law 🔑878(3)—Acquittal of crimes charged in other counts as overt acts of conspiracy held acquittal of conspiracy (Pen. Code, § 1104).

Where overt acts of criminal conspiracy, charged in one count of indictment, consisted of specific crimes of larceny and embezzlement charged in numerous other counts, and jury acquitted defendants on all counts charging larceny and embezzlement, *held*, that result was acquittal of offense of conspiracy, since under Pen. Code, § 1104, one of overt acts charged must be proved to permit conviction of conspiracy.

2. Prohibition 🔑10(3)—Acquittal of overt acts constituting acquittal of conspiracy presents proper case for prohibition against further trial on conspiracy charge.

Where court is without jurisdiction to try defendants on charge of conspiracy by reason of acquittal of crimes constituting overt acts of conspiracy, a proper case to afford remedy of prohibition is presented.

Application for writ of prohibition by Fred Oliver and others, prayed to be directed to the Superior Court of Los Angeles County. Writ granted.

Thomas H. Hearn, of Los Angeles, for petitioners.

Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

CRAIG, J. The prosecution from the disposition of which this proceeding originated was one by indictment against the petitioners, Lawrence J. Daw and Thomas Williams. This indictment contained 34 counts accusing the defendants therein of grand larceny, embezzlement, and conspiracy. In counts Nos. 1 to 33, inclusive, 11 different unlawful acts are charged, each in a set of 3 counts. In each set the first charge is grand larceny of a certain sum of money; the second, grand larceny of certain property of the same value as that charged in the first of each set; and, in the third, embezzlement of both money and property.

Count 34 charges conspiracy to obtain the money and property exceeding in value $200, alleged to have been the subject of the offenses set forth in the preceding counts. It is also averred to be "a different statement of the same offense and of the same class of crimes and offenses as those set forth in counts 1 to 33 inclusive thereof." Also it is alleged that in furtherance of the conspiracy the defendants committed certain overt acts which are delineated as the same offenses whose commission is charged in the first 33 counts of the indictment.

The defendants were tried, and the jury acquitted petitioners of the crimes charged in counts 1 to 33, inclusive, and failed to agree concerning count 34. Defendants Daw and Williams were convicted of the 11 counts of embezzlement and conspiracy and acquitted of the grand larceny charges. The petitioners further assert that the superior court has set the cause alleged in count 34 for trial, and they insist that this court should prohibit further prosecution thereof because had they been found guilty of the overt acts charged in the conspiracy count they would necessarily have been guilty of the grand larceny and embezzlement counts to which these overt acts respectively pertain, but that the jury having acquitted them as well of all charges of grand larceny and embezzlement, have thereby necessarily acquitted them as well of the conspiracy charge in count 34, and it is said that upon this theory petitioners have heretofore been in jeopardy for the crime of conspiracy, and that the subject-matter of count 34 is now res adjudicata.

The argument is that since Daw and Williams were found guilty of the embezzlement charges and the petitioners were acquitted of the same, the effect of these verdicts of the jury was to decide that the petitioners did nothing in furtherance of the commission of the crimes by way of counseling, advising, procuring, aiding, or abetting; hence that their acquittal of the charges was an acquittal of the commission of any overt act in furtherance of the same, and if no overt act was committed, of course there could be no criminal conspiracy.

[1] It is important to note the fact conceded by respondent, that the only overt acts alleged in count 34 are the specific crimes charged in the other counts; the sole overt acts averred were "larceny and embezzlement." The situation is clearly different from that which would have been presented had the conspiracy charge contained allegations of a number of overt acts which, taken together, would constitute grand larceny or embezzlement. Had the indictment been so drafted, it could not be said that an acquittal of grand larceny or embezzlement would necessarily have been a determination that no criminal conspiracy pertaining to the same transactions had occurred. But here the conclusion cannot be escaped that since each crime, considered and described collectively as a single entity, is alleged to be an overt act, and as the jury fully acquitted these petitioners of each overt act thus alleged, the portion of the count charging conspiracy remaining unadjudicated is insufficient to constitute criminal conspiracy. Moreover, considering the record here presented, by finding that none of the overt acts charged as parts of the conspiracy were committed, the jury, in effect, acquitted the petitioners of the offense of conspiracy. This must be so, since one of the overt acts charged must be proved to permit of conviction of conspiracy under section 1104 of the Penal Code.

[2] We are satisfied that under these circumstances the trial court is without jurisdiction to retry the defendants who are petitioners herein, as it is alleged that it is about to do. A proper case is thus presented to afford the remedy of prohibition. Huntington v. Superior Court, 5 Cal. App. 288, 90 P. 141.

It is ordered that the writ issue as prayed, prohibiting the superior court from proceeding further with the trial of the cause.

We concur: WORKS, P. J.; THOMPSON, J.

92 Cal. App. 91

COMMERCIAL SECURITIES CORPORATIONS CONSOL. v. LINDSAY MERCANTILE CO. (Civ. 5472.)

District Court of Appeal, Second District, Division 1, California. May 21, 1928.

Chattel mortgages ⚷6, 196—Transaction in form of sale and conditional sale of automobile held chattel mortgage, void as to owner's judgment creditor where not recorded (Civ. Code, § 2957).

In action for claim and delivery of automobile, evidence *held* to sustain court's finding that instrument, under which plaintiff claimed title to automobile, was chattel mortgage, in that possession of automobile was not delivered by owner at time he borrowed money and indorsed certificate of legal ownership, and conditional sale contract was executed purporting to sell car back to owner; and, no attempt having been made to comply with Civ. Code, § 2957, the mortgage was void as to judgment creditor of owner purchasing automobile at sale under execution.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action for claim and delivery of automobile by the Commercial Securities Corporation Consolidated against the Lindsay Mercantile Company. Judgment for defendant, and plaintiff appeals. Affirmed.

G. W. Zartman, of Tulare, for appellant.

C. W. Braswell, of Long Beach, for respondent.

WOOD, Justice pro tem. Plaintiff commenced this action to recover possession of an automobile, and prosecutes this appeal from a judgment in defendant's favor. One J. R. Hobbs was the owner of the automobile and applied to one E. Allen Abbott for a loan thereon. Hobbs indorsed his certificate of legal ownership in favor of Abbott, who, in turn, executed a conditional sale contract whereby he purported to sell the car back to Hobbs. The conditional sale contract contained the provisions in regard to title remaining in the seller and to defaults on the part of the buyer which are customary in instruments of this kind. The car was then registered in the office of the motor vehicle department in the name of Abbott as legal owner and Hobbs as registered owner. Thereafter, on January 1, 1926, Hobbs desired to borrow an additional sum and surrendered the conditional sale contract to Abbott, who loaned him the sum wanted and executed and delivered to him a new conditional sale contract, the legal title continuing to be registered in the name of Abbott. The conditional sale contract last mentioned and the certificate of legal ownership were then assigned by Abbott to the plaintiff, and on January 13, 1926, a new certificate of legal ownership was issued by the motor vehicle department to plaintiff. Early in January, 1926, and before default by Hobbs on the conditional sale contract, defendant obtained a writ of execution in an action in which defendant herein was plaintiff and J. R. Hobbs defendant, and in which judgment against Hobbs had been taken by default. The automobile in question was levied upon and bought at a constable's sale by the defendant. At the time of the sale plaintiff made a third-party claim to the car and gave notice thereof to all concerned. After default by Hobbs on the conditional sale contract, plaintiff demanded possession of the car from the defendant. Upon defendant's refusal to turn over the car to plaintiff this action was commenced.

Plaintiff now contends that its right to possession of the car is established by the registration of the legal ownership in its name and the conditional sale contract. We are of the opinion that the rights of plaintiff in the transaction were only those of a mortgagee. The case of Bonestell v. Western Auto-Motive Finance Corp., 69 Cal. App. 719, 232 P. 734, seems to be decisive of the question involved herein. In that case one Chrisman applied to the defendant for a loan, offering to secure the repayment of the loan by creating a lien upon an automobile. He gave a bill of sale covering the automobile to defendant, who thereupon executed and delivered to him a conditional sale contract similar in its provisions to the contract in the case now before us. Chrisman defaulted in his payments, and defendant took possession of the car. Chrisman then assigned his rights to the property to plaintiff, who recovered judgment for the possession of the car. In affirming the judgment the court said:

> "The whole transaction, though couched in the form of a bill of sale from Chrisman to the appellant and a conditional agreement of sale from the appellant to Chrisman, was simply a device to secure the repayment of the sum of $750 loaned by the appellant to the said Chrisman. There was no transfer of possession of the touring car from Chrisman to the appellant at the time of the execution of the bill of sale executed and delivered by him, nor was there any retransfer of possession at the time of the execution of the conditional agreement of sale by the corporation to Chrisman. * * * We think the transaction, which we have outlined in brief, comes within the provision of section 2924 of the Civil Code, to wit: 'Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession in which case it is to be deemed a pledge.' The property thereafter was impressed only with a lien, the legal title to the car remained in Chrisman, and the defendant was not entitled to possession unless authorized by the express terms of the mortgage. (Civ. Code, § 2927.)"

The court cited as authority the case of Blodgett v. Rheinschild, 56 Cal. App. 728, 206 P. 674.

The facts in the case at bar are very similar to those established in the case from which we have just quoted. There is ample evidence in the record to sustain the implied finding of the trial court that possession of the car was not delivered to Abbott at the time Hobbs borrowed money thereon. The court found that the instrument under which plaintiff claims title to the automobile is a chattel mortgage, and this finding is sustained by the evidence. Section 2957 of the Civil Code provides:

> "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value unless: 1. It is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay, or defraud creditors; 2. It is acknowledged or proved, certified, and recorded in like manner as grants of real property."

The record discloses that no attempt was made to comply with the provisions of this section.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

204 Cal. 267

CITY OF PASADENA v. McALLASTER, City Atty. (S. F. 12726.)

Supreme Court of California. May 28, 1928.

1. Municipal corporations 🔑865(2)—Municipality's obligation to pay assessment on municipally owned property for improvement constituted "indebtedness" within constitutional limitation (Acquisition and Improvement Act 1925, § 41; Const. art. 11, § 18).

Obligation of city for payment of assessments against municipally owned property pursuant to Acquisition and Improvement Act 1925 (St. 1925, p. 849), being made under section 41 an enforceable obligation against governing body controlling said land, constituted an "indebtedness" or liability within Const. art. 11, § 18, forbidding indebtedness or liability exceeding in any year income and revenue provided without assent of two-thirds of qualified electors.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Indebted—Indebtedness.]

2. Municipal corporations 🔑865(2)—Municipality's obligation to pay improvement assessment against municipally owned property held not "obligation imposed by law" within exception to debt limitation of Constitution (Acquisition and Improvement Act 1925, § 41; Const. art. 11, § 18).

Obligation of municipality to pay assessment for improvement against municipally owned property pursuant to Acquisition and Improvement Act 1925 (St. 1925, p. 849), which obligation under section 41 thereof is made an enforceable obligation against governing body controlling such land, *held* not to constitute an obligation imposed by law within Const. art. 11, § 18, limiting indebtedness of municipality within general rule allowing exception in case of obligations imposed by operation of law.

In Bank.

Original application by the City of Pasadena for a writ of mandate prayed to be directed to R. C. McAllaster, as City Attorney at Pasadena, to require him to institute condemnation proceedings for street improvement purposes. Writ denied.

O'Melveny, Millikin & Tuller, O'Melveny, Tuller & Myers, James L. Beebe, and Pierce Works, all of Los Angeles, for petitioner.

R. C. McAllaster, of Los Angeles, for respondent.

Everett W. Mattoon, Gordon Boller, and H. Woodworth Kennedy, all of Los Angeles, amici curiæ.

SHENK, J. This is an original application for a writ of mandate to compel the respondent, as city attorney of the city of Pasadena, to institute condemnation proceedings pursuant to an order of April 28, 1927, of the board of directors of the petitioner, city of Pasadena, for the acquisition of property necessary to widen, improve, and extend Holly street between Marengo avenue and Grand avenue, and to widen Grand avenue between Holly street and Colorado street in said city.

As a return to the alternative writ the respondent filed a general demurrer to the petition and also an answer setting forth certain facts which are admitted by the petitioner to be true. The matter is therefore submitted on the undisputed averments of fact set forth in the petition and in the answer. From these averments it appears that on March 15, 1927, pursuant to the provisions of the Acquisition and Improvement Act of 1925 (Stats. 1925, p. 849), the board of directors of the city of Pasadena duly adopted a resolution of intention to order the acquisition of land necessary for the improvement mentioned. It also appears that all of the steps required by the act were duly and regularly taken. It is unnecessary to recite them in detail. The order of April 28, 1927, adopted and established the boundaries of the assessment district, designated as acquisition and improvement district No. 2 of the city of Pasadena, which comprises the property to be benefited by the proposed improvement. The area to be benefited was divided into eight zones, designated as A, B, C, D, E, F, G, and H. The order also provided that the expense of the acquisition should be defrayed by the sale of bonds, to be issued in the total amount of such expense; the bonds to bear interest at the rate of 5½ per cent. per annum, payable semiannually, and to mature serially within 30 years, approximately 1/25 part of the aggregate principal to be payable annually, begining 5 years after the issuance of the bonds. Payment is to be provided for "by the levy of special assessment taxes upon the lands within the assessment district according to the assessed value of said lands (exclusive of improvements thereon), and in accordance with the zones and percentages," as set forth in the order. A large amount of municipally owned property is situate in this proposed assessment district and is included with zone H thereof. The percentage of the total bond issue allotted to zone H, if the proceedings are completed, is 20.68. The estimated total cost of the acquisition is $1,150,000, making the share of zone H approximately $230,000. No declaration was made in the resolution of intention to omit any of the municipally owned or controlled property from the assessment district, and it is conceded that such publicly owned property, by the terms of the Acquisition and Improvement Act, will be subject to the special assessment tax to the extent of its share of the expense of acquisition. By the provisions of the act the amount of the special assessment tax levied each year against the municipally owned land in zone

H is made "an enforceable obligation against the owner of or the governing body controlling said land, and it shall be the duty of the officer or body having charge of the disbursement of the funds of the owner of said land to pay the amount of said special assessment tax levied from any of the funds thereof available immediately upon its becoming due."

The charter of the city of Pasadena (subdivision 15, § 3, art. 1; section 12, art. 12) limits the tax rate to be levied each year for the purpose of raising sufficient revenue to carry on the various departments of the municipal government for the current fiscal year, exclusive of bonded indebtedness, etc., to $1 for each $100 of the assessed valuation of real and personal property. By subdivision 17 of section 3 of article 1 of said charter, the city is given power to levy taxes exceeding the limit permitted, provided the levy is first approved by two-thirds of the qualified electors of the city voting at a special election called for that purpose by the city council, and by section 21 of article 12 of the charter, if the council shall determine that the public interest requires the construction of any public improvement the cost of which, in addition to the other expenditures of the city, will exceed the income and revenue provided for in any one year, it may, by ordiance, submit a proposition to incur a debt for such purpose, and proceed therein as provided in section 18 of article 11 of the Constitution of the state of California. No proceedings have been had, and it is contemplated that none will be taken, in accordance with these provisions of the city charter or of section 18 of article 11 of the Constitution with respect to the proposed indebtedness.

It is admitted by the pleadings that if the city incurs any liability by reason of these acquisition proceedings, the amount of the obligation will exceed the income and revenue of the city in the year in which it is incurred. Petitioner argues that this is not an indebtedness of the city contracted by the city, but is a charge on the land benefited, the obligation of the payment thereof being imposed on the city by law; that payment of the bonds is provided for exclusively out of a special fund derived from the collection of assessments within the district, and therefore not a general obligation against the city; that the levy of an assessment does not create an indebtedness at all, an assessment not being contemplated to be an indebtedness within the meaning of the Constitution.

[1] On the other hand, the respondent insists that the assessment to pay the contemplated bond issue will create an indebtedness or liability of the city in violation of the section of the charter referred to and of section 18 of article 11 of the Constitution. Section 5 of article 9 of the city charter incorporates in the charter by reference the said Acquisition and Improvement Act. We therefore need be concerned only with the question of whether the issuance of the improvement bonds for the acquisition of said property and the city's obligation to provide money for the payment of the same would be in violation of the provisions of section 18 of article 11 of the Constitution. That section reads:

> "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity. * * * Any indebtedness or liability incurred contrary to this provision, with the exceptions hereinbefore recited, shall be void."

It is conceded by the petitioner that if and when the contemplated bonds are issued they must be paid in part by the city of Pasadena presumably out of general tax money as provided in the act. It is also conceded that the total payments by the city to be made by the city of Pasadena from time to time during the life of the bonds into the bond retirement fund will be in excess of the revenue of any one year during the period from the inception of the acquisition proceeding up to the final retirement of the bonds, and this, coupled with the fact, also conceded, that no assent of the electors of the city is proposed to be obtained in connection with the matter, will result in a violation of the constitutional provision if the obligation of the city so assumed is prohibited by the Constitution.

A survey of the authorities on the subject clearly shows that in the application of the prohibitive language of section 18 of article 11 of the Constitution to the situation here presented at least two conditions must concur: First, that an indebtedness or liability be incurred by the city of Pasadena in excess of the income and revenue provided for the year in which it is incurred; and, secondly, that such indebtedness be incurred voluntarily on the part of the officers of the city having an official duty to perform in the matter. If these two conditions be present, the result is not that the indebtedness or liability may not be incurred at all, but that the assent thereto of two-thirds of the qualified electors of the city must be first obtained. The first question, therefore, is this: Does the obligation assumed by the city, under the Acquisition and Improvement Act of 1925 and the proceedings in question, constitute an indebtedness or liability on the part of the city? The constitutional language is very broad. It is that no "indebtedness or liability in any manner or for any purpose," etc., shall be incurred except as in the section permitted. Sections 26 to 36, inclusive, of the act prescribe the procedure for the accquisition of property and the sale of bonds to obtain the money to pay the amount fixed by the judgment in condemnation. Section 41 provides that there shall, each year, at the time of levying taxes for general municipal purposes, be levied against and upon all the lands within the district (including, as here, the lands belonging to the municipality), according to the assessed valuation of said lands, exclusive of improvements thereon, a special assessment tax in an amount clearly sufficient, together with any moneys which are or may be in the district fund, to pay all the principal and interest which has become or may become payable on the bonds before the proceeds of another tax levy for municipal purposes may become available. That section further provides that in the event that there be included within the assessment district any land belonging to the municipality, the amount of the special assessment tax levied each year against said land shall be an enforceable obligation against the governing body controlling said land, and it is made the duty of the governing body having charge of the disbursement of the funds of the owners of said land to pay the amount of said special assessment tax so levied from any funds available, immediately upon the assessment tax becoming due. It would be difficult to perceive a more direct obligation imposed on the city authorities to pay into the district bond fund the amount of the assessment chargeable against the city. It is conceded that the city's lands, although in form assessed for the improvement, may not legally be sold to satisfy the assessment in the manner provided for the sale of privately owned lands, or at all. The city's proportion of the acquisition cost must be paid into the district bond fund provided for by the act from the general funds of the city or from the proceeds of some general municipal tax levy. In any event, the taxpayers of the city as a whole bear the burden of the obligation thus incurred.

It is pointed out on behalf of the petitioner that the bond form prescribed by the statute provides that the amount of the principal and interest on said bond is payable exclusively out of the district bond fund, and that "neither said city, nor any officer thereof, shall be holden from its payments otherwise." From this provision of the bonds it is urged that the city assumes no liability thereunder and that the only obligation otherwise assumed by the city is as a property owner within the assessment district. It is obvious that the city's liability does not arise by reason of the form of the bond, and that the holder of the bond may enforce payment thereof only from the district bond fund. But the liability of the city is to pay the assessment, which, when paid into the district fund, becomes available for the payment of the bonds. In the case of privately owned property there is no personal liability under the bonds on the part of the owners of the property assessed. The property itself is security to the bondholder that the assessments will be paid into the district fund. But the publicly owned property cannot be so bound. The city is obligated under the statute to provide the equivalent of the amount assessed thereon and to pay the same into the district fund. When the assessment is thus paid and is then disbursed to satisfy the bonds, the money leaves the public coffers irrevocably. This situation is clearly distinguishable from that presented in Stege v. City of Richmond, 194 Cal. 305,[1] wherein no municipally owned property was involved. It is admitted by the parties that if no municipally owned property be included in the assessment district no questions may arise concerning the constitutional debt limit or the charter tax limit. It seems clear, however, that when, as here, municipally owned property is included in the assessment district and the city is bound under the statute to pay from its general funds and into the special bond fund an amount toward the cost of the improvement which exceeds the constitutional debt limit, it is a mere play on words to argue that the city itself is not liable to pay the assessment because the form of the bond provides that the principal and interest thereon shall be paid only from the special fund provided for that purpose and that the city shall not be holden otherwise. Counsel for petitioner certainly would not suggest that if valid bonds be issued and sold, and if default be made in the payment into the special fund of the city's share of the assessment, a bondholder could not compel the city authorities to transfer from the general funds of the city to the special fund sufficient money to satisfy the city's proportion of the assessment or to levy a tax on all the taxable property of the city to replenish adequately the special fund to the extent of the city's proportion.

It is not the liability of the city generally on the bonds to be issued that presents the crucial questions. The liability of the city generally to feed the fund from which the bonds are to be paid is the vital point. That liability is definite, certain, and irrevocable during the full period of outstanding bonds and for the full proportion of the city's share. In principle this situation cannot be distinguished from that wherein a city is proposing to acquire the land by purchase and is binding itself to provide the funds, either from the general funds of the city or from a levy of a tax on the property in the municipality as a whole to pay the cost of the acquisition. In the event that the bonds be sold to provide the money to satisfy the judgment and the title to the property condemned be transferred to the city, the transaction will be closed so far as the acquisition proceeding is concerned. The proceeding is therefore not one governed by the principles laid down in such cases as McBean v. Fresno, 112 Cal. 159, 44 P. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191; Smilie v. Fresno County, 112 Cal. 311, 44 P. 556; and Doland v. Clark, 143 Cal. 176, 76 P. 958. In those cases the right to the public funds accrued only after the performance of some future service on the part of those whose claims thereto might arise or upon the happening of some contingency which might not arise. In the present case the right to the full purchase price will accrue at once upon the finality of the judgement in condemnation, which finality necessarily would occur prior to the assessment and also prior to the sale of the bonds.

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[1] 228 P. 461.

[2] The petitioner relies upon the general rule that no obligation cast upon a municipality by operation of law can be said to be an "indebtedness or liability" within the meaning of section 18 of article 11 of the Constitution. It is argued that the petitioner's obligation to pay the assessment on its property is one imposed by law because section 41 of the act provides that when the municipally owned property is assessed the assessment tax levied thereon is an enforceable obligation against the governing body controlling the land. It is true that the statute so provides, but it does not follow therefrom that the city's liability thereunder is involuntary. The proceeding is instituted by the same governing body charged with the duty of providing the funds for the payment of the bonds. This governing body was under no compulsion to start the proceeding in the first instance. It was entirely optional with the city to proceed or not to proceed in the commencement thereof. Later it was likewise optional with said governing body to include or exclude from the assessment the property belonging to the city. Acting voluntarily in both instances, the city elected to commence the proceeding and also to include the city property in the assessment. Under these circumstances it would seem idle to argue that the obligation thus assumed is imposed by the law and therefore involuntary. In support of its contention in this respect the petitioner cites Lewis v. Widber, 99 Cal. 412, 33 P. 1128; Federal Construction Co. v. Wold, 30 Cal. App. 360, 158 P. 340; City of Long Beach v. Lisenby, 180 Cal. 52, 179 P. 198; and other cases of like import which need not be specially mentioned. The doctrine announced by these cases is, of course, recognized. It was held in the case of Lewis v. Widber, supra, that "the clear intent expressed in the" constitutional provision "was to limit and restrict the power of the municipality as to any indebtedness or liability which it has discretion to incur or not to incur." The payment of the salary of a public officer whose office was created and whose salary was fixed by the Legislature was held not to be within the prohibition of the constitutional section. It was further stated in that case:

> "That this clause of the Constitution refers only to an indebtedness or liability which one of the municipal bodies mentioned has itself incurred—that is, an indebtedness which the municipality has contracted, or a liability resulting, in whole or in part, from some act or conduct of such municipality. Such is the plain meaning of the language used."

In the Federal Construction Company Case it was held that the obligation of the municipality to purchase all property offered at delinquent sales for the nonpayment of street assessments, in the absence of other purchasers, pursuant to the Improvement Act of 1911 (St. 1911, p. 730) and the Improvement Bond Act of 1915 (St. 1915, p. 1441), was an obligation imposed on the city by law and was not a liability prohibited by the constitutional provision. In such a case the payment out of the public treasury is for the purpose of a loan or advancement to facilitate and make effectual the proceedings under the act and which the city later may recover. The Long Beach Case involved, basically, the liability of a municipality arising out of torts. In all of these cases it was very properly held that the constitutional prohibition did not apply to the situations there presented.

We are unable to distinguish in principle the case here presented from the long line of cases in which this court has enforced the restriction on municipal indebtedness or liability contained in section 18 of article 11 of the Constitution. See Mahoney v. City and County of San Francisco, 73 Cal. Dec. 643; In re City and County of San Francisco v. Boyle, 195 Cal. 426, 233 P. 965; Chester v. Carmichael, 187 Cal. 287, 201 P. 925; Arthur v. City of Petaluma, 175 Cal. 216, 165 P. 698; People v. Hanford High School Dist., 148 Cal. 705, 84 P. 193; San Francisco Gas Co. v. Brickwedel, 62 Cal. 641; 18 Cal. Jur. 879.

The petitioner has cited and strongly relies on the case of City of Perry v. Johnson, 106 Okl. 32, 233 P. 679, as supporting the contention that the levy of an assessment against municipally owned property does not result in the creation of an indebtedness as contemplated by section 18 of article 11 of the Constitution. In the Oklahoma case the court held that the provision of the Constitution of that state similar to that contained in our Constitution was a "debt" limit and not a "tax" limit and did not apply to assessments for benefits occasioned by reason of public improvements levied against real estate owned by a municipal corporation. The court in that case was mainly concerned with the meaning of the word "indebtedness" in the Constitution of that state. Our constitutional provision is broader, in that it prohibits the incurring of any "indebtedness or liability," without the consent of the electors. But assuming the two provisions were the same, we are unable to arrive at the same conclusion. As pointed out in that case, there is for some purposes a distinction between an assessment for benefits and an ad valorem tax; but when the city pledges its credit, i. e., the credit of the taxpayers of the city as a whole, to pay for a public improvement and, as here, the amount agreed to be paid is in excess of the income and revenue for the year in which the liability is incurred and without the assent of the electors of the city, it seems to us that a liability is incurred contrary to the provisions of section 18 of article 11 of our Constitution as the same has been interpreted by this court since the adoption of the section. Whether the transaction be one of purchase by firm contract in installments, or by voluntarily assuming to pay assessments levied by itself, the city is contemplating an unauthorized expenditure of public funds.

We are quick to recognize a growing and commendable tendency on the part of the legislative branch and of the subordinate governmental agencies of the state to authorize and adopt measures which will enable the taxpayers of the city at large to bear a just proportion of special assessments for benefits on account of public improvements; but we cannot lose sight of the fact that in carrying out this laudable purpose constitutional bounds must be observed. It may also be noted that if the improvements be important enough to warrant expenditure of general funds in excess of ordinary income and revenue, the authorities having the matter in charge should not hesitate to submit the question of the incurring of the liability therefor to the electors for their approval or rejection as plainly contemplated by the constitutional provision.

The respondent urges, as a further reason why the relief sought herein should not be granted, the fact that after the petitioner started the present acquisition proceeding, the Legislature amended the act. It is claimed that the effect of the amendment has deprived the city of jurisdiction to further proceed. Under the act as originally framed, the first interest payment on the district bonds was made payable on the 2d day of the January or the July next succeeding the date of the bonds. In 1927 (St. 1927, p. 1375, § 10) the Legislature amended the act so as to provide that the first payment of interest should be payable on the 2d day of the January or the July next succeeding one year after the date of the bonds. It is urged that the delayed payment of interest under the amendment might result in a lower bid for the bonds and an increased cost of the improvement. It is not made clear, and we do not perceive, how the amendment would increase the cost of the acquisition of the land which of necessity is not determinable by any provision of the bonds but is fixed in the condemnation proceeding. Nor does it appear that the burden of the property owners in the district would be increased by reason of the amendment. We find nothing in the amendment which may not be given effect without prejudice to any right of the petitioner or those who might be required to pay the cost of acquisition.

The peremptory writ is denied.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; RICHARDS, J.; CURTIS, J.

204 Cal. 280

McNEECE v. WOOD et al. (L. A. 9562.)

Supreme Court of California. May 29, 1928.

1. Landlord and tenant 🔑103(1)—Courts give full application to rule requiring strict interpretation of lease relative to forfeiture (Civ. Code, §§ 1442, 1641).

The courts do not, in view of Civ. Code, § 1641, hesitate to give full application to the rule of interpretation of a lease, as provided by section 1442, that a condition involving a lease forfeiture must be strictly interpreted against the party for whose benefit it was created.

2. Landlord and tenant 🔑103(1)—Lease forfeitures are not favored by courts, and are not enforced if couched in ambiguous terms.

Lease forfeitures as such are not favored by the courts, and are never enforced if they are couched in ambiguous terms.

3. Landlord and tenant 🔑103(1)—Lease forfeiture can be enforced only where breach shown is within clear and manifest intention of parties.

A lease forfeiture can be enforced only where there is such breach shown as it was the clear and manifest intention of the parties to provide for.

4. Landlord and tenant 🔑103(1)—Burden is on party claiming lease forfeiture under contract to show that such was unmistakable intention.

The burden is on the party claiming forfeiture of lease under terms of contract to show that such forfeiture was the unmistakable intention of the instrument, and, if the agreement can be reasonably interpreted so as to avoid the forfeiture, it is court's duty to so interpret it.

5. Landlord and tenant ⚷105—Under lease providing for forfeiture for unlawful use of premises, declaration of forfeiture was premature when condition causing forfeiture had not continued for stipulated 30 days.

Where lease providing for forfeiture of lessee's rights in the premises for any improper or unlawful use thereof, and also contained a provision relative to conditions of forfeitures existing 30 days before declaration of forfeiture, *held*, in landlord's suit for breach for bookmaking and possession of whisky on premises, that declaration of forfeiture was premature, since 30 days provided in contract had not expired.

6. Landlord and tenant ⚷105—Forfeiture of lease held improper, where basic act was by sublessees, and lessee attempted to stop act as soon as he became aware of it.

Forfeiture of lease *held* improper, where unlawful act, violation of bookmaking statute (Pen. Code, § 337a), on which it was based, was by sublessees, and lessee attempted to stop act as soon as he became aware of it.

7. Landlord and tenant ⚷105—Single unlawful act of liquor selling by occupant held not sufficient to work forfeiture of lease (Volstead Act, § 23 [27 USCA §§ 35–37]).

Single unlawful act of liquor selling by occupant of leased premises *held*, in view of Volstead Act, § 23 (27 USCA §§ 35–37), insufficient to work a forfeiture of the lease providing for forfeiture for use of premises for improper or unlawful purposes, where lessee did not know of the possession of liquor at the time, and, on his discovery thereof, took immediate steps to remedy condition.

In Bank.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by James H. McNeece against George W. Wood and another. From the judgment, the named defendant appeals. Reversed.

Superseding former opinion, 260 P. 816.

Luce & Swing, James J. Breckenridge, Titus & Macomber, and Lewis R. Kirby, all of San Diego, for appellant.

A. Haines, John H. McCorkle, and Haines & Haines, all of San Diego, for respondent.

PER CURIAM. This is an appeal by the defendant Wood from a judgment declaring forfeited a lease on the McNeece building in the city of San Diego.

By written instrument dated November 1, 1920, the plaintiff leased to the defendant Wood the building in question, which is a business block in said city. On February 17, 1923, Wood subleased the upper four floors to Mrs. Jennie H. Hipwell. Mrs. L. E. Geoghegan, a daughter of Mrs. Hipwell, became manager and had charge of the renting of rooms of that portion of the building leased to her mother. On November 20, 1925, Mrs. Geoghegan rented room No. 438 to Bradley and O'Brien, who took possession of the room 2 or 3 days later. One Logan was employed by Mrs. Geoghegan to operate the elevator in the building and was acting as such at the time of the transactions involved herein. Logan was also employed at the same time by the defendant Wood to keep watch and report to Wood any infractions of the law or other things not proper and right about the building. Bradley and O'Brien installed telephones in room 438 and started bookmaking operations. It is conceded by all parties that the operations of Bradley and O'Brien in said room were in violation of section 337a of the Penal Code. Logan became suspicious of the conduct of Bradley and O'Brien and endeavored to notify defendant Wood, but was unable to locate him. He then notified the police department of what was going on in said room. After the lapse of four or five days the room was raided by the police. The raid took place on December 1, 1925, the guilty parties were apprehended and prosecuted, and the unlawful business ceased to be carried on in said room.

The defendant Wood subleased a room on the ground floor to one Joe England, who conducted a restaurant therein. England employed one Shepard to look after the restaurant during certain hours of the night. On the evening of June 19, 1926, police officers visited the restaurant to search the same for contraband liquor. Shepard was in the restaurant at the time. Five pints of whisky were found on the premises by the officers. Shepard was arrested and he entered a plea of guilty to the charge of unlawful possession.

On December 18, 1925, the plaintiff served written notice of the forfeiture of the original lease on the defendant Wood and his subtenants and 12 days later filed suit to have the forfeiture declared and possession restored to the lessor. Subsequently the plaintiff, by way of supplemental complaint filed on July 2, 1926, set up the alleged unlawful possession of liquor on the part of Shepard on June 19, 1926. The cause was tried and the court declared the lease forfeited for breach of the following covenant of the lease:

> "It is further agreed and understood that said lessee shall not use or permit to be used said premises for any improper or unlawful purpose, and any such improper or unlawful use shall work a forfeiture of this lease."

The trial court refused to consider as having any bearing on the rights of the parties another provision of the lease as follows:

> "It is further hereby agreed that, if the lessee shall at any time refuse or fail to pay rent as herein provided to be paid by him, or shall refuse or fail to keep any of the covenants herein contained, and such condition shall continue for a period of 30 days, then, and in that event, the lessor may at his option declare this lease

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

forfeited, and may retake possession of said premises without process of law."

The first contention of the appealing defendant is that the court should have read both clauses of the lease together, and that when they are so read there is evidence from the document itself that the parties intended no forfeiture to take place until the lessee should have opportunity to remedy any alleged breach of a covenant, and that such opportunity should continue for at least 30 days. Section 1641 of the Civil Code provides:

> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

[1-4] This is a familiar rule of construction and when due regard is given to it there is much force in the contention of the defendant that when these two clauses of the lease are read together the second clause helps to interpret the first and evidences an intention of the parties that no forfeiture should at once take place for a breach of any of the covenants of the lease. At least it must be said that when the two clauses are read together an uncertainty or ambiguity arises requiring a construction to be placed on the language used by the parties in order to declare their intention. As there is nothing in the evidence to explain the uncertainty, and thus determine what was meant, we turn to the law for guidance in the construction of the terms of the lease. At once we are met with the Code provision as follows:

> "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." Section 1442, Civ. Code.

Examination of the cases in this state shows that our courts have not hesitated to give this rule of interpretation full application.

> "Forfeitures, as such, are not favored by the courts, and are never enforced if they are couched in ambiguous terms." Cleary v. Folger, 84 Cal. 316, 321, 24 P. 280, 281 (18 Am. St. Rep. 187).
>
> "A forfeiture can be enforced only when there is 'such a breach shown as it was the clear and manifest intention of the parties to provide for.'" Randol v. Scott, 110 Cal. 590, 595, 42 P. 976, 977. "The burden is upon the party claiming the forfeiture to show that such was the unmistakable intention of the instrument. If the agreement can be reasonably interpreted so as to avoid the forfeiture, it is our duty to do so." Quatman v. McCray, 128 Cal. 285, 289, 60 P. 855, 856.

Reference to cases of like import might be multiplied. See Johnson v. Kaeser, 196 Cal. 686, 700, 239 P. 324; Jameson v. Chanslor-Canfield Oil Co., 176 Cal. 1, 167 P. 369; 6 Cal. Jur. 362; 12 Cal. Jur. 633; 15 Cal. Jur. 779.

[5] It seems reasonable to conclude that the parties to the lease here in question intended that the lessor could not take advantage of the breach of any covenant therein on the part of the lessee until the expiration of 30 days after the breach. As 30 days had not expired when the notice of forfeiture was given and action taken in the courts to have the forfeiture declared, the said court action in each case was premature.

[6] Even if our conclusion as to the intention of the parties under the lease might be to the contrary, the equities of the case do not call for the drastic remedy of forfeiture under the facts presented. As to the original cause of action, it appears that room 438 was rented on November 20. Possession was taken by Bradley and O'Brien about November 22. Several days prior to the December 1st following, the employee and agent of the defendant Wood notified the police department of the violation of law in the building and the violators were promptly arrested and prosecuted. What more could the lessee Wood have done? He acted through his agent with the utmost promptness. It would seem to be highly inequitable under the facts here shown to have deprived him of his estate in the property. The fact that Mrs. Geoghegan testified that she knew when she rented the room that bookmaking was to be carried on there would not estop the lessee Wood from taking prompt action to oust the malefactors from the building and thus avoid the forfeiture.

As to the cause of action set forth in the supplemental complaint, it appears that the liquor was in the possession of an employee of the sublessee without the knowledge or consent of the lessee or the sublessee. Assuming, as contended by the plaintiff, that the acts of a sublessee are binding on the lessee, it would also appear to be highly inequitable to forfeit the lease on account of one act of unlawful possession on the part of the employee of the sublessee in the absence of some notice or knowledge of the infraction of the law on the part of the lessee or his subtenant. If such a rule be applied, the lessee of an office building or hotel would indeed be in a precarious position, for any infraction of the law on the part of an employee or guest or invitee or licensee on the premises, and entirely unknown to the lessee of the premises, would ipso facto work a forfeiture of the lease. If such result be contemplated by the parties, it should be evidenced by their agreement in no uncertain terms.

The plaintiff relies on section 23 of the Volstead Act (41 Stats. at Large, 305, 314 [27 USCA §§ 35-37]) as authorizing the forfeiture. That section provides that:

> "Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease." 27 USCA § 37.

It may well be questioned whether an employee or a guest or a licensee of the lessee or tenant in possession is an "occupant" of the premises as contemplated by the section relied upon. Webster defines the word "occupant" as:

> "One who occupies; especially a tenant in possession of property, as distinguished from the actual owner; by extension, in law, one who occupies and claims property that is without an owner."

When this meaning is given to the word the unreasonable and absurd consequences of including within its meaning one who has no responsibility for the conduct of the premises such as to bind the innocent lessee by his unlawful act are obviated.

[7] We conclude that a single unlawful act on the part of such a one is not sufficient to work a forfeiture of the lease under the written agreement and the circumstances here shown. It necessarily follows that the evidence is insufficient to support the findings and that the judgment is unsupported.

The judgment is therefore reversed.

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91 Cal. App. 577

PACIFIC EMPLOYERS' INS. CO. v. DEPARTMENT OF INDUSTRIAL RELATIONS et al. (Civ. 5952.)★

District Court of Appeal, Second District, Division 1, California. May 3, 1928.

Rehearing Denied June 2, 1928. Hearing Denied by Supreme Court by Operation of Law July 2, 1928.

1. Master and servant 🔑362—Employee, ordered to wreck barn, which took less than ten days, costing less than $100, held engaged in "casual employment" (Workmen's Compensation Insurance and Safety Act of 1917, § 8(c).

Employee engaged in wrecking barn, which work was to be completed within ten days, at cost of less than $100, at order of employer, who was engaged in trucking business, *held* engaged in "casual employment" within meaning of Workmen's Compensation Insurance and Safety Act (St. 1917, p. 835), § 8(c).

2. Master and servant 🔑405(2)—Evidence held not to support finding of commission that employee wrecking barn was engaged in business of employer, which was trucking (Workmen's Compensation Insurance and Safety Act, § 8).

In proceeding under Workmen's Compensation Insurance and Safety Act St. 1917, p. 831, where employee, hired by employer in trucking business, was ordered to wreck barn, evidence *held* not to support findings of Industrial Commission that employee was engaged in course of trade, business, profession, or occupation of his employer within meaning of section 8.

On Petition for Rehearing.

3. Master and servant 🔑362—That employer engaged in single wrecking job prior to one in question did not extend trucking business to wrecking buildings "with some degree of regularity" (Workmen's Compensation Insurance and Safety Act of 1917, § 8(c).

In proceedings under Workmen's Compensation Insurance and Safety Act of 1917 (St. 1917, p. 835), where employer was engaged in trucking business, and employee was injured while wrecking barn, fact that employer had done single wrecking job prior to one in which employee was injured *held* not to show the employer was engaged in wrecking of buildings "with some degree of regularity," within meaning of section 8(c).

4. Master and servant 🔑362—That employer purchased barn with proceeds of trucking business did not extend such business to include wrecking of barn (Workmen's Compensation Insurance and Safety Act of 1917).

In proceedings under the Workmen's Compensation Insurance and Safety Act of 1917 (St. 1917, p. 835), where employee was engaged in wrecking barn purchased from proceeds of trucking business, *held*, that such fact did not make work incidental to trucking business.

5. Master and servant 🔑362—That employer was having barn wrecked to put materials in haulable condition did not extend trucking business to include wrecking of barn (Workmen's Compensation Insurance and Safety Act of 1917).

In proceedings under the Workmen's Compensation Insurance and Safety Act of 1917 (St. 1917, p. 835), where employer, engaged in trucking business, hired employee to wreck barn, fact that barn was being wrecked incidental to putting materials in haulable condition did not make it incident to trucking business.

6. Master and servant 🔑403—Presumption that one rendering service is employee, within meaning of act, held not applicable to casual employee, expressly excluded by act (Workmen's Compensation Insurance and Safety Act of 1917, § 8 (a), (b).

Workmen's Compensation Insurance and Safety Act of 1917 (St. 1917, p. 835), § 8(b), providing that any person rendering service for another other than independent contractor or expressly excluded herein is presumed employee, within meaning of act, *held* not to apply to casual employee, excluded by § 8(a).

7. Master and servant 🔑417(7)—Appellate court may not examine evidence to determine which of conflicting inferences should be accepted as basis for finding by commission (Workmen's Compensation Insurance and Safety Act of 1917).

Appellate court has no power to examine evidence for purpose of determining which of two or more conflicting statements or inferences from evidence should be accepted as basis for finding by Industrial Accident Commission in awarding compensation under Workmen's Compensation Insurance and Safety Act of 1917 (St. 1917, p. 835).

★Rehearing denied. Hearing denied by Supreme Court.

8. Master and servant ⚷417(7)—Appellate court may examine evidence to determine whether, on reasonable view, evidence will support finding of commission as to jurisdictional facts essential to award (Workmen's Compensation Insurance and Safety Act of 1917).

Appellate court has power to examine evidence for purpose of ascertaining whether, on any reasonable view that may be taken of it, accepting only statements and inferences most favorable to findings in case of conflict or uncertainty, it will support finding of Industrial Accident Commission, under Workmen's Compensation Insurance and Safety Act of 1917 (St. 1917, p. 835), as to jurisdictional facts essential to its award, and to set award aside, if no support for it is found.

Proceedings under the Workmen's Compensation Act by Ralph R. Powell, claimant, opposed by the Pacific Employers' Insurance Company, insurance carrier, and Delsie L. Isley and another, employers. To review an order of the Industrial Accident Commission, a part of the Department of Industrial Relations, awarding compensation, the insurance carrier petitions for certiorari. Award annulled.

F. Britton McConnell, of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

SHAW, Justice pro tem. This is a proceeding by the petitioner to review an order of the Industrial Accident Commission, which, under the present law dividing the functions of the state government into various departments, is a part of the department of industrial relations. Petitioner is the insurance carrier of Delsie L. Isley, and an award was made against it on account of injuries sustained by one Ralph R. Powell while engaged in wrecking a barn and while in the employ of said Delsie L. Isley.

From the evidence before the commission, it appears that the said Delsie L. Isley was the owner of two trucks, and was engaged in the general trucking and hauling business under the name of "Isley Transfer." This business seems to have been entirely conducted and managed by her husband, Everett Isley, and the business is usually referred to in the record as his business; in fact, the evidence shows but little connection of Delsie L. Isley with the business, except that she was the owner of the trucks used therein, but, as petitioner concedes that the evidence is sufficient to show that Powell was in her employ, no discussion of it from this standpoint is necessary. The scope of the business, as stated by Everett Isley, was that he hauled "anything at all." He also said that he had engaged in one other wrecking job about three or fourth months previous to the wrecking of the barn, but that his wife had no interest at all in that job. Powell, who was the only other witness on this point, stated that the principal business of the Isley Transfer was hauling all kinds of stuff, general hauling or draying, and that to his knowledge "Mr. Isley" had moved buildings before.

Everett Isley learned that certain contractors for whom he was doing hauling had for sale a house and a barn. Desiring to provide himself and Delsie L. Isley with a place of abode, he bought this house and barn, and paid for them by a credit on his wife's account with the contractors. He had the house moved upon a lot, which had already been bought for residential purposes in the name of his wife; and, as soon as the house was moved and made ready, he and his wife began living in it. He proceeded to wreck the barn and haul the materials composing it to this same lot. Part of these materials were used in repairing the house after it had been moved. It was his original intention to use the remainder thereof in building a garage on this lot, but this purpose was abandoned, and the surplus materials were sold.

Powell was engaged in tearing the barn apart, and in the course of that work received the injuries for which the award was made. He was engaged by Everett Isley a short time before these injuries were received under an employment by which he was promised steady work when there was any work to be done, and was to work at anything Isley had to do, and to be paid 50 cents an hour. After doing a couple of jobs of hauling, he was set by Isley at the work of tearing down the barn, doing no hauling in connection with it, and worked a little less than two days thereat before he was injured. After the materials of the barn were taken apart, they were hauled to the lot above mentioned by Everett Isley himself, from time to time, as he had a little leisure from other jobs. There were three men altogether working at the wrecking of the barn, who were each paid $4 per day, and the testimony is undisputed that they could complete the job in not more than five days at a labor cost of not more than $60.

The Industrial Accident Commission found that the applicant, Powell, was employed by Delsie L. Isley and not by Everett Isley, and that "the work in which applicant was engaged at the time of said injury was connected with the regular business of the employer, and was not casual." There were, of course, other findings to which it is unnecessary to refer.

Petitioner claims that there is no evidence on which the findings above quoted as to the nature of the work may be based, and that this finding does not cover the whole issue. The solution of the problems presented by this claim depends upon the following provisions of section 8 of the Workmen's Compensation Insurance and Safety Act of 1917 (St. 1917, p. 835):

> "(a) The term 'employee' * * * shall be construed to mean: Every person in the service of an employer as defined by section seven hereof * * * excluding any person whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer, * * * (c) The term 'casual' as used in this section shall be taken to refer only to employments where the work contemplated is to be completed in not exceeding ten working days, without regard to the number of men employed, and where the total labor cost of such work is less than one hundred dollars. The phrase 'course of the trade, business, profession or occupation of his employer' shall be taken to include all services tending toward the preservation, maintenance or operation of the business, business premises or business property of the employer. The words 'trade, business, profession or occupation of his employer' shall be taken to include any undertaking actually engaged in by him with some degree of regularity, the trade name, articles of incorporation or principal business of the employer to the contrary notwithstanding."

[1] There can be no doubt that Powell's employment on the barn wrecking job was casual, as that term is defined in the statute above quoted. The work contemplated on that job was to be completed in less than ten working days at a total labor cost of less than $100. We do not think the situation is altered in this respect by the fact that he was under a general engagement to work for Isley. The wrecking of the barn was a separate and independent piece of work which Powell undertook in response to a specific order from Isley, and it must be considered by itself in determining whether it was casual. Rissman v. Industrial Acc. Com'n, 190 Cal. 619, 213 P. 991.

[2] The question remains whether Powell's work on the barn was "not in the course of the trade, business, profession, or occupation of his employer." Petitioner contends that the finding of the Commission that the work "was connected with the regular business of the employer" does not meet the issue on this matter, and its argument has much force, but we need not determine the point, because we think the finding, even if sufficient in form, finds no support in the evidence. The employer, it must be remembered, was Delsie L. Isley. Her business, according to all the evidence, was trucking and hauling. No other evidence was needed to show that it did not include the wrecking of buildings. While Everett Isley testified that he had previously wrecked one building, he also said that his wife had no interest in that job, and, hence, it cannot be used to amplify the scope of her business. Under the peculiar circumstances of the case, perhaps Powell's testimony that "Mr. Isley" had moved buildings before can be construed to refer to something done by him in carrying on the business of Delsie L. Isley, but, if so, it covers merely the moving, not the wrecking, of buildings. There is nothing to show that Delsie L. Isley had engaged with some or any degree of regularity in the wrecking of buildings. Neither was Powell's service one tending toward the preservation, maintenance, or operation of the trucking business, or of the business premises or business property used in such business. The respondent suggests that it might be so classified because Everett Isley intended to use a part of the materials taken from the barn in building a garage; but there is no direct testimony as to the purpose for which that garage was to be used, and the inference from the fact that it was to be placed on the lot where Mr. and Mrs. Isley had their residence—nothing else appears as a basis for any inference—would be that it was to be used for some purpose connected with their residence, and not with the business. In fact, a part of the lumber was used in repairing the dwelling house, and the remainder was sold, and neither of these operations was in the course of any business carried on by Delsie L. Isley.

The petitioner also contends that the work in question was not covered by the insurance policy which it had issued to Delsie L. Isley, but, in view of our conclusion on the point already discussed, it is not necessary to pass upon this contention.

The award is annulled.

We concur: CONREY, P. J.; HOUSER, J.

On Petition for Rehearing.

PER CURIAM. The respondent Department of Industrial Relations has filed a petition for a rehearing, in which several contentions are stated at some length. Most of the points so made were at least suggested in the brief originally submitted to us, and were considered by us before the decision was made, although some of them are not discussed in the opinion. A large part of this petition seems to be based on a misunderstanding of the language of our opinion, which has apparently led counsel to believe that we held the particular work in which Powell was engaged when he was hurt to be the personal business of Everett Isley. Following the example of the witnesses, we referred to the various acts of Everett Isley as being his acts, without specifically stating that they were done by him for Delsie L. Isley; but we fully understood that all of these acts were done by him as her agent, except in the single case of the previous wrecking job to which he testified. We considered the case in the same aspect, except as to that one job, as if all the acts referred to had been done by Delsie L. Isley in person.

As to the casual nature of Powell's employment, respondent complains that the opinion fails to distinguish between the employment and the work done under it. Perhaps the words "specific order," used in the opinion, did not fully express our meaning; but we had the distinction referred to in mind, and were of the opinion that the evidence showed a separate employment of Powell to work upon the barn, which was distinct from his employment to work in the trucking business.

[3] Respondent also argues that this court was in error in its statement that Delsie L. Isley had no interest in the previous wrecking job done by Everett Isley. We have again carefully read the evidence quoted in support of this argument, but can find therein no reason for a different conclusion from that previously reached by us. However, even if we were wrong on that point, a single wrecking job done prior to the one in question would not be sufficient to show that Delsie L. Isley had engaged in the wrecking of buildings "with some degree of regularity," and, hence, by the terms of the act, would not effect an extension of her business beyond its previous scope.

[4] Respondent also claims that because the barn, having been paid for from the proceeds of Delsie L. Isley's business, was her property, therefore any work done on it was incidental to and done in the course of that business. This is not the criterion established by the statute, and if it were adopted it would lead to extreme consequences. The testimony showed that all of the living expenses of the Isleys were paid out of the proceeds of this same business, and hence Delsie L. Isley was no doubt the owner of all food bought for their personal use; but if she had called Powell into her kitchen to peel potatoes for the family dinner, and he had cut himself while so doing, it would hardly be contended that the cut was received by him in the course of her business, and if such contention were made it would receive scant attention. A number of cases are cited which hold that an employee may recover compensation for injuries received by him in doing work which, although not strictly within the scope of his particular employment, is done in the course of the employer's business; but they are clearly not applicable here, where the work was within the scope of Powell's special employment, but was not done within the course of the employer's business.

[5] Another contention is that, because the wrecking of the barn was done in order to put its materials into a haulable condition, such wrecking was incidental to the business of hauling. Several cases are cited where it was held that work which appeared to be somewhat out of the line of the employer's business was nevertheless done in the course of that business. But in all of them it appeared that the work was done at the employer's place of business and was to some extent connected with and arose out of his business operations. No case is cited which is at all similar in its facts to that now before us. This contention would lead to the conclusion that the business of every common carrier includes as an incident the manufacturing of the commodities hauled by such carrier, although such manufacturing had never been engaged in before the occasion which gave rise to the question.

[6] Respondent also refers to the presumption declared by section 8, subdivision (b), of the act, and claims that this is evidence on which a finding that Powell was an employee subject to the act may be based, even in the face of evidence showing the facts to be otherwise. The decisions are in conflict on the question whether a presumption may thus be used to support a finding; but under either rule the presumption referred to is of no avail to respondent. On this subject the act provides:

> "Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this act."

Hence, when it appears, as it does in this case, that the person rendering service is expressly excluded by the act from its scope, there is no presumption as to him.

[7, 8] Respondent also claims that the court has exceeded it powers by weighing the evidence. If by weighing the evidence is meant its examination for the purpose of determining which of two or more conflicting statements or inferences from the evidence should be accepted as the basis for a finding, we agree that this court has no power to perform that function in this case. But it does have power to examine the evidence for the purpose of ascertainng whether, on any reasonable view that may be taken of it, accepting only the statements and inferences most favorable to the findings in case of conflict or uncertainty, it will support the findings of the Industrial Accident Commission as to jurisdictional facts essential to its award, and to set the award aside if no such support for it is found. We think we have gone no further in this case.

A rehearing is denied.

92 Cal. App. 171

SHOWERS v. ROBER. (Civ. 5257.)

District Court of Appeal, Second District, Division 1, California. May 23, 1928.

1. **Appeal and error ⟾931(1)—Findings being favorable to plaintiff, evidence on appeal must be considered in light most favorable to plaintiff.**

Where findings are favorable to plaintiff on appeal from judgment for plaintiff, evidence must be considered in light most favorable to him.

2. **Corporations ⟾432(12)—Evidence in broker's action for commission held to sustain finding that one signing contract for corporate purchaser had authority to do so.**

In action for real estate broker's commission, evidence *held* to support finding that general manager, secretary, and director of corporate purchaser who signed contract of purchase in name of corporation was authorized to execute contract, and hence contract was a binding agreement.

3. **Corporations ⟾406(4)—General manager's authority to execute contract for corporation need not be evidenced by written instrument.**

Authority of general manager of corporation to execute contract of purchase for corporation need not be evidenced by an instrument in writing.

4. **Brokers ⟾49(3)—Purchaser's agreement containing terms generally found in such instruments held not substantially different from broker's authorization.**

In action for recovery of real estate broker's commission, purchaser's agreement, containing terms which would be supplied by law if not specifically set forth and which are generally found in instruments of such nature, *held* not fatally at variance with broker's authorization, especially since it was owner's duty to object to any of terms of purchaser's agreement if they were not suitable, so that an adjustment could be made.

Houser, J., dissenting.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Jack Showers, doing business under the firm name and style of San Vicente Realty Company, against H. Mary Rober, for real estate broker's commission. Judgment for plaintiff, and defendant appeals. Affirmed.

Victor H. Kendrick and Wm. T. Kendrick, both of Los Angeles, for appellant.

Lee R. Taylor and Richard Glass, both of Los Angeles, for respondent.

WOOD, Justice pro tem. Defendant appeals from a judgment in the sum of $1,250 rendered against her in an action in which plaintiff sued for a commission alleged to have been earned in negotiating the sale of defendant's real estate. On November 16, 1923, defendant gave to plaintiff written authorization to sell the land in question, in which it is stated: "I hereby constitute Jack Showers sole agent for the herein described property for 30 days and thereafter until notified in writing to the contrary." The price stated was $25,000, of which $16,300 was to be cash ("down"), and the balance to be covered by mortgage. On November 28, 1923, through the efforts of plaintiff, the South Park Land Company, a corporation, agreed to purchase defendant's property by an instrument which was executed in the name of the corporation by C. M. Crawford, its general manager. By the instrument the purchaser agreed to pay the price fixed by defendant, of which $1,000 was then paid by check. The instrument provided:

> "The balance of the purchase price is to be paid 30 days from date hereof as follows, to wit: ($4,000) four thousand dollars additional to the ($1,000) one thousand dollar deposit to be paid into escrow and the balance when the title has had a report upon. Purchaser to be given possession within ninety (90) days hereof."

Plaintiff then called upon defendant and informed her that he had sold the property. Mrs. Rober refused to talk to plaintiff, shut the door in his face, and directed him to talk to her husband. Plaintiff then told Mr. Rober that he had sold the property to the South Park Land Company, but Mr. Rober said he "told his wife that she should not have signed any card or any listing like that, and that he would not have anything to do with it, and he would keep her from selling if he could." An escrow was started at the Citizens' State Bank at Sawtelle, and the $1,000 deposited there. The cashier of the bank wrote a letter to Mrs. Rober concerning the escrow, and the registration return card was returned to the bank bearing Mrs. Rober's signature by her daughter.

[1-3] Two points are presented by appellant in arguing for a reversal of the judgment. It is first contended that it is not shown by the agreement of the South Park Land Company, or otherwise, that C. M. Crawford was authorized to bind the corporation. Since the findings are favorable to plaintiff the evidence must be considered in the light most favorable to him. The witness Crawford testified that the corporation was buying and selling real estate and that he had conducted practically all of the purchases and sales; that he was handling all of the affairs of the corporation. Witness Martin, the president of the South Park Land Company, testified that Crawford was the general manager of the corporation and that four of the five directors had met and discussed the proposed purchase and had "told Mr. Crawford to close

the transaction on either of the terms he wanted to, either for cash or on the payment down and balance on the mortgage." Crawford was secretary of the corporation and a member of its board of directors. It was established that the South Park Land Company was ready, able, and willing to complete the purchase. We are of the opinion that the agreement to purchase secured from the Sourth Park Land Company was a binding agreement and that the finding of the trial court that Crawford was authorized to execute it is supported by the evidence. In 6 California Jurisprudence, p. 1109, it is said:

> "In the case of a corporation organized for commercial purposes, its general manager, or whoever may be given immediate direction or control of its affairs, is its agent, empowered, unless expressly restricted to the performance of certain specified acts, to do, in respect to the management of the ordinary and usual affairs of the corporation, what the corporation itself could do within the scope of its authority." Betts v. Southern Cal., etc., Exchange, 144 Cal. 402, 77 P. 993; Grummet v. Fresno Glazed Cement Pipe Co., 181 Cal. 509, 185 P. 388; Raftis v. McCloud River Lumber Co., 35 Cal. App. 397, 170 P. 176; Stevens v. Selma Fruit Co., 18 Cal. App. 242, 123 P. 212.

It was not necessary that Crawford's authority be evidenced by an instrument in writing. In McCartney v. Clover Valley Land & Stock Co. (C. C. A.) 232 F. 697, 1 A. L. R. 1127, it is said:

> "In our judgment section 2309 of the California Code, requiring an agent's authority to execute a contract in writing to be itself in writing, does not apply to the executive officers of a corporation. It has never been the practice to require powers of attorney to confer authority upon such agents. We think the statute was intended to apply to agents proper; that is, persons who were not officers of the corporation. The executive officer of a corporation is something more than an agent. He is the representative of the corporation itself."

See, also, Arnold v. La Belle Oil Co., 47 Cal. App. 290, 296, 190 P. 815.

[4] Appellant argues in support of her second contention that the terms offered by the purchaser are not the same as those contained in the authorization to plaintiff. She points out: That by the purchaser's agreement the purchase price was to be paid within 30 days, whereas the agent's authority called for part of the payment immediately ("down"). The purchaser was to be given possession within 90 days from said date instead of 30 days. That the evidence of title to purchaser from owner was to be guaranteed by a responsible title company at the expense of owner. That if improvements were destroyed or materially damaged between date of agreement and consummation of sale, purchaser might at his option declare it null and void. That taxes for the then fiscal year ending June 30 next and insurance, rents, etc., were to be prorated. That the property was sold subject to the approval of owner. That time was of the essence of the agreement. We fail to see any substantial difference between the terms set forth in the purchaser's agreement and the defendant's authorization to plaintiff. The latter is very brief and is silent on most of the points just enumerated. Some of the terms proposed would be supplied by law if not specifically set forth in the agreement. The purchaser's agreement contains merely the items which are generally found in instruments of this kind. One of the items, that extending the time for giving possession, is for the benefit of the seller. The allowance of 30 days before completing the cash payment cannot be held to be a fatal variance, when it is considered that during this period the evidence of title would be produced and the delays customary to the handling of escrows would follow. Moreover, it was the duty of Mrs. Rober to object to any of these terms of the purchaser's agreement if they did not suit her, so that an adjustment could be made. In Cal. Land Security Co. v. Ritchie, 40 Cal. App. 246, 180 P. 625, the court said:

> "It has been held, upon the soundest of reason, where a broker has negotiated the sale of real property to a purchaser able, ready, and willing to take and pay for the property, and any of the terms of the contract as to payment, or the abstract or deed are unsatisfactory to the intending vendor, the latter should object to them on that ground and not refuse absolutely to sell; and that where he fails to make such objection under such circumstances, he will be held liable to the broker negotiating the sale for his commissions if he refuses to accept the purchaser."

Mrs. Rober not only failed to point out wherein any of the terms of the purchaser's agreement were unsatisfactory, but she precluded the possibility of completing the sale by shutting the door in her agent's face and refusing to discuss the matter further. She is not now in position to deny his right to the commission earned. The record discloses that plaintiff procured a purchaser for the property and that he did everything in his power to consummate the sale. He was prevented from doing so by the conduct of the defendant.

The judgment is affirmed.

I concur: CONREY, P. J.
I dissent: HOUSER, J.

92 Cal App. 200

Ex parte LOWENTHAL. (Cr. 1444.)

District Court of Appeal, First District, Division 1, California. May 25, 1928.

1. Municipal corporations 🔑592(1)—City ordinance regulating sale of uncured and uncooked meats held not contrary to or inconsistent with State Meat Inspection Law (St. 1921, p. 1269; Const. art. 11, § 11).

Ordinance of city of Fresno prohibiting sale of uncured or uncooked meats between certain hours or on Sundays *held* not contrary to nor inconsistent with California Meat Inspection Law (St. 1921, p. 1269), and hence does not contravene Const. art. 11, § 11.

2. Municipal corporations 🔑615—Conduct of meat market is subject to regulation under police power.

The conduct of a meat market is the subject of regulation under the police power of the state or any municipality.

3. Counties 🔑21½—Municipal corporations 🔑592(1)—Counties and cities may make and enforce police and sanitary regulations not conflicting with general laws.

Any county or city may make and enforce within its limits all such local, police, sanitary, or other regulations as are not in conflict with general laws.

4. Municipal corporations 🔑63(1)—Courts will not disturb determination by legislative body that ordinance is essential to protect public health.

Determination by the legislative body that ordinance regulating sale of uncured and uncooked meats is essential to protect public health will not be disturbed by the courts.

5. Municipal corporations 🔑625, 626—Ordinance regulating sale of uncured and uncooked meats held not unreasonable and discriminatory.

Ordinance of city of Fresno prohibiting sale of uncured and uncooked meats between certain hours or on Sundays is not void as being unreasonable and discriminatory in selecting one kind of meat products to the exclusion of others; there being wide distinction between sale of uncooked and other meat products, and in view of fact that fresh and uncooked meats are easily infected and require constant supervision to insure their wholesomeness.

Application by Jake Lowenthal for writ of habeas corpus prayed to be directed to the Chief of Police of the City of Fresno to secure release of petitioner from custody on a charge of violation of city ordinance governing sale of uncured and uncooked meats. Writ dismissed, and petitioner remanded.

Lindsay & Gearhart, of Fresno, for petitioner.

Loren A. Butts, City Atty., of Fresno, and John J. O'Toole, City Atty., of San Francisco, for respondent.

Henry Heidelberg, Deputy City Atty., of San Francisco, amicus curiæ.

TYLER, P. J. Habeas corpus. Petitioner was accused of the violation of a certain ordinance of the city of Fresno which imposes certain restrictions upon the sale of uncured and uncooked meats. On application to this court he was granted a writ of habeas corpus by which he seeks to have determined the legality of his arrest and detention. From the return filed herein it appears that petitioner was charged in the police court of the city of Fresno with the violation of Ordinance 1320 of said city as amended by Ordinance 1327, which declares in substance that it shall be unlawful and a misdemeanor, punishable by fine or imprisonment, or both, for any person to sell or offer for sale any uncured or uncooked meats, or to remove the same from any established place of business in said city, or to keep open for business any place where such meats are sold or offered for sale between the hours of 7 o'clock p. m. and 7 o'clock a. m. of the following day, or on any Sunday; that petitioner violated said ordinance and was arrested, and now is held upon such charge by respondent the chief of police of said city. Petitioner seeks his release upon the ground that the ordinance which he is charged with violating is invalid and void for the reason that it is in conflict with the California Meat Inspection Law, and therefore contravenes the provisions of section 11 of article 11 of the Constitution.

[1-4] The law invoked was approved June 3, 1921 (Stats. 1921, p. 1269). In substance it provides that the director of agriculture is given supervision over all establishments used in the business of slaughtering and preparing animals for food purposes in the state of California, except establishments under the supervision of an inspection department of any chartered or incorporated city where inspection is made by certain qualified officers or where inspection is maintained by the bureau of animal industry of the United States department of agriculture, or under and in accordance with a county meat inspection ordinance. The state director is also given broad powers to provide suitable rules and regulations to insure a healthful, wholesome, and safe meat supply for the state of California. Section 8 of the act expressly inhibits any further restrictions than those imposed by the act itself on the sale of meats. It is conceded that the city of Fresno has never adopted a meat inspection ordinance except it has provided by ordinance (970), among other things, that "beef, veal, mutton and pork" shall not be sold unless it has been inspected and bears the inspection stamp of the state authorities. The record is silent upon the question as to whether or not the city maintains an inspection department, though counsel for respondent claims in his brief that the board of health performs

this office. Under these facts it is the claim of petitioner that the Legislature of the state of California, by the enactment of the Meat Inspection Law, above referred to, has indicated its intent to legislate fully upon the whole subject of meat inspection and to provide all regulations and restrictions necessary to insure to the people a pure, healthful, wholesome, and safe supply of fresh meats; that the law is a general one applicable to the city of Fresno, as such city has no department to supervise the inspection of establishments slaughtering and preparing animals for food products, no inspectors, nor any ordinance in reference thereto so as to exempt it from the operation of the law. The question of whether or not the Legislature of the state, by the enactment of the Meat Inspection Law, indicated an intent to occupy the whole field of meat supply regulation within the state, and the further question as to whether or not such law is operative in the city of Fresno, are questions that to our minds are not here involved. The ordinance here attacked does not in any manner attempt to prohibit or restrict the sale of meat that has been inspected according to the provisions of the state law, nor does it impose any additional burdens or requirements concerning such meats. The portion of the ordinance objected to regulating the hours of sale of meats is in no manner contrary to or inconsistent with the provisions of the state law. The conduct of a meat market has always been the subject of regulation under the police power of the state or any municipality. Ex parte Kohler, 74 Cal. 38, 15 P. 436. Any county or city may make and enforce within its limits all such local, police, sanitary, or other regulations as are not in conflict with general laws. In re Holmes, 187 Cal. 640, 203 P. 398. The ordinance under consideration is one designed to protect the public health, and the determination by the legislative body that the regulation is essential, will not be disturbed by the courts. Boyd v. City of Sierra Madre, 41 Cal. App. 521, 183 P. 230. Its manifest object is to prevent the sale of unfit or tainted meat at a time when those employed to safeguard the people are not on duty. The state law does not attempt to regulate the hours of sale of uncooked meats, but merely deals with the subject of the slaughtering of animals. The ordinance in question in no manner trespasses upon the provisions of the state law, nor is it inconsistent therewith. This is a subject that has received such general attention by the courts that we do not consider a further discussion of it to be necessary.

[5] The further contention is made that the ordinance is invalid and void for the reason that the regulation sought to be imposed is unreasonable and discriminatory, in that it selects one kind of meat products to the exclusion of others. There is a wide distinction between the sale of uncooked and other meat products. Fresh and uncooked meats are easily infected, and it requires constant supervision to insure their wholesomeness, or abuses will arise which may seriously impair the health of the public. The exclusion of other meats or foodstuffs from the operation of the ordinance therefore does not affect any right of petitioner under the organic law, for it is a proper exercise of the police power of the city.

Writ dismissed, and petitioner remanded.

We concur: KNIGHT, J.; PARKER, Justice pro tem.

92 Cal. App. 145

FLYNN et al. v. BLEDSOE CO. (Civ. 3523.)

District Court of Appeal, Third District, California. May 22, 1928.

1. Pleading 🔑204(2)—General demurrer to complaint containing more than one count should be overruled if one count states good cause of action.

Where a complaint sets forth two or more causes of action and a general demurrer is filed directed to the whole complaint and one of the causes of action is sufficient, the general demurrer should be overruled.

2. Automobiles 🔑12—City ordinance relative to manner of parking automobiles held for traveling public's protection as well as protection of parking public.

City ordinance, relative to manner of parking automobiles and the proximate angle at which such cars should be parked relative to the curb, *held* for the protection of the traveling public as well as for the parking public.

3. Evidence 🔑14—In interpreting city parking ordinance relative to purpose, appellate court would judicially notice that automobile drivers on crowded streets must closely watch on-coming traffic to avoid collision.

In interpreting city parking ordinance relative to purpose, appellate court would judicially notice that automobile drivers on crowded streets must closely watch on-coming traffic to avoid collision.

4. Automobiles 🔑9—City parking ordinance providing parking angles and distance from curb held not unconstitutional as in violation of Motor Vehicle Act relative to stopping on highway (Motor Vehicle Act 1923, §§ 136, 145).

City traffic ordinance relative to the parking of vehicles, and stating distance from curb and angle relative thereto, *held*, in view of Motor Vehicle Act (St. 1919, p. 191) § 22, subd. d, as it read prior to St. 1923, p. 517, not unconstitutional as being in conflict with Motor Vehicle Act 1923 (St. 1923, p. 561) § 136, providing for the stopping of vehicles on the highway, since neither by such section nor by section 145 (p. 563) has the Legislature legislated as to method or manner of parking vehicles on streets of cities and towns so as to make stated ordinance conflict with state laws.

5. Automobiles 🔑173(2)—Violation of city parking ordinance held negligence per se.

Violation of city parking ordinance *held* negligence per se.

6. Negligence 🔑56(1)—There can be no liability for negligence which is not cause of injury complained of.

There can be no liability for negligence which is not the cause of the injury complained of.

7. Negligence 🔑61(1)—To impose liability, it is not necessary that negligence complained of be sole cause.

To impose liability, it is not necessary that the negligence complained of be the sole cause of an injury, since one is liable if his act concurs with that of another in producing injury.

8. Negligence 🔑56(1)—Primary cause may be proximate cause, though it operate through successive instruments.

A primary cause of injury may be the proximate cause, though it operate through successive instruments.

9. Automobiles 🔑201(5)—Proximate cause of plaintiff's injury, when automobile in which she was riding on city streets collided with parked truck, was truck owner's wrong in parking car so as to be dangerous to traveling public.

Proximate cause of plaintiff's injury, when automobile in which she was riding on city streets collided with defendant's parked truck, was truck owner's wrong in parking car so as to be dangerous to traveling public.

10. Automobiles 🔑245(83)—Whether automobile driver, in whose car plaintiff was passenger when injured, was contributorily negligent in colliding with parked truck, held question of fact for jury.

Whether automobile driver, in whose car plaintiff was riding as a passenger when injured, was contributorily negligent in colliding with parked truck, resulting in plaintiff's injury, *held* a question of fact for the jury.

11. Appeal and error 🔑999(1)—Jury's finding on fact question held conclusive on review.

The finding of the jury on a question of fact *held* conclusive on reviewing court.

12. Automobiles 🔑243(5)—That other automobile drivers had passed sills on parked truck extending into street held no excuse for defendant's negligence in parking truck, so as to preclude plaintiff's recovery for personal injury from automobile in which she was riding running into sills.

Fact that other automobile drivers had passed sills on a truck parked contrary to a city ordinance so that the sills were extending into the street *held* no excuse for defendant truck owner's negligence in so parking his truck so as to preclude plaintiff's recovery for personal injury sustained when automobile in which she was riding ran into such projecting sills.

13. Automobiles 🔑245(62)—Whether defendant's negligence in parking truck on city street was proximate cause of automobile collision resulting in plaintiff's injury held for jury.

In action for damages for personal injury sustained in collision between automobile in which plaintiff was riding on city street and truck parked in violation of a city ordinance, whether defendant's negligence in so parking the truck was the proximate cause of the collision and of plaintiff's injury *held* for jury.

14. Negligence 🔑135—Evidence held not to show negligence, imputable to plaintiff, of driver in whose automobile plaintiff was passenger when injured in collision.

In automobile passenger's action for damages for personal injury in automobile colliding with truck parked contrary to city ordinance, evidence *held* not to show any negligence of driver of automobile in which plaintiff was passenger imputable to plaintiff.

15. Negligence 🔑93(1)—There can be no imputable negligence in collision of vehicles except where driver is acting as agent of injured plaintiff.

There can be no imputable negligence in collision of automobiles save and except where the driver of the vehicle in which injured plaintiff was riding was acting as the agent of such injured person.

16. Automobiles 🔑245(17)—In personal injury action from automobile collision, jury could take into consideration kind of vehicle negligently parked and causing plaintiff's injury.

In personal injury action, where injury resulted from collision of automobile in which plaintiff was riding with truck parked in violation of city ordinance, jury could take into consideration the kind of vehicle and projections thereon that was so negligently parked as to cause collision and injury.

17. Trial 🔑260(1)—Error could not be predicated on refusal to give instruction fully covered by instruction given.

Error could not be predicated on refusal to give instruction fully covered by instruction given.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by M. J. Flynn and another against the Bledsoe Company. From the judgment, defendant appeals. Affirmed.

Sweet & Plank, of San Diego, for appellant.

Chester A. Smith, of San Diego, for respondents.

PLUMMER, J. The plaintiffs had judgment against the defendant on account of personal injuries sustained by Coranna Flynn by reason of a collision between a Ford car in which said plaintiff was riding and a parked truck belonging to the defendant. From this judgment the defendant appeals.

The record shows that about noontime on June 14, 1924, Raymond Flynn, the son of the plaintiffs, was driving a Ford car along a certain street in the city of San Diego, known as and called "C" street, between Sixth and Seventh streets. The mission on which the son was driving was to get his father and bring him home to lunch. The plaintiff Coranna Flynn was riding with him as his guest, upon his invitation. C street is a public thoroughfare in the city of San Diego 52 feet wide from curb to curb, and extends in an easterly and westerly direction. The defendant at that time was conducting a business on the north side of C street between Sixth and Seventh streets, and at the time mentioned had a truck 18 feet and 4 inches in length parked on the north side of said street; the truck being parked almost at an angle of 90 degrees with the north line of C street. The truck was about 6 feet in height. The body of the truck was 19½ inches from the bed of the body to the top of its sides. On each side of the top of the body of the truck there were two loading rails or sills, 2 inches by 3 inches, extending along the full length of the truck, and from 10 to 18 inches to the rear of the rear end of the body. The projecting ends of these sills were supported by steel rods or braces. The body of the truck was painted red. The rails or loading sills were covered with two layers of green carpet. The front wheels of the truck were about 6 inches from the curb. At the time in question a building was being erected on the south side of C street, and building material and equipment extended out into the street from 10 to 12 feet north of the south curb line. At the time under consideration the street was filled with a continuous stream of traffic both easterly and westerly. Raymond Flynn, seated on the left or driver's side of the Ford car, was driving in a westerly direction. His mother, accompanying him, was seated on the right side of the car. In driving along the street above named the Ford car came in contact with the projecting sills on the parked truck, the projecting sills coming in contact with the door on the right-hand side of the Ford sedan, breaking the glass and otherwise injuring the car. The breaking glass wounded the plaintiff Coranna Flynn, and the judgment awarded her compensation therefor. At the time involved in this action, section 15 of the traffic ordinance of the city of San Diego read as follows:

> "Sec. 15. *Parking at an Angle.* On all streets where there are no street railway lines in operation, and on all streets or portions of streets having a width of 85 feet or more from curb line to curb line, vehicles when parked at the curb shall stand at an angle of approximately 45 degrees to the curb with the front of such vehicles towards the curb and with the right front wheel of such vehicle not farther than six inches distant from the curb line; provided, all vehicles parked under this section shall be so parked that no portion of such vehicle shall extend beyond the prolongation of the property line adjacent to and parallel with the nearest curb line of the nearest intersecting street."

There is no railroad on C street.

[1] The complaint originally was in two counts, one based upon negligence of the defendant in parking its truck contrary to the provisions of the ordinance just quoted. The second cause of action was based upon negligence in parking its truck in such a manner as to render the projecting sills dangerous to traffic, etc. To this complaint the defendant filed a general demurrer in the following language: "That said complaint does not state facts sufficient to constitute a cause of action against this defendant," and then added three specifications of ambiguity, uncertainty and unintelligibility directed against the first cause of action. The trial court overruled the demurrer as to the first cause of action and sustained the demurrer as to the second cause of action set forth in the plaintiffs' complaint. In so doing it must have overlooked the rule set forth in 21 California Jurisprudence, p. 17, § 76, supported by a long line of California cases to the effect that where a complaint sets forth two causes of action and a general demurrer is filed directed to the whole complaint, and one of the causes of action is sufficient, "a general demurrer to the complaint containing more than one count should be overruled if there is one good count stating a cause of action." However, as the plaintiff proceeded to trial upon the first cause of action, we are necessarily confined only to what is stated in the first count. Upon this appeal it is urged that the evidence is insufficient to support the verdict; that it shows no negligence on the part of the defendant; that the manner of parking the truck was not the proximate cause of the collision; that the driver, Raymond Flynn, was guilty of contributory negligence; that the trial court erred in admitting in evidence the traffic ordinance of the city of San Diego; and also that the trial court erred in its instructions to the jury. Some of these objections are presented in different forms, but need not be considered in their variations.

[2] The negligent manner of parking the truck in this case, in violation of the traffic ordinance of the city of San Diego, is the gravamen of the charge. The ordinance in question requires vehicles to be parked at an angle of approximately 45 degrees to the curb with the front of the vehicle towards the curb and not farther therefrom than 6 inches. The testimony is practically undisputed that the automobile, 18 feet 4 inches in length, was parked practically at right angles to the curb.

This is set forth as negligence per se. The defendant's violation of the ordinance is practically admitted, but it is urged in avoidance that the plaintiff is not in a position to take advantage of the violation of such ordinance, and in this particular, advances the argument that the traffic ordinance requiring vehicles to be parked at an angle of 45 degrees was enacted for the purpose of subserving the convenience of the parking public; that is, to provide a parking system which would accommodate a greater number of automobiles than if such vehicles were permitted to be parked at right angles with the curb line. In support of this contention, the appellant cites 19 California Jurisprudence, 635, § 66, which reads:

> "A violation of a statute or ordinance within the above rule is actionable negligence only as to those persons for whose benefit or protection it was enacted, and if a plaintiff does not come within that class, a violation does not supply the element of duty owing."

And, also, the case of Corbett v. Spanos, 37 Cal. App. 200, 173 P. 769, relative to a fire ordinance prohibiting certain coverings for stairways, and also the case of Toomey v. So. Pac. R. R. Co., 86 Cal. 374, 24 P. 1074, 10 L. R. A. 139, relating to signals at crossings where the injury to the plaintiff did not occur at a crossing.

The parking of a vehicle 18 feet and 4 inches in length diagonally on a crowded street of a city is a complete answer in and of itself to the appellant's contention that the traveling public, using said street, was not intended to be benefited by the ordinance under consideration. We cannot exhibit parked automobiles in this opinion, but one glance at the photographs in the record of the defendant's truck with its projecting sills is a stronger argument than mere words as to what was or is included within the intent and meaning of the parking ordinance of the city of San Diego. Obstruction to a street is a serious menace to the automobile public and is as great a consideration as could be presented to a city council to induce the enactment of an ordinance which would tend to minimize the obstruction thereof by parked vehicles.

[3] We cannot shut our eyes to the common knowledge, possessed by every one, that automobile drivers on our crowded city streets must keep close watch of on-coming traffic in order to avoid collision therewith, and we cannot assume that the members of the city council of the city of San Diego were any less conscious of this necessity than other people, and therefore did not have in mind the safety of the general traveling public when enacting an ordinance which, if complied with, would give the widest possible space usable for moving vehicles. The natural inference would be that the members of the city council had all these matters in mind and intended by the ordinance to afford to the traveling public the maximum possible degree of safety. To do this, the parking of vehicles on the street would necessarily have to be so aligned as to limit to the least degree all obstructions. The cases relied upon by appellant do not limit in the least what we have here said. In the case of Toomey v. So. Pac. R. R. Co., 86 Cal. 374, 24 P. 1074, 10 L. R. A. 139, it was sought by the appellant to invoke the protection of a statutory provision requiring the ringing of a bell or blowing of a whistle when a train drawn by a steam locomotive was approaching a crossing, and therefore, as the plaintiff was upon defendant's railroad track within a distance of a crossing where he would have heard the signal had it been given, he could have avoided injury. The court held, as it could not reasonably hold otherwise, that the requirement of giving the signal was for the safety of the general public using the crossing in question, and not for the benefit of trespassers upon the defendant's property who might be near enough to the crossing to hear such signal. In Corbett v. Spanos, 37 Cal. App. 200, 173 P. 769, the ordinance in question related to the manner in which stairways, etc., should be covered, had nothing to do with the general public, and was a matter of fire protection only.

[4] Appellant, in further attack upon the traffic ordinance of the city of San Diego, insists that it is void as being in conflict with section 136 of the Motor Vehicle Act of 1923. Section 136 of the Motor Vehicle Act, so far as pertinent here, reads as follows:

> "*Stopping on Highway.* No person shall park or leave standing any vehicle whether attended or unattended upon the paved or improved or main traveled portion of any public highway, outside of a business or residence district when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway; provided, in no event shall any person park or leave standing any vehicle whether attended or unattended upon any public highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for the free passage of other vehicles thereon." St. 1923, p. 561.

To support this contention appellant cites the case of In re Murphy, 190 Cal. 286, 212 P. 30, which refers to the cases of In re Mingo, 190 Cal. 769, 214 P. 850, and Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A. L. R. 1172. These cases, however, are based upon subdivision D of section 22 of the Motor Vehicle Act (St. 1919, p. 191) as it read prior to the act approved May 30, 1923 (Stats. 1923, chap. 266). The subdivision to which we have referred, and upon which the cases cited were founded, expressly made the provisions of the Motor Vehicle Act exclusive as to the subjects mentioned in the subdivision, to wit, regulation of speed, etc. Subdivision D of section 22 of the act, upon which the cases cited were based, by its very terms excluded city legislation upon certain subject-matters which were dealt with by the section. Section 136 of the Motor Vehicle Act of 1923 relates to stopping upon the highway, and does not contain one word as to the manner of parking vehicles within the corporate limits of cities and towns. It does not purport to be exclusive upon that subject, but is absolutely silent thereon. It requires only a casual reading of section 136 of the Motor Vehicle Act of 1923 to enforce the conclusion that the Legislature had in mind only the stopping of motor vehicles on highways outside of cities and towns where the improved portion of the highway would be confined to a comparatively narrow portion thereof, leaving ample space on both sides of the improved strips for stopping automobiles or other vehicles needing immediate repair or mechanical adjustments. Nor does section 145 of the Motor Vehicle Act of 1923 in any particular limit or control the power of cities relative to the method or manner of parking automobiles upon the streets thereof. Section 145, supra, has to do with the movement of traffic, the safeguarding of crossings, and the installation of signal devices, etc. This legislation partakes of, and is akin with, the section of the Motor Vehicle Act relating to the speed at which vehicles may be propelled, and give cities authority to legislate upon that subject in so far as it pertains to crossings or intersecting portions of the streets. The Legislature not having legislated as to the method or manner of parking vehicles on the streets of cities and towns, there can be no conflict created by a city ordinance regulating the same. It follows, therefore, that we have no need of reviewing cases having to do with a conflict between a city ordinance and an act of the Legislature.

[5-8] That violation of a parking ordinance of the city of San Diego was negligence per se is amply supported by the cases of Berkovitz v. American Gravel Co., 191 Cal. 195, 215 P. 675; Scragg v. Sallee, 24 Cal. App. 133, 140 P. 706. See, also, page 144 of 24 Cal. App. (140 P. 710), where this court held that driving in excess of the speed limit was negligence per se in an action involving an injury caused by an automobile when traveling at an unlawful rate of speed. To meet this situation appellant argues that the negligent parking of the defendant's automobile with the projecting loading sills was not the proximate cause of the injury, arguing that other automobiles had passed by without being impaled on the projecting sills. It is, of course, true that if the plaintiff had not been riding on C street between Sixth and Seventh streets in the city of San Diego at the time in question, she would not have been injured. The logic of the appellant, therefore, applied to this case would be that the plaintiff Coranna Flynn was guilty of a contributory act of negligence in riding on C street. The fact is that said plaintiff was where she had a right to be, and the projecting sills of the defendant's truck were where the defendant had no legal right to place them. It would scarcely relieve a defendant from negligently placing a pile of stones upon a highway by insisting that the stones were stationary, and that an automobile driver who did not see them in time to avoid an injury was solely responsible for the same on account of his contributory negligence. As stated in 19 California Jurisprudence, p. 556, § 9, there is a distinction between proximate cause in law and proximate law as reasoned out by a logician. The latter portion of the section referred to is applicable here:

> "There can be no liability for negligence which is not the cause of the injury complained of, but to impose liability it is not necessary that the negligence be the sole cause, for one is liable if his act concurs with that of another in producing the injury, and a primary cause may be the proximate cause though it operate through successive instruments."

[9-12] Here the liability of the defendant is on account of its negligence in parking the automobile. Without this negligent act the lawful act of the driver of the automobile in traversing C street would not have resulted in any injury. Thus the proximate cause of the injury was the wrong of the defendant in leaving an automobile parked in such a manner as to be dangerous to the traveling public. The only possible theory upon which contributory negligence might be charged against the automobile driver would be that he should have, as a reasonable person, seen the projecting sills in time to have avoided the collision. This, of course, was a question of fact submitted to the jury and is in no sense a question of law as urged by appellant, and the finding of the jury against the appellant is conclusive here. It requires only the mere statement of the question whether an automobile driver, watching the on-coming traffic of a busy street to avoid collision, should or should not have seen the small projecting sills, in addition to observing the large body of the truck, to show it is a question of fact for the jury, and this especially in view of the further fact that the smaller objects might readily have blended with other larger objects so as not to have been easily observed. Again, the height of the truck shows that these projecting sills were somewhat above the range of ordinary vision of the driver of the Ford car in watching the traffic moving in an opposite direction. The fact that others had passed by without injury furnishes no excuse for the defendant. The testimony shows that there

was considerable obstruction on the opposite side of the street on account of the presence of building material, that there was a continuous stream of traffic moving in the opposite direction, and it required only a slight deviation of the eastbound traffic to necessitate a corresponding deviation in the line of the westbound traffic, in which direction the Ford car was traveling, and while a careful and experienced driver could very readily slightly change the course of his machine to avoid on-coming traffic, and also avoid colliding with the rear end of the truck, the projecting sills were in such a position that a collision therewith would be probable even though there was plenty of room for the passage of the Ford car without striking the rear end of the large body of the truck.

[13-15] Under all these circumstances we think it clearly presented a case where the jury was justified in concluding that the negligence of the defendant was the proximate cause of the collision and of the plaintiff's injury. Again, appellant overlooks the question that there is no imputable negligence to the plaintiff Coranna Flynn in this case. There is no evidence to show that Raymond Flynn was acting as her agent. Two cases cited by respondent we think conclusive of this question, to wit: Bryant v. Pac. R. R. Co., 174 Cal. 737, 164 P. 385, and Nonn v. Chicago City R. R. Co., 232 Ill. 378, 83 N. E. 624, 122 Am. St. Rep. 114. These cases hold that there can be no imputable negligence save and except where the driver is acting as the agent of the injured person. We may here state that the driver of the Ford car testified that he saw the truck, but did not observe the projecting sills. The testimony further shows that the Ford car was moving only between five and six miles per hour, and that the curved or bulging portion of the body of the Ford sedan was the portion of the car that came in contact with the projecting sills.

[16] As a final objection it is argued that the court erred in refusing the following instructions requested by the defendant, to wit:

> "The court instructs you that under the issues in this case the sole basis of the plaintiff's claim of negligence on the part of the defendant is the alleged improper parking of defendant's truck; and I further instruct you that the presence of any projecting sills or beams or sticks of wood at the rear of the body proper of the truck, or any other feature of its construction is not to be regarded by you as any element whatever of negligence in this case."

And further that—

> "Where the evidence is as consistent with a neglect of duty or ordinary care on the part of Raymond Flynn as it is with neglect of duty or ordinary care on the part of the defendant, then plaintiffs cannot recover in this action."

We do not very well see how there could be any division in the negligent parking of the truck. The whole vehicle, including running gear, body, and projecting sills, constituted the one instrumentality placed in a position dangerous to the traveling public. It may be admitted that if the truck of the defendant had no projecting sills, the negligence of the defendant would have possibly been less dangerous, but because the truck was so constructed that negligent parking made it doubly dangerous to the public is no reason why the jury should not take into consideration the kind of vehicle which was negligently parked. The truck was there as a whole. It was parked as a whole and not in separate parts or parcels, and the appellant, by the proposed instruction, was evidently trying to exclude from the jury the very reason why its negligent parking of the truck was the proximate cause of the injury complained of, and to in some manner relieve itself from its negligent conduct.

[17] As to the second instruction complained of, there is no testimony upon which to predicate such an instruction; there being nothing to show that Raymond Flynn was acting as the agent of the injured plaintiff. At the request of the defendant, however, the court did give the following instruction:

> "The court instructs you that if at the time of the collision involved in this case Raymond Flynn was operating the Ford sedan as the agent of the plaintiff M. J. Flynn, and that if you find from the evidence that the collision was proximately caused, in even the slightest degree, by the failure of the said Raymond Flynn to use due care and caution in the operation of said Ford sedan, at and immediately prior to such collision, then you must render your verdict for the defendant."

Thus the appellant had given to the jury everything to which it was entitled in the way of instructions, and more than the testimony called to our attention justified.

The appellant assigned as error the denial of the court to grant its motion for a nonsuit, and also its motion for a directed verdict. It also presents some other objections, but they are only repetitions and variations of the objections which we have considered, and therefore do not merit any separate setting forth in this opinion.

The judgment is affirmed.

We concur: FINCH, P. J.; BARTLETT, Justice pro tem.

92 Cal. App. 212

HAMMOND v. HAMMOND. (Civ. 5045.)

District Court of Appeal, Second District, Division 2, California. May 26, 1928.

1. Divorce 🔑131—Conflicting evidence held to support finding for defendant, in action for divorce for willful neglect.

In action for divorce on ground of willful neglect, conflicting testimony as to amount defendant expended for plaintiff's use and as to plaintiff working and keeping earnings *held* sufficient to support finding for defendant.

2. Divorce 🔑31—Willful neglect is not established if, while spouses live together, wife earns sufficient to provide for herself and is permitted to use it.

Willful neglect as ground for divorce is not established if, while spouses are living together, wife works and earns sufficient to provide for herself and she is permitted to use it.

3. Divorce 🔑161—Where default was entered in divorce case, judge noticing defendant in court after plaintiff put on her case may call defendant as witness.

Where default was entered in divorce case, trial judge, noticing defendant in court after plaintiff had put on her case, *held* to have right to call defendant to stand as witness.

4. Divorce 🔑161—Testimony of defendant, called as witness by court, held sufficient to justify opening of default without affidavit of merits (Code Civ. Proc. § 473).

Where default was entered in action for divorce for willful neglect, testimony of defendant when called as witness by court relative to support of plaintiff by defendant *held* sufficient to justify court in opening default without affidavit of merits, notwithstanding Code Civ. Proc. § 473.

Appeal from Superior Court, Los Angeles County; J. W. Summerfield, Judge.

Action by Bernice N. Hammond against W. D. Hammond. Judgment for defendant, and plaintiff appeals. Affirmed.

Thomas K. Case, of Los Angeles, for appellant.

Dennison, Towner & Kleber, of Los Angeles, for respondent.

STEPHENS, Justice pro tem. This is an action for divorce on the grounds of willful neglect and extreme cruelty. No evidence was introduced upon the latter cause of action. An order to show cause was issued against the defendant, but thereafter a stipulation was entered into by and between the parties, through their attorneys, that such order might be set aside, which was done. The defendant did not plead to the complaint, and after expiration of the legal time counsel for plaintiff requested the clerk to enter his default. The record before us does not disclose whether or not the clerk ever entered the default, but we take it that he did inasmuch as the case was set down for hearing as a default case and counsel in their briefs treat the case as though the default had been regularly entered. After plaintiff had put on her case, the trial judge, noticing the defendant in court, called him to the witness stand. To this plaintiff's counsel entered an objection upon the ground that such proceeding was incompetent, irrelevant, and immaterial. The objection was overruled and the court proceeded to examine defendant. The examination elicited testimony tending to prove the support of plaintiff by defendant, and revealed a number of canceled checks which defendant testified were given for the support of plaintiff. Counsel for plaintiff asserted in open court that the checks were spurious, that the plaintiff had been surprised with their production, and asked time in which to respond to this evidence. This proceeding was had on Thursday, December 6, 1923, and the court remarked: "We will take a recess now till next Friday." The reporter's transcript shows the next hearing to have been on January 23, 1924. Meantime we learn from the clerk's transcript that an answer and cross-complaint was filed, but there is no record of any proceeding relieving defendant from his default. However, both sides to this appeal refer to the taking of the default and the relief therefrom as facts in the proceeding, and the court in the course of the proceedings does likewise. We shall therefore assume the default to have been entered and set aside. Much discussion was had as to whether the trial on January 23d should proceed without regard to the testimony taken before the relief from default, but it appears to have proceeded as an adjourned hearing and not de novo. The court denied the prayer of plaintiff and gave no relief under the so-called cross-complaint. This appeal is on behalf of the plaintiff, who summarizes her points as follows:

[1, 2] "(1) That plaintiff has proven her case of willful neglect by uncontradicted evidence in the default case and is entitled to a decree of divorce on that ground."

We have read the record in its entirety and find that the parties lived together up to within about 90 days before the action was brought, and that plaintiff worked and kept her earnings, although the court was not informed as to the extent thereof nor whether or not they were reasonably sufficient for her needs. Much testimony was introduced tending to show that defendant expended considerable money for plaintiff's use, and this was fortified by bank checks. This testimony was inconsistent with plaintiff's testimony. Under the circumstances, we cannot disturb the finding of the trial court. Upon the point that willful neglect is not established if while the spouses are living together (we do not here intimate that living together or separate would or would not change the rule) the wife works and earns sufficient to provide for herself and she is permitted to use it, the trial judge referred to Hansen v. Hansen, 27 Cal. App. 401, 150 P. 70. The cited case was pertinent, and had it been read, counsel for plaintiff, who doubted that the Supreme Court would support the doctrine therein announced, would have ascertained that the case was itself based upon decisions of the Supreme Court in Washburn v. Washburn, 9 Cal. 476, Rycraft v. Rycraft, 42 Cal. 445, and Locke v. Locke, 153 Cal. 56, 94 P. 244.

[3, 4] "(2) That the trial court had not the right to set aside the default of the defendant without an affidavit of merits as contemplated in section 473 C. C. P., after the default case had been tried and finished."

This statement assumes a premise not sustained by the facts, in that it states that the default case had been finished. True, counsel for plaintiff had stated that he had no more to offer, but the court, desiring information, called the defendant to the stand as a witness, as it had a perfect right to do. This examination was left unconcluded, through the request of plaintiff's counsel, and was only terminated after the resumption of the trial more than a month later. Whether or not an affidavit of merit in connection with the motion to set aside the default was ever submitted to the court we cannot say, for the record is silent and there seems to be a difference between counsel on that point. It is unimportant, however, as no affidavit is required. We think the testimony of defendant, after having been called as a witness by the court, was sufficient to justify the court in opening the default. The following quotation from Rehfuss v. Rehfuss, 169 Cal. 86, at p. 92, 145 P. 1020, 1022, states the situation in apt words:

> "The rules of practice applicable to divorce actions differ in many respects from those which govern other actions. In an action for divorce, upon very slight showing the court will set aside a default, if application for relief be made in due time. And although in other actions a party seeking relief from default must support his motion by an affidavit of merits, no such affidavit is required on motion to set aside the judgment in an action for divorce. The law is at all times very solicitous to preserve the integrity of the * * * family, the foundation of society. It cannot be destroyed by the mere consent, whim, or caprice of the parties to the marriage, nor can it be stipulated away in judicial proceedings. The relation can be dissolved only by consent of the state, and upon statutory grounds, presented in good faith to a court of competent jurisdiction. An action for divorce concerns not only the parties immediately interested, but also the state. The attorneys in the case represent the respective parties —the court in a sense represents the state. It is the duty of the court, representing the state, in accordance with the letter and policy of the law, to guard strictly against fraud, collusion, or imposition when the husband or wife seeks to dissolve the bonds that bind them together."

See, also, McBlain v. McBlain, 77 Cal. 507, 20 P. 61; Cottrell v. Cottrell, 83 Cal. 457, 23 P. 531; and Mulkey v. Mulkey, 100 Cal. 91, 34 P. 621.

"(3) That the record in this case shows that defendant had attorneys who appeared for him herein prior to the entry of the default."

This is undisputed, and has absolutely no significance.

"(4) That the judgment denying to plaintiff a decree of divorce on the ground of willful neglect should be reversed and the trial court directed to enter its interlocutory decree granting a divorce to plaintiff and appellant."

This is the same as point No. 1, in different words.

We are constrained to remark that a proper briefing of authorities would have convinced counsel for appellant that this appeal was without merit, and would have enabled counsel for respondent to have cited pertinent authority in support of their side of the case, without putting this court to the necessity of searching for the proper doctrine and authorities in support thereof.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

ALAMEDA CITY LAND CO. v. MORTIMER.★ (Civ. 6356.)

District Court of Appeal, First District, Division 2, California. May 22, 1928.

Hearing Denied by Supreme Court July 19, 1928.

1. Corporations 🔑90(1)—Some delinquent stockholders may be sued, while proceeding against others in ordinary manner (Civ. Code, § 349).

Civ. Code, § 349, does not preclude institution of actions against some delinquent stockholders for assessments on their shares, while at same time proceeding in ordinary manner and taking ordinary relief by selling delinquent stock as to other stockholders.

2. Constitutional law 🔑70(3)—That construction of statute as written would render it unjust is matter for Legislature, not courts (Civ. Code, § 349).

Argument that construction of Civ. Code, § 349, as permitting institution of actions against some stockholders for delinquent assessments, while proceeding at same time in ordinary manner and taking ordinary relief by selling delinquent stock as to other holders, would render it unjust should be addressed to Legislature, not courts.

3. Licenses 🔑39—Permit to issue stock for realty, to be conveyed subject to mortgage, held not void.

Permit to issue stock in exchange for certain realty, to be transferred to company subject only to taxes or assessments and mortgage not exceeding stated amount, on certain conditions, none of which were violated, *held* not void, so as to preclude recovery of delinquent assessment from stockholder, because realty was conveyed free of debt and thereafter mortgaged, nor because each prospective shareholder executed joint guaranty of mortgage, and deed omitted two acres used for road.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by the Alameda City Land Company, a corporation, against W. J. Mortimer. Judgment for plaintiff, and defendant appeals. Affirmed.

Clark, Nichols & Eltse, of Berkeley, for appellant.

Stanley Pedder, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action to recover an alleged delinquent assessment on shares of stock alleged to be owned by the defendant. The defendant appeared and answered, and a trial was had in the lower court before the court sitting without a jury. The trial court made findings in favor of the plaintiff. From a judgment entered on those findings the defendant has appealed and has brought up the judgment roll and a bill of exceptions. The bill of exceptions is so brief that it covers only two pages of the transcript and contains little, if anything material to the points presented by the defendant.

[1, 2] The first point made by the defendant is that under section 349 of the Civil Code the plaintiff had no right to institute actions against some of the delinquent stockholders and at the same time, as to other stockholders, to proceed in the ordinary manner and take the ordinary relief of conducting a sale of the delinquent stock. In making this contention the defendant asserts that section 349 of the Civil Code should be construed as though it were worded as follows:

> "On the day specified for declaring the stock delinquent, or at any time subsequent thereto and before the sale of the delinquent stock, the board of directors may elect to waive further proceedings under this chapter for the collection of (unpaid) delinquent assessments, or any part or portion thereof (remaining unpaid) and may elect to proceed by action to recover the amount (of the unpaid part) of the assessment and the costs and expenses already incurred, or any part or portion thereof (so remaining unpaid)." Words in parentheses are interpolations.

We are wholly unable to follow counsel in this contention. To do so would be judicial legislation. We have no such power. 23 Cal. Jur. 727. It is earnestly argued that any other construction renders the provisions of the statute unjust. We do not concede that following the statute as written its provisions are unjust. But even though they may be the argument should be addressed to the Legislature, and not to the courts. The statute has stood on the books since 1872 and this is the first time that it has been claimed that the statute is unjust. A similar statute exists with reference to every taxpayer. Pol. Code, § 3899. But whether just or unjust, the action was properly brought against the defendant.

[3] In the next place the defendant contends that he never became a stockholder. This point is based on the facts surrounding the organization of the plaintiff on April 9, 1917. A few days later it applied to the commissioner of corporations for a permit to issue stock. Later a permit was issued. That permit, among other things, contained the following passages, which we have numbered 1 and 2:

> (1) "Pursuant to its application, Alameda City Land Company is permitted to sell and issue shares of its capital stock to the present subscribers therefor, not exceeding in the aggregate to any one or all of them 9,991 shares, in exchange for all that certain real property described in said application first to be transferred to said company, subject only to any taxes or assessments that may be a lien on said property at the time of said transfer, and to any mortgage or deed of trust of said real prop-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

erty now existing or hereafter to be executed prior to said transfer securing the payment of a principal sum not exceeding $500,000, together with interest then accrued thereon."

(2) "This permit is issued upon the condition that all certificates for any of said shares, when issued, shall be forthwith deposited with the commissioner of corporations, or with such other depositary as may be selected by the certificate holder and approved by said commissioner, to be held as an escrow pending the further order of said commissioner, and that while the same shall be so held, shares evidenced thereby shall not be sold or offered for sale or otherwise transferred without the consent of said commissioner shall have been first obtained in writing so to do."

It will be noted that in paragraph 1 it is stated that certain real estate will be conveyed to the corporation subject to a mortgage debt of $500,000. As the organization proceeded the real estate was conveyed free and clear of any debt. Still later the plaintiff corporation executed a mortgage, which act was performed after it received its permit. The fact that the real property was conveyed to the corporation free of mortgage debts was not in violation of the permit, but in harmony therewith. The fact that thereafter the real property was mortgaged was foreign to the provisions of the permit, which neither gave nor withheld the power to mortgage.

As a part of this same point the defendant calls to our attention that, after receiving its permit and as a part of the execution of the mortgage, each prospective shareholder executed a joint guaranty under the provisions of which each stockholder guaranteed the mortgage in the proportion of stock held by such stockholder. Reverting to the terms and provisions of the permit, it will be noted that there was nothing in that transaction that was in any respect in violation of the provisions of the permit. Another subdivision of the point made by the defendant is that when the real estate was actually conveyed the deed omitted two acres which were at all times used for a road. The finding of the trial court was that the conveyance was a substantial performance of the terms of the application. There is nothing in the record to show that it was not.

Relying on the items just discussed, the defendant contends that the permit was void. He cites no provision of the statute and no decision supporting the contention. Again reverting to the terms of the permit it will be noted that all of the conditions thereof are contained in paragraph 2. It is not even contended that a single one of those conditions has been violated. The facts were otherwise in Stark v. Shemada, 187 Cal. 785, 204 P. 214. It is not in point. As the contrary does not appear, we hold the permit was not void.

The next point made by the defendant in his opening brief is expressly waived in his closing brief. We pass, therefore, to the fourth point. In that point he calls to our attention that he interposed a counterclaim in which he pleaded his contention that the permit was void, and, not being informed as to the facts of its invalidity, he had paid $1,000, which in equity and good conscience the plaintiff should return. Thereupon he asserts that the judgment of the trial court should have been in his favor on the counterclaim. As we have shown above, the permit was not void. It is unnecessary for us to further discuss the point.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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92 Cal. App. 790

ALAMEDA CITY LAND CO., a Corporation, Plaintiff and Respondent, v. W. P. WOOLSEY, Defendant and Appellant. (Civ. 6370.)★

District Court of Appeal, First District, Division 2, California. May 22, 1928.

Hearing Denied by Supreme Court July 19, 1928.

Appeal by defendant from a judgment of the Superior Court of Alameda County, James G. Quinn, Judge, in an action to recover delinquent assessment on shares of stock. Affirmed.

Clark, Nichols & Eltse, of Berkeley, for appellant.

Stanley Pedder, of San Francisco, for respondent.

STURTEVANT, J. Upon the grounds stated and for the reasons set forth in Alameda City Land Co. v. Mortimer (No. 6356, Cal. App.) 267 P. 895, this day decided, the judgment appealed from is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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92 Cal. App. 791

ALAMEDA CITY LAND CO., a Corporation, Plaintiff and Respondent, v. S. C. IRVING, Defendant and Appellant. (Civ. 6371.)★

District Court of Appeal, First District, Division 2, California. May 22, 1928.

Hearing Denied by Supreme Court July 19, 1928.

Appeal by defendant from a judgment of the Superior Court of Alameda County, James G. Quinn, Judge, in an action to recover delinquent assessment on shares of stock. Affirmed.

Clark, Nichols & Eltse, of Berkeley, for appellant.

Stanley Pedder, of San Francisco, for respondent.

STURTEVANT, J. Upon the grounds stated and for the reasons set forth in Alameda City Land Co. v. Mortimer (No. 6356, Cal. App.) 267 P. 895, this day decided, the judgment appealed from is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

★Hearing denied by Supreme Court.

92 Cal. App. 185

In re THOMAS' ESTATE.★

BROWN v. MARTIN et al.

(Civ. 6395.)

District Court of Appeal, First District, Division 2, California. May 24, 1928.

Hearing Denied by Supreme Court July 23, 1928.

Descent and distribution 🔑47(1)—Decree distributing to daughter one-half of shares of stock and proceeds held proper, where children of deceased daughter had not been provided for by the will (Civ. Code, §§ 1306–1308).

Where testatrix made no provisions for grandchildren, the children of a deceased daughter, but bequeathed to living daughter certain shares of stock, and provided that on liquidation of company daughter should have proceeds up to $5,000, *held* that, under Civ. Code, §§ 1306–1308, decree of distribution, providing that daughter was to receive one-half of bequeathed shares of stock and $2,500 of proceeds on liquidation, was proper.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

In the matter of the estate of Mary J. Thomas, deceased. From a decree directing distribution, Grace C. Brown appeals, making Caroline S. Martin executrix, etc., and others parties respondent. Affirmed.

Percy E. Towne, of San Francisco, for appellant.

R. W. Macdonald, Harrison S. Robinson, and Harry L. Price, all of Oakland, for respondent First Presbyterian Church of Berkeley, Cal.

STURTEVANT, J. Mary J. Thomas died testate in the county of Alameda on the 7th day of June, 1926. She left her surviving a daughter, Grace C. Brown, and two grandchildren, Bernard V. Goe and Eleanor Wolf Caroe, the children of a deceased daughter. In her will she designated several devisees and legatees, but did not mention in any way her grandchildren. At the time the will was written the decedent owned 10,000 shares of the capital stock of the Five Thirty-Six Oil Company. Before her death the oil company reduced its stock and issued to decedent a certificate for 5,000 shares in lieu of her 10,000 shares. Afterwards the oil company commenced to liquidate. It had paid, before the death of the decedent one or more dividends in liquidation and the decedent had been informed that on her stock there might be further payments amounting to $5,000 or $7,000. The will was admitted to probate and in due time a decree of distribution was made. By that decree the trial court made certain provisions protecting the rights of the grandchildren. Excepting as will hereinafter be noted, no objection is made to the decree on that ground.

Among other things, the decedent inserted in her olographic will a passage as follows:

> "I give and bequeath * * * ten thousand shares of Five Thirty-Six Oil Co. * * * to my daughter Grace C. Brown stipulating that when the affairs of the Five Thirty-Six Oil Co. are finally settled and the company dissolved, all amounting above five thousand dollars coming as my part of the ten thousand shares in my name she shall give as a legacy by me to the First Presbyterian Church, Berkeley, Cal."

At the time of the entry of the decree the executor had received dividends from the oil company amounting to $1,500.

Among other things, the decree provided as follows:

> "Grace C. Brown is entitled to receive 2,500 shares of the capital stock of Five Thirty-Six Oil Company, a corporation; provided, however, that when the said Grace C. Brown, or her successors in interest have received from said corporation by way of cash dividends, whether the same be regular dividends or dividends in liquidation, the sum of $2,500 of which the sum of $750 is distributed herewith * * * leaving a balance of $1,750 to be received by her, then and in that event the title to said stock shall go to and vest in said First Presbyterian Church of Berkeley. * * *"

The daughter, Grace C. Brown, attacks the quantity $2,500, and asserts that it should be $5,000. If the trial court did not err in using the expression $2,500, the decree should be affirmed; otherwise, the decree should be modified.

The appellant cites and relies on the provisions of section 1308 of the Civil Code. Omitting irrelevant parts, that section provides:

> "When any share of the estate of a testator is assigned to * * * the issue of a child, omitted in the will, as hereinbefore mentioned, * * * so much as may be necessary must be taken from all the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest, or other provision in the will, would thereby be defeated; in such case, such specific devise, legacy, or provision, may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted."

We think the section is not helpful on the question before us. It is not contended that the trial court erred in taking 50 per cent. from each devisee or legatee. But that is the subject-matter to which the section is addressed.

The Five Thirty-Six Oil Company being in process of dissolution, the meaning of the will, so far as the stock in the oil company is concerned, is not different than though it had contained two separate passages as follows:

> "To my daughter, Grace C. Brown, I give and bequeath $5,000 of the proceeds obtained from my stock in the Five Thirty-Six Oil Company.

★Hearing denied by Supreme Court.

To the First Presbyterian Church of Berkeley I give all of the balance of the proceeds obtained from said stock."

If the will had been so written and the probate proceedings had presented the same facts as this record discloses, the legacy to Grace C. Brown would have been reduced 50 per cent.—that is, it would have been cut down to $2,500—and the legacy to the First Presbyterian Church would likewise have been cut down 50 per cent. However, if we look back at the terms of the decree, it will be seen at once that such was the effect of the decree. From the legacy of Grace C. Brown was taken 50 per cent. and from the possible legacy to the First Presbyterian Church there was taken the same percentage. The amounts so taken were given to the grandchildren. Nothing less would have complied with the statute. Civ. Code, §§ 1306, 1307, 1308. In other words, the decree might have been worded in terms of dollars and cents instead of in terms of shares of stock. Arguing in terms of shares of stock is to present a false issue. As the Five Thirty-Six Oil Company was in liquidation, the shareholders were interested in proceeds (dividends in liquidation as well as ordinary dividends), as distinguished from shares of stock. Of the proceeds Grace C. Brown was originally entitled to $5,000. When it transpired that the grandchildren had not been provided for, her possible legacy of $5,000 fell to $2,500. The other $2,500 passed to the grandchildren.

We find no error in the record.

The decree is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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92 Cal. App. 178

AVIS et al. v. REBHAN et ux. (Civ. 5366.)

District Court of Appeal, Second District, Division 1, California. May 23, 1928.

1. Evidence ⚷460(4)—In action for broker's commission, exclusion of parol evidence tending to cure defective description in authorization to sell held error (Civ. Code, § 1624, subd. 6).

In action for real estate broker's commission, exclusion of parôl evidence tending to aid defective description in agreement authorizing brokers to sell property, as required by Civ. Code, § 1624, subd. 6, by showing that vendor had no other land in vicinity, *held* error.

2. Brokers ⚷43(3)—Broker's authorization listing property as ranch and residence of vendor, giving postal address, held to identify property sufficiently (Civ. Code, § 1624, subd. 6).

In action for real estate broker's commission, authorization to sell which disclosed property involved was 40-acre ranch which was residence of vendor, postal address, that property was located on certain street, that there was six-room house thereon, and that place was planted to walnuts and alfalfa, *held* sufficient to identify property as required by Civ. Code, § 1624, subd. 6.

3. Appeal and error ⚷1010(1)—Trial court's finding that contract for sale was never completed, sustained by evidence, held conclusive on appellate court in action for broker's commission.

In action for real estate broker's commission, finding of trial court that contract for sale of property was never completed or delivered, sustained by evidence, *held* conclusive on appellate court.

4. Vendor and purchaser ⚷25—Manual delivery of document containing elements necessary to constitute binding contract for sale and purchase of ranch held not necessary.

Manual delivery of document, signed by vendor and purchaser, which contained necessary elements to constitute binding contract for sale and purchase of ranch, *held* not necessary to its effectiveness.

5. Brokers ⚷60, 64(1)—Broker is not deprived of right to demand commission by failure or inability of purchaser to comply with contract or release by seller.

Broker is not deprived of right to demand commission by subsequent failure or inability of purchaser to comply with terms of contract or by voluntary release of purchaser by seller.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by W. M. Avis and F. W. Wehn, copartners doing business under the firm name and style of Avis & Wehn, against J. G. Rebhan and wife, for real estate broker's commission. Judgment for the defendants, and plaintiffs appeal. Reversed in part, and affirmed in part.

Allard & Mitchell, of Pomona, for appellants.

Frank T. Bates and Walter E. Byrne, both of San Bernardino, for respondents.

WOOD, Justice pro tem. Plaintiffs commenced the action to recover the sum of $1,075 alleged to have been earned as brokers' commission in the sale of defendants' ranch and certain personal property thereon. The appeal is prosecuted from a judgment in favor of defendants. On August 17, 1923, defendant J. C. Rebhan and Jennie L. Wagner met, through the instrumentality of plaintiffs, at defendants' ranch and signed the following memorandum agreement for the purchase and sale of the property:

"Pomona, Cal., Aug. 17, 1923.

"Received from Jennie L. Wagner $500.00 on account of a total purchase price $33,000, for the 30½ acre ranche of J. G. Rebhan, bounded on the N. by S. P. R. R., on the east by Ramona Ave, on the south by Chino Ave, with all stock, tools and equipment except team of horses and ¼ interest in the well, the buyer to assume a government first mortgage of $8,000.00 and a second mortgage of four thousand dollars. To pay $2,500.00 cash on or before Sept. 20, 1923, and $500.00 or more monthly thereafter with interest on the deferred payments quarterly at 7%. All parties hereto agree to the above, also to enter into escrow at the bank Monday Aug. 20th where more details of the above will be entered into. Insurance to be prorated as of Sept. 20—2—21—milk cows and a bull go.

"J. G. Rebhan.
"Jennie L. Wagner."

At the time the memorandum agreement was signed, Mrs. Wagner paid $500 on account of the purchase price. On August 20th plaintiff W. M. Avis, Mrs. Wagner, and the defendants met at the First National Bank at Ontario, and there a contract for the purchase and sale of the property was prepared by an officer of the bank and signed by Mr. and Mrs. Rebhan as sellers and Mrs. Wagner as purchaser. By the terms of this contract the purchaser was to pay $2,500 by September 20, 1923, and $500 each month thereafter until the entire purchase price should be paid. The sum of $500, which had been paid by Mrs. Wagner, was by consent of all parties turned over by Mr. Avis to Mr. Rebhan. The contract itself, which was not signed in duplicate, was left with the bank. The defendants also left with the bank a bill of sale covering the personal property and a letter instructing the bank to pay to plaintiffs the sum of $1,075 out of the payment of $2,500 which Mrs. Wagner was to make on September 20th. A few days later Mr. and Mrs. Wagner wished to make certain changes in the contract, and accordingly they met the defendants at the bank and attached a rider to the original agreement embodying the changes agreed upon. On September 19, 1923, the Wagners informed defendants that they would not for financial reasons be able to comply with the terms of the contract, and Mr. Rebhan then told the Wagners to "let it drop." On October 4, 1923, Mrs. Wagner and Mr. Rebhan met at the bank, and an officer of the bank, with the consent of Mrs. Wagner, delivered the contract to Mr. Rebhan, who retained the sum of $500, the original payment made by Mrs. Wagner.

The trial court found, among other things, that the agreement by which plaintiffs were authorized to sell defendants' property is invalid for lack of a sufficient description of the property involved, holding that plaintiffs are prevented from recovering by the provisions of subdivision 6 of section 1624 of the Civil Code. On one side of the listing card the defendant J. G. Rebhan signed an agreement to pay commission for the sale of "the property herein described." On the other side of the card the following appears:

"Name J. G. Rebhan, Dairy Price 40,000
Mort. 12,000
Residence, Chino R.D. No. 3 Phone 6146
Location, Bet. Riverside and Chino on Ramona
Imp. 6 rooms, 1 bath, 1 garage, electricity & Gas.
40 acres, 30 a. Walnuts 11-a-8 yr. old 20 A. set last year 10A. - 5 A. Alfalfa, 5 A. Farmed.
Water, owns pump about 90 electric motor all piped for irrigation.
20 hd. cows, barn full hay goes, milk now 7.00 Mo.
Terms 20,000. Mortgage 8000 federal loan, 5½% - 4000 second 7% due 1925, 17 years.
Exchange for Calif. clear or about clear.
Remarks: S-9 A. Wal. 6000, W- 10-a 7000."

[1, 2] It was shown by the evidence that defendants resided on the property which was the subject of the contract between defendants and the Wagners. Upon being asked where the memorandum agreement was signed, defendant J. G. Rebhan answered: "Down at my ranch where I was living at the time." In their answer defendants allege that they own the property described in the complaint and that they employed plaintiffs to sell it. Plaintiff Avis testified that the words "Riverside," "Chino," and "Ramona" are the names of streets. This evidence was proper under the circumstances, although it was on motion of defendants stricken out by the court as being a voluntary statement by the witness. Defendant J. G. Rebhan was asked by counsel for plaintiffs if the property listed consisted of the ranch on which he lived at Chino and if he owned any other property in the vicinity of Chino. Objections to these questions were erroneously sustained by the trial court. In an action to recover a broker's commission, parol evidence is in some instances admissible to cure a defective description. Plaintiffs should have been allowed to prove that defendants did not own any land in the vicinity of Chino other than that on which they resided. However, we are of the opinion that, notwithstanding the court struck out the testimony, there is enough in the record to show that the description in the listing is sufficient to comply with the provisions of the statute of frauds. In Macknight v. Davitt, 37 Cal. App. 720, 174 P. 77, the court said:

> "Much greater liberality is allowed in construing and curing defective descriptions in broker's contracts than in a deed of grant of land, for, so far as the statute of frauds is concerned, the terms of the employment are the essential part, and such contracts will not be declared void merely because of a defect, uncertainty, or ambiguity, in the description of the property to be sold or exchanged when such defect can be cured by the allegation or proof of extrinsic facts and circumstances."

In Cowing v. Wofford, 68 Cal. App. 538, 229 P. 883, plaintiff sought to recover a broker's commission. The court said:

> "In Maze v. Gordon [96 Cal. 61, 30 P. 962], supra, the rule is laid down that a contract to employ a broker need not describe the lands specifically if the terms of employment can be made

definite without it, and if the circumstances surrounding the transaction disclose that one owns property of similar dimensions to that insufficiently described, it is enough for a contract of this character. The office of a description is not solely to identify the land but also to furnish a means of identification."

See, also, Anderson v. Wilstrup, 34 Cal. App. 771, 168 P. 1150; Tolosano v. Will, 62 Cal. App. 622, 217 P. 803.

The terms of the employment of plaintiffs, the "essential part" of the written authorization, are clearly set forth in the case before us. It is readily disclosed from the listing that the property involved is a 40-acre dairy ranch on which is the residence of J. G. Rebhan; that the postal address of said residence is "Chino R. D. No. 3"; that the property is located on Ramona street; that there is a six-room house with garage thereon; and that the place is planted to walnuts and alfalfa. This description is sufficient to identify the property in an action of this kind, even without the testimony of plaintiff that "Riverside" and "Chino" are the names of streets.

Defendant Nellie I. Rebhan did not sign the listing card. No evidence is in the record showing that, as to her, there was a compliance with subdivision 6 of section 1624 of the Civil Code.

[3] Plaintiffs contend that they produced a purchaser with whom defendants made a binding contract for the sale of the property. The trial court made the following finding:

> "* * * That said instrument of sale and purchase signed (on Aug. 20th) by and between said Jennie L. Wagner and said defendants, to wit, 'Exhibit B,' was never completely executed by the parties thereto, in that there was never any delivery therof, for the reason that the same was only deposited in the Bank of Ontario, Cal., and held for the benefit of said defendants, and for their convenience only, and that the understanding and agreement of the parties to said instrument at the time of the signing thereof, and at all times, was that the same was not to be delivered to said purchaser or be effective for any purpose until the payment of $2,500 was made to or for defendants as provided in said instrument."

This finding is supported by the evidence. Defendant J. G. Rebhan testified that "the contract was to be left there (at the bank) until the next payment was made, and then it was to be turned over to Mrs. Wagner." The witness further testified that he did not at any time direct or authorize the delivery of the contract to Mrs. Wagner. Mrs. Wagner testified that "the contract was to be left with the bank until the $2,500 was paid." The president of the bank testified: "They deposited the contract with us for collection." The document signed by the parties was never in the possession of Mrs. Wagner. The finding of the trial court that there was no delivery of the instrument, being sustained by the evidence, is binding upon the appellate court.

[4, 5] A different situation is presented by the instrument signed by defendant J. G. Rebhan and Mrs. Wagner on August 17th at the ranch. This instrument contains the elements necessary to constitute a binding contract for the sale and purchase of the property. The terms are clearly stated and the property sufficiently described. Manual delivery of the document to either party was not necessary. In Oneto v. Restano, 89 Cal. 63, 26 P. 788, it is said:

> "In regard to a lease, the mere fact that the instrument has always been in the possession of the lessor is not conclusive evidence that it has not been delivered so as to become operative. An ordinary deed is usually of value only to the grantee. The maker has no further interest in it. But an indenture of lease is a very different thing. It continues to be of fully as much interest to the landlord as to the tenant, and he has fully as much occasion for its possession. Such agreements are usually executed in duplicate. But where it is retained by either party with consent of the other, it must be considered as delivered, if both understand that it has been executed and is in operation."

The pleadings and the findings are silent on the question of the delivery of this instrument. No evidence was offered to show who retained possession of the instrument after it was signed; nor was evidence offered to show whether the parties left it with any one with the understanding that it was binding and in effect. A new trial will be necessary to enable the trial court to make findings on the question presented by the agreement of August 17th, upon the evidence to be presented and upon such amended pleadings, if any, as the parties may care to file in accordance with the views herein expressed. If it should be found that Mr. Rebhan and Mrs. Wagner signed the instrument of August 17th with the understanding that it was in effect as a binding agreement, it would follow as a matter of law that plaintiffs are entitled to their commission under the theory that they procured a purchaser who was accepted by defendant J. G. Rebhan and who entered into a valid contract with him. In such a case plaintiffs are not deprived of their right to demand their commission by the subsequent failure or inability of the purchaser to comply with the terms of the contract or by the voluntary release of the purchaser by the seller. 9 Cal. Jur. 631. A good statement of the rule applicable to the case is found in 4 Ruling Case Law, 309:

> "Once the customer procured by the broker is accepted by the employer, the latter is thereafter estopped from denying the purchaser's ability or willingness to complete the contract, inasmuch as he is not bound to accept the offer of such person without a reasonable opportunity to inquire and satisfy himself in relation to it. Consequently his acceptance should estop him

from alleging anything against the claim except fraud on the part of the broker in inducing the acceptance."

This statement has been approved in a number of cases in our jurisdiction, among them being Carrington v. Smithers, 26 Cal. App. 460, 147 P. 225, and Wood & Tatum Co. v. Basler, 37 Cal. App. 381, 173 P. 1109.

The trial court made the following finding:

"That at the time the terms of the instrument marked 'Exhibit B' to the second amended complaint were agreed upon and said instrument was signed by the parties thereto, it was then agreed upon between the plaintiffs and defendants that the plaintiffs were to be paid a commission on account of the transaction only when said instrument so signed became a valid and binding and enforceable contract upon the parties thereto when and upon the first payment of $2,500 therein specified was made and not otherwise."

No evidence whatever appears in the record to sustain this finding.

In so far as the judgment of the trial court affects defendant J. G. Rebhan only, it is reversed. The judgment is affirmed as to defendant Nellie I. Rebhan.

We concur: HOUSER, Acting Presiding Justice; YORK, J.

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92 Cal. App. 194

WESTERN FOREST PRODUCTS CO. v. WOODHEAD LUMBER CO.

(Civ. 5393.)

District Court of Appeal, Second District, Division 1, California. May 24, 1928.

1. Sales 🔑181(12)—Seller's evidence of grade of lumber could not be disregarded because relating to place of shipment, in absence of evidence showing change en route.

Where amount of lumber loaded and shipped by seller was same as amount received by purchaser, seller's testimony as to grade of lumber could not be disregarded entirely in suit for purchase price because it related to lumber at place of loading, in absence of evidence showing lumber had been changed en route; it being assumed that lumber taken from car was same as lumber loaded.

2. Appeal and error 🔑1010(1), 1011(1)—Finding that lumber was as represented by seller, based on conflicting evidence and supported by substantial evidence, cannot be disturbed on appeal.

Where evidence in action for purchase price of lumber on issue as to grade of lumber delivered was conflicting and there was substantial evidence to support finding that lumber was as represented by seller, such finding cannot be disturbed.

3. Sales 🔑178(4), 179(4)—Purchaser's appropriation and sale of lumber held waiver of objection of inferior quality and supported finding of acceptance.

In action to recover purchase price of lumber sold, whatever right purchaser reserved when it objected that grade of lumber was inferior to grade ordered was waived, by purchaser's deliberate appropriation and sale of lumber, and hence finding that purchaser did not refuse to accept lumber was not unsupported by evidence.

4. Principal and agent 🔑111(3)—Agency to sell personalty held not to extend to adjusting claim for damages from sale (Civ. Code, § 2323).

Extent of agent's authority as agent to sell personal property *held* not to extend to adjusting claim for damages that might arise out of sale made by him under Civ. Code, § 2323.

5. Principal and agent 🔑169(3)—Agent's agreement to adjust controversy, if enforceable, held not ratified by seller denying breach on being informed of purchaser's rejection of property.

Where agent selling lumber to defendant wrote seller that defendant had rejected car because of poor stock and that he had told purchaser to unload and he would get matter adjusted, but seller's only response was to deny lumber was not up to grade, seller could not be held to have ratified agent's agreement to make proper adjustment if such agreement was enenforceable.

6. Sales 🔑288(2)—Selling agent's promise to make adjustment for poor quality held no greater than purchaser's right to accept lumber and offset in damages difference between contract price and market value.

Promise to purchaser by agent making sale of lumber to make proper adjustment for inferior quality of lumber shipped was no more than right given purchaser by law to accept lumber and claim as offset in damages difference between contract price and market value of lumber.

7. Sales 🔑89—Finding that seller, not authorizing agent to make adjustment, never agreed to accept less than contract price for lumber, held not unsupported by evidence.

Where promise by agent making sale of lumber to purchaser to see that matter of poor quality of lumber would be adjusted, though implying agreement to compromise, was too indefinite to form basis of enforceable agreement, and agent had no authority to bind seller to accept less than order price, finding that seller never agreed to accept sum less than full contract price could not be held to be unsupported by evidence.

Appeal from Superior Court, Los Angeles County; C. W. Miller, Judge.

Action by the Western Forest Products Company against the Woodhead Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Loyd Wright and Charles E. Millikan, both of Los Angeles, for appellant.

Bicksler, Smith & Parke, of Los Angeles, for respondent.

HAHN, Justice pro tem. This action was brought for the recovery of the sum of $1,889.88, less freight charges, claimed by plaintiff as owing from the defendant for a carload of casing lumber shipped by the plaintiff from its mills in Seattle, Wash., to defendant's plant in Los Angeles, Cal. The answer admitted the receipt of the carload of lumber in question, totaling 28,571 feet but claimed that the quality of the lumber was not according to agreement, and that by reason of the inferior character of a portion of the lumber, the entire carload was of the reasonable value of only $1,298.77. Judgment, however, went for the plaintiff for the full amount of its claim, and defendant appeals.

It appears that one W. P. Frambes, of the firm of Fletcher & Frambes, who designated himself as a "wholesale commission merchant," took defendant's order for a carload of casing lumber which Frambes represented would be delivered to the defendant by the plaintiff company. The order provided that the carload was not to exceed 30,000 feet, of which amount not less than 90 per cent. was to be of No. 2 casing lumber, and the balance of No. 3 casing. The price, according to the order, was $66.50 per thousand feet for No. 2 casing, and $51.50 per thousand for No. 3 casing.

Upon the arrival of the car on the siding in defendant's yard in Los Angeles, Davis Woodhead, president of the defendant company, was not satisfied with the character of the casing, concluding that over half of the lot was No. 3, or inferior, casing. He at once called Frambes on the telephone and informed him that he would not accept the lumber because of its inferior quality. Thereupon Frambes requested him to unload the car, and promised to take the matter up with the plaintiff and secure an adjustment. Relying upon this promise, the defendant unloaded the car. The first information respondent had of any dissatisfaction on the part of appellant with the casing was received when Fletcher & Frambes wrote a letter to respondent, the material portion of which reads as follows:

> "Woodhead Lumber Company has rejected the car of casing shipped him on account of the poor grade of stock and the very poor milling of it. The writer went out to see this stock this morning and I must say that this is about as poor a car of finish as I have ever seen. Knowing that there was no chance to sell this elsewhere, he told them to go ahead and unload this, and that we would see that this matter was adjusted."

Respondent immediately wrote appellant advising it of Frambes' letter informing it of appellant's rejection of the car, and expressed surprise that there was any criticism of the grade of the lumber. In the somewhat extended correspondence that followed between appellant and respondent, respondent vigorously contended that the lumber was up to grade, and appellant was just as positive that less than half was No. 2 grade. It was finally agreed that an inspector from the Pacific Lumber Inspection Bureau should make an inspection of the lumber and report. When the inspector arrived at appellant's plant, he discovered that all of the casing lumber, except 5,251 feet, had been milled, or sold by appellant. Hence his report related only to what was left, and that showed 2,318 feet was No. 2, 1,916 feet was No. 3, and 1,017 feet was not classified, but described as lumber that could be trimmed to make No. 2.

Witnesses for the plaintiff who checked and helped load the car at Seattle testified that the lumber put into the car consisted of 27,898 feet of No. 2 casing and 653 feet of No. 3 casing. Witnesses for defendant estimated the amount of No. 2 casing at from 30 to 40 per cent. of the carload, grading the balance as No. 3. These estimates were based upon a casual survey of part of the lumber, or of the lumber in the car before it was unloaded. None of defendant's witnesses claimed to have made a check of the entire lot of lumber.

In urging a reversal of the judgment, appellant makes three points: First, that the evidence is insufficient to support the finding that the carload of lumber contained 27,989 feet of No. 2 clear casing and 653 feet of No. 3 clear casing. Second, that the evidence is insufficient to support the finding that the defendant did not refuse to accept the carload of lumber, and that no agreement was entered into in relation to the holding of the lumber by the defendant. Third, that the evidence is insufficient to support the finding that the plaintiff did not at any time agree to accept less than the full contract price for the lumber.

[1, 2] As we have already indicated, the evidence as to the amount of No. 2 casing and the amount of No. 3 casing is in marked conflict. Appellant attempts to avoid this conflict by urging that the evidence of plaintiff's witnesses on this question is of no weight because it relates to the lumber as and when placed in the car at Seattle, while appellant's testimony related to the lumber as it was unloaded in Los Angeles. There is no merit in this contention. Appellant concedes that there was a total of 28,571 feet of lumber on the car when it arrived in Los Angeles, and this is the amount which respondent claims was loaded into the car at Seattle. To make any differentiation in the weight of the testimony because of the point where the lumber was loaded and checked would necessarily assume that some one had, while the car was en route, removed a portion of the No. 2 lumber and substituted in its place the exact number

of feet of No. 3 lumber. Lacking any evidence to show that the lumber had been changed en route, it must be assumed that the lumber which was taken from the car in Los Angeles was the identical lumber that was loaded into it at Seattle. The evidence upon this issue was clearly conflicting, and inasmuch as there is substantial evidence to support the finding attacked, we cannot disturb it.

[3] As to appellant's contention that the evidence is insufficient to sustain the finding that the defendant did not refuse to accept the carload of lumber, a complete answer is found in the undisputed fact that, notwithstanding its declaration to Frambes that it would not accept the casing, shortly after the lumber was unloaded appellant began to use and sell it, and so continued in using and selling the lumber until the time the inspector arrived, when most of the casing had been disposed of. Whatever right appellant reserved when its objection was made to Frambes was waived so far as acceptance was concerned, by the deliberate appropriation and sale of the lumber.

[4] As to the remaining points urged, appellant's argument is based largely upon the assumption that Frambes was the agent of respondent, with full authority to bind respondent to an agreement to make a proper adjustment of the disputed question of the grade of the lumber. Woodhead, president of appellant, testified that when he told Frambes over the telephone that he would not accept the lumber, Frambes "asked us to unload it and said we would agree on the undergrade of it, and agree to make a proper adjustment." Assuming, for the sake of argument, at this point, that this statement of Frambes constituted an agreement of sufficient certainty to enable it to be enforced, it does not appear to be anything more than an agreement on the part of Frambes that he or his firm, together with appellant, would make the adjustment. Frambes does not pretend to say that the respondent would make a proper adjustment, as, indeed, there is no evidence in the record that Frambes was authorized to bind respondent to any such agreement. The extent of Frambes' authority as an agent to sell personal property did not extend to adjusting a claim for damages that might arise out of a sale made by him. Section 2323, Civ. Code; 9 Cor. Jur., p. 524.

[5, 6] Nor does the record support appellant's contention that respondent ratified Frambes' agreement to "make a proper adjustment," if that statement or promise can be said to constitute an enforceable agreement. While it appears that Frambes' firm did write respondent, advising it that appellant had rejected the car of casing on account of poor stock, and that Frambes had "told them to go ahead and unload this and that we would see that this matter was adjusted," respondent's only response was to write appellant vigorously contending that the casing was up to grade, and refuting the suggestion that more than half of the carload was No. 3 casing. In fact, Frambes' promise to make a proper adjustment amounted to nothing more than the law gave to appellant, i. e., the right to accept the lumber and claim as an offset in damages the difference between the contract price and the market value of the lumber. Such was undoubtedly the interpretation put upon Frambes' language by appellant as is indicated by the special defense set up in the answer.

[7] Appellant's last point, that the finding that respondent never agreed to accept a sum less than the full contract price for the lumber is not supported by the evidence, cannot be sustained. In the first place, Frambes' so-called promise "to see that the matter would be adjusted," while implying an agreement to compromise, is too indefinite to form the basis of an enforceable agreement; and in the second place, as we have already pointed out, Frambes had no authority to bind respondent to accept less than the order price.

For the reasons indicated, the judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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92 Cal. App. 189

GREGG v. H. & M. DRILLING CO. et al.
(Civ. 5812.)

District Court of Appeal, Second District, Division 1, California. May 24, 1928.

1. Improvements ⚷4(4)—Five-acre tract held not essential to convenient use and occupation of improved driveway, within materialmen's lien statute (Code Civ. Proc. § 1185).

Five-acre tract, sublet by lessee of larger tract for oil development purposes, *held* not essential to convenient use and occupation of improved driveway, used by sublessee with owner's consent for ingress and egress from and to highway, within Code Civ. Proc. § 1185, making surrounding land, required for convenient use and occupation of improved land, subject to lien for materials furnished.

2. Improvements ⚷4(4)—Use of improvement, not of adjoining land, determines extent of materialmen's lien under statute subjecting adjoining land, required for convenient use and occupation of that improved, to lien (Code Civ. Proc. § 1185).

It is not the use to which land adjoining an improvement is to be put, but rather the use for which the improvement was constructed, that determines the extent of materialmen's lien under Code Civ. Proc. § 1185, making surrounding land required for convenient use and occupation of that improved subject to lien.

3. Improvements ⟹4(4)—Market value of improved land cannot be considered in establishing extent of materialmen's lien under statute subjecting adjoining land thereto, where required for convenient use of that improved (Code Civ. Proc. § 1185).

Market value of improved land is not an element to be considered in establishing the extent of materialmen's lien under Code Civ. Proc. § 1185, making adjoining land, required for convenient use and occupation of that improved, subject to lien.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by A. H. Gregg, doing business under the fictitious firm name and style of Sycamore Canyon Gravel Company, against the H. & M. Drilling Company and James Lyle Hagey and wife. From a judgment establishing a mechanic's lien on a portion of defendants Hageys' land, they appeal. Reversed and remanded.

J. H. Ardis and W. S. Knott, both of Los Angeles, for appellants.

Dorland & Sewell, of Whittier, for respondent.

HAHN, Justice pro tem. The action which gives rise to this appeal is one wherein the plaintiff and respondent sought to enforce as a mechanic's lien a claim for $1,425 for gravel sold and furnished to the defendant H. & M. Drilling Company, and placed upon a strip of land in preparing the same for road purposes, which was a portion of a larger tract of land owned by defendants and appellants. From a judgment establishing plaintiff's claim as a lien on a portion of the lands of appellants, this appeal is prosecuted.

Appellants were the owners of a tract of land, irregular in shape and comprising about 24 acres. The northerly boundary line of the land extended in a straight line easterly and westerly for a distance of 1,985 feet. The easterly four acres of the tract projected out, as it were, from the main body of the land like an arm. Along the easterly boundary of this portion of the tract lay the county highway. The main body of the land is exceedingly irregular in form, no two sides being parallel and no corner forming a right angle. The entire tract was leased by appellants to one Daynes for oil development purposes. He in turn subleased to the defendant H. & M. Drilling Company a portion of the land lying in the northeast corner of the tract. The record discloses that the evidence presented to the court as to what portion, or how much of the entire tract was sublet to the H. & M. Drilling Company, was far from satisfactory and in fact quite indefinite. The only evidence in the record bearing upon this point is the testimony of one of the appellants, who stated that he heard that the tenant expected to drill for oil on the northeast five acres of the tract.

The H. & M. Drilling Company, in order to haul their supplies and equipment to the ground upon which they were to drill, and have ingress and egress thereto from the county highway, obtained permission from appellants to use a strip of land lying along the northerly boundary line of the tract for driveway purposes. Plaintiff sold and delivered to defendant H. & M. Drilling Company 570 yards of gravel, which was spread upon this strip of land to be used for driveway purposes over a width of from 8 to 12 feet. To collect his bill of $1,425 for the gravel, plaintiff filed his lien against the entire 24-acre tract owned by appellants. Judgment was rendered for the plaintiff establishing his lien upon the strip of land upon which the gravel was placed, which hereafter will be referred to as the "driveway," and also upon the "northeasterly five acres" of the 24-acre tract.

From this judgment appellants have taken this appeal, and urge as grounds for reversal: First, that the court committed error in establishing the plaintiff's lien upon the northeasterly five-acre tract; and, second, that the description of the ground as the "northeasterly five acres" is void for uncertainty.

[1] Section 1185 of the Code of Civil Procedure provides that:

> "The land upon which any building, improvement, well, or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien," etc.

Appellants admit that respondent is entitled to a lien upon the strip of ground referred to as the driveway upon which the gravel was placed, but urge that to extend the lien to the northeasterly 5-acre piece is contrary to the provisions of section 1185, Code of Civil Procedure.

Respondent, on the other hand, contends that because the defendant H. & M. Drilling Company had the right to drill for oil on the so-called northeasterly 5-acre piece, and that the driveway in question was improved so as to provide ingress and egress to the leased land, that therefore the 5-acre piece constituted a convenient space about the improvement, or space, that was convenient for the use and occupation of the improvement.

Respondent bases his contention in the main on the case of Western Well Works v. California Farms Co., 60 Cal. App. 749, 214 P. 491. There the lien claimant had drilled a test water well on a 40-acre tract of land, which well was intended to be used in furnishing water for the irrigation of two adjoining tracts of land. The trial court restricted the lien to the actual ground upon which the well and the derrick were located, and a circular space having a diameter of 100 feet about the well as a center. Upon appeal the court sustained appellant's contention that he was entitled to a lien upon the 40-acre tract upon which the well was located for the reason that the well was put down to furnish water for this tract and, without the land to irrigate, the well would be useless. In sustaining this view, the Court of Appeal said:

> "In determining what would be a convenient space for the use and occupation of an irrigating well consideration must be given to the reasonable and beneficial use of the waters of the well, since the well is useless without the use and application of its waters upon sufficient land to render an adequate return for the cost of its creation and use."

In the case of Springer Land Ass'n v. Ford, 168 U. S. 513, 18 S. Ct. 170, 42 L. Ed. 562, the court having under consideration this same question in relation to the extent of the lien for the construction of an irrigating system, said:

> "The truth is that what area of land is subject to lien in a given case largely depends on the character of the improvement. The extent of ground proper and necessary to the enjoyment of a building, a wall, or a fence, would not be the same as that required for or appertaining to an irrigation system, but the principle of determination is the same."

In the case of Cowan v. Griffith, 108 Cal. 224, 41 P. 42, 49 Am. St. Rep. 82, an attempt was made to enforce a mechanic's lien arising out of the construction of a dwelling house upon a 40-acre tract of land upon which the house was located. The trial court established the lien on the entire tract, as contended for by the plaintiff, but the Supreme Court, in reversing the judgment, declared:

> "For the convenient use and occupation of this dwelling house it is very evident that 40 acres of land is not necessary. The statute does not contemplate anything of that kind. It means exactly what it says—a sufficient space around the dwelling for its convenient use and occupation. It does not contemplate that sufficient land around the dwelling house to support the owner while living there be set apart."

Again, in Tunis v. Lakeport, etc., Ass'n, 98 Cal. 285, 33 P. 63, 447, an attempt was made to foreclose a mechanic's lien arising out of the construction of a hotel and a saloon situate on 60 acres of ground upon which was also located fair grounds, a race track, racing stables, and other improvements. The trial court established the lien upon the entire tract, but the Supreme Court in reversing the judgment said:

> "In the present case it is easy to see that the race track with its training stables, grandstand, corrals, and other improvements, may be necessary to create business for the hotel, clubhouse, and saloon, for which the building in question was constructed, but it is not at all apparent that they are necessary to the convenient use and occupation of the building for the purposes indicated. Their uses are foreign to its purposes, except as they may tend to bring custom to its doors."

These, as well as other cases that might be cited, declare the principle that should control in determining the extent of ground that will in each case attach to the improvement. In the instant case, the convenient use of the driveway, which is the improved property, is not in any sense dependent upon the possession or control of the northeasterly 5-acre tract. The driveway was to serve one purpose only, and that was to drive over and furnish ingress and egress between the highway and the 5-acre tract. It appears quite as clearly that the 5-acre tract is no more essential to the convenient use and occupation of the improved driveway than was the 40-acre tract for the convenient use of the dwelling in Cowan v. Griffith, supra, or the entire 60 acres for the convenient use of hotel and saloon in Tunis v. Lakeport, etc., Ass'n, supra.

[2] It is not the use to which the land was to be put that adjoins the improvement that determines the extent of the lien, but rather the use for which the improvement was constructed. In the cases cited by respondent involving the construction of wells and irrigation systems, the uses for which the improvements were constructed determined the extent of the liens. In the instant case, the improvement was constructed for the use of vehicles and pedestrians. Such use, at most, would require only sufficient space at the easterly terminus of the driveway that would enable vehicles to turn around so as to again reach the highway. Clearly, 5 acres would not be necessary for such purpose.

[3] It is suggested by respondent that the driveway would have little or no market value without having attached to it the 5-acre piece of land. But market value is not an element which the statute provides the court shall take into consideration in establishing the extent of the lien; nor would reason give its approval to such a consideration.

In view of these conclusions, we are of the opinion that the evidence does not support the finding that the northeasterly 5-acre portion of the 24-acre tract is necessary and required for the convenient use and occupation of the driveway in question.

Inasmuch as our ruling upon the first point required a retrial of the case, we do not deem it necessary to discuss in detail the second point raised. The description of the ground as the "northeasterly five acres of that parcel," etc., is exceedingly vague and difficult, if not impossible, of determining. However, upon a retrial of the case it is quite likely that the difficulty presented in the description will not again arise.

For the foregoing reasons, the judgment is reversed and the case remanded, for the purpose of determining the amount of ground at the terminus of the driveway in question that will be necessary for the convenient use of said driveway to enable vehicles using the driveway to turn about.

We concur: CONREY, P. J.; HOUSER, J.

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92 Cal. App. 6

PEOPLE v. ADAMS. (Cr. 1612.)

District Court of Appeal, Second District, Division 2, California. May 17, 1928.

1. Criminal law 🔑1186(4)—Misconduct of deputy district attorney during argument in consistently questioning defendant's character and stating facts within personal knowledge held reversible error (Const. art. 6, § 4½).

Misconduct of deputy district attorney during argument to jury, in consistently referring to question of character of defendant and lack of evidence respecting character after court requested him to refrain therefrom, and in stating facts within his personal knowledge without having taken stand and testified relative thereto, *held* reversible error, notwithstanding Const. art. 6, § 4½.

2. Rape 🔑48(1)—Evidence of substance of complaint by prosecutrix to father, mother, and grandmother held admissible whether or not part of res gestæ.

In prosecution for rape, evidence as to substance of complaint made by prosecutrix to her father, mother, and grandmother, to effect that defendant had ruined her, not constituting a relating of a conversation detailing offense, *held* admissible whether or not it constituted a part of res gestæ.

3. Criminal law 🔑783(2)—Instruction that testimony relative to offer of settlement was admitted only for impeachment improperly limited impeachment to prosecutrix only.

In prosecution for rape wherein testimony was introduced concerning offer to settle with defendant without publicity for a certain amount, instruction relative to such evidence, being admitted for purpose of impeachment, improperly limited impeachment to prosecutrix only.

4. Rape 🔑60—Verdict finding defendant guilty of rape held sufficient under information charging forcible rape and evidence showing prosecutrix was 21 years old (Pen. Code, § 1151).

In prosecution for rape under information charging commission of rape accomplished without consent of prosecutrix and when her resistance was forcibly overcome by defendant, with uncontradicted evidence showing prosecutrix was 21 years of age, verdict finding defendant guilty of rape *held* sufficient without specifying kind of rape, since under Pen. Code, § 1151, general verdict of guilty imports a conviction of offense charged in indictment.

5. Jury 🔑131(4)—Action of court, after examining jurors, in requesting counsel to proceed with peremptory challenges, held not error, in absence of request for questions not covered by examination.

Action of court in examining prospective jurors and in stating that in his opinion examination for grounds upon which to base a challenge for cause was sufficient, and in asking counsel to proceed with exercise of peremptory challenges, *held* not error, in absence of showing that counsel desired to ask question not covered by examination or that such question would have been disallowed if counsel had made request.

6. Jury 🔑131(13)—Collective examination of jurors, without framing questions calling for physical manifestation betokening affirmation or negation, held not error under circumstances.

Questioning prospective jurors collectively, without framing question as to call for physical manifestation on part of individuals betokening affirmation or negation which might be translated by the reporter into the record, *held* not erroneous, in view of silence of counsel and apparent understanding and assent to the proceeding, particularly where counsel after exercising six peremptory challenges stated that they passed the jury for cause.

7. Criminal law 🔑913(1)—Denial of new trial on ground defendant was adjudged insane after sentence held not error, without positive showing defendant was of unsound mind during trial.

Denial of motion for new trial based on fact that defendant, after pronouncement of sentence, was adjudged insane and committed to hospital for treatment, with subsequent discharge as restored to sanity, *held* not to constitute error, in absence of positive showing that defendant was not of sound mind at time of trial.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

George R. Adams was convicted of rape, and he appeals. Reversed.

A. S. Maloney and Duckworth & Harrison, all of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and George H. Johnson, Dist. Atty., and C. O. Thompson, Deputy Dist. Atty., both of San Bernardino, for the People.

THOMPSON, J. The defendant was charged by information with the crime of rape committed by force and violence upon the person of a woman over the age of 21 years. He was found guilty by the verdict of the jury and appeals from the judgment and order denying his motion for a new trial.

The facts are very much in dispute, and it would serve no useful purpose to recite in detail the testimony of the prosecutrix and the appellant, and those who corroborated them. It may be fairly said that the testimony established a growing intimacy between appellant and prosecutrix, who had been in his employ for some months prior to the alleged offense, covering a period of four or five weeks and evidenced by theater and dinner engagements and rides in appellant's automobile, and declarations of love by appellant for prosecutrix. He flatly disputes her testimony relating to the alleged offense and says that what occurred while they sat in the rear seat of his Hudson brougham on Shandon Hill outside of San Bernardino city, at which time she says the offense was committed, might be described in the vernacular of youth as a "necking party." Suffice it to say that there are incidents which strongly tend to support her version of the affair, and there are also, as the evidence appears to us from the printed page, incidents indicating that his statement is the true one. Evidence was introduced by the prosecution from the father, mother, and grandmother of her complaint, after reaching home and while in the bathroom, and that her clothes were covered with blood. Testimony was also offered by the defense tending to contradict their statements. This latter testimony was produced through the medium of a Mrs. Cummings, a cousin of appellant, and another witness who was a neighbor of hers, who say that they visited the prosecutrix during the night of and not long after the alleged offense and found her calm and composed, without sign of bruise or hysteria, and who say that she said to them in effect that if they could get "a large enough settlement there would not be any publicity." Testimony was also introduced by the defense to show that the prosecutrix knew that appellant was putting $5,000 into a business corporation of which she was to be assistant secretary, and that before a complaint was sworn to an attorney employed by Mr. Halley, her father, had, in an interview with defendant's counsel, offered to settle for $5,000.

While the appellant argues that there is not sufficient evidence to support the verdict, we have concluded, after a careful and thorough study of the transcript, that this assignment does not require us to set forth in detail testimony which, but for the error to be noted hereafter, would be quite ample to uphold the verdict.

[1] Appellant also assigns as a reason why the judgment should be reversed the misconduct of a deputy district attorney during the argument to the jury, and in this we think he must be upheld. Part of the objectionable matter is as follows:

"*Ah, ladies and gentlemen, is the American Legion or is a soldier of America proud of a man that would hide behind his record of service to his country to defend him for conduct like this? Why hasn't he brought some of his good American Legion friends in here to have his character for morality and standing in the community—*

"Defense Counsel: *Just a moment. We object to that and assign it as error, and ask the court to instruct the jury to disregard it.*

"The Court: *Counsel, I think that is without the evidence. The remark will be stricken out and the jury will disregard the comments.*

"Deputy District Attorney: *Ah, ladies and gentlemen of the jury, if I were on trial, and I believe if you were on trial, under the law they could not impeach—*

"Defense Counsel: *Object to that and assign it as error on the ground that is not the law; that the state has a right to impeach the character.*

"The Court: *There is no evidence either way on the question of character, and the subject should not be discussed.*

"Defense Counsel: *Let's get the record clear. We wish to assign it as error.*

"The Court: *There is nothing in the record showing that the remark was completed, but the subject of the character of the defendant is not an issue and will not be commented upon by counsel.*

"Deputy District Attorney: *Ladies and gentlemen, if I were on trial for an offense like this I would not stand on a war record in defense of my character. I would bring the people of my community, with whom I lived and with whom I had done business, and I would let those people set upon the witness stand and tell you as to my moral character.*

"The Court: * * * *The Court ruled that you were not to refer to the question of the character of the defendant, as to the evidence or lack of evidence respecting his character.*

"Deputy District Attorney: *I am simply talking about standing on his war record.*

"The Court: *Refrain from any question as to the witness testifying as to his character and not testifying as to his character. Those remarks will be stricken out and the jury are instructed to disregard them.*" (Italics ours.)

These statements of the deputy district attorney are clearly misconduct and although the court endeavored to undo the damage wrought by the uncalled-for and entirely illegitimate remarks, the deputy exhibited a disregard for the court and for the rules of evidence and failed to display that judicial frame of mind which should characterize those who hold the high office of deputy district attorney. He displayed great persistence in his effort to impress upon the jury the fact that defendant had failed to call character witnesses. In fact, his attitude in this regard is accentuated by the mildness (at least as it appears from the record) of the court's rebuke. Counsel would not have been dealt with harshly had the court imposed a much more severe reproof.

The next matter assigned as objectionable relates to the testimony of two witnesses for the defense who testified that Mr. Richards offered to settle the affair for $5,000, and the testimony of Richards for the prosecution that he did not. Richards also testified that the deputy district attorney was present during at least a part of the conversation, but the latter did not take the stand. The record is as follows:

> "Deputy District Attorney: *She told you she waited there until Dave Richards came in, and after Dave Richards came in she went out with him and went to this office around there and got those personal effects and had the conversation on Fourth street at the corner where it enters the court, and from there she went to the county jail to see Adams, and returned to Mr. Maloney's office about noon. That was her testimony on cross-examination. Maloney knows it, Harrison knows it, and this jury knows it, and I say, ladies and gentlemen, I was in that office and I saw Mr. Richards come in. I heard him introduced to Mrs. Cummings.*
>
> "Defense Counsel: *He didn't go on the stand, and I object to his testifying.*
>
> "The Court: *The jury will be instructed that any statements of counsel are not to be received as evidence.*
>
> "Deputy District Attorney: *I am discussing the testimony. Richards said he was introduced. I was there and I know that Dave Richards told you the truth.*
>
> "Defense Counsel: *If the court please, just a moment. I assign it as error, that remark where counsel says he was there. He didn't go on the stand, and I assign it as error.*
>
> "Deputy District Attorney: *Dave Richards said I was there.*
>
> "The Court: *Proceed with the argument.*
>
> "Deputy District Attorney: *And I know, ladies and gentlemen, that Dave Richards, when he entered that office, did not say, 'It can be settled for $5,000,' and Maloney knows it too. I was there. Dave Richards did not say it could be settled for $5,000, and Dave Richards says he never said it at any time, and I believe Dave Richards told you the truth. That is what I believe about it.*
>
> "Defense Counsel: *Now if the court please, I object to the statement of counsel where he passed the lie to me, and assign it as error and misconduct upon the part of the district attorney, for the reason that we did not have an opportunity to cross-examine him.*
>
> "The Court: *Proceed with the argument.*
>
> "Deputy District Attorney: *I want to ask you one thing, ladies and gentlemen. If Dave Richards had been there previous to my being there and had been introduced to this woman, as the defense claim, wouldn't it have been an extraordinary thing for him to have received a second introduction on this same morning in the same office to the same woman within a very few minutes? What do you think about it? Do you mean to tell me that if some one would come to your office and you gave them an introduction to a party, and in a few minutes they came back you would give them another introduction to the same party? You would not do it, and I don't think Maloney would do it; and I did hear him, as Dave Richards said in his testimony, I did hear him introduce Mrs. Cummings to Dave Richards.*
>
> "The Court: *Counsel, I hardly think you have a right to testify. You are not under oath.*
>
> "Defense Counsel: *If the court please, I believe we should make our record clear on this. We object to the statement of the testimony by Mr. Thompson before this jury, and request at this time that the jury be instructed to disregard it, and assign it as misconduct on behalf of the district attorney.*
>
> "The Court: *Any remarks on the part of the court or on the part of counsel on either side as to what the facts are in this case are not to be received as evidence by the jury. They are to look only to the evidence produced in open court.*
>
> "Defense Counsel: *If the court please, we don't want to interrupt again, but we want it understood that our objection goes to his statements along this line that he makes as to his own testimony. We don't want to interrupt him again, and he can go on forever if he wants to.*
>
> "The Court: *I think that counsel should confine his argument to the evidence in the case.*" (Italics ours.)

The tenacity of the offender might have been admirable if employed in proper channels, but not where it evidences an attempt to pervert the course of justice. Not once, but four different times, he persisted in testifying: "*I was in that office and I saw Mr. Richards come in. I heard him introduced to Mrs. Cummings.*" After being told in effect to desist, he offended: "*I was there, and I know that Dave Richards told you the truth.*" The court failed to reprimand counsel or to instruct the jury, and for the third time counsel throws his testimony without privilege of cross-examination into the scales against the defendant: "*And I know, ladies and gentlemen, that Dave Richards when he entered that office, did not say, 'It can be settled for $5,000,' and Maloney knows it too. I was there.*" For an unaccountable reason the trial judge again neglected to administer the stern reprimand of the court or set the minds of the jury on the right trail, and counsel again took up the burden of a voluntary unsworn witness: "*And I did hear him, as Dave Richards said in his testimony, I did hear him introduce Mrs. Cummings to Dave Richards.*" (Italics ours.) The respondent argues that the court corrected the error in the first assignment, and the defendant waived the failure of the court to correct it in the second assignment, and, further, that the deputy district attorney had the right to argue as he did in the matter last assigned as objectionable. We think a complete answer to respondent's contention is found in the language of People v. Valliere, 127 Cal. 65, 59 P. 295, as follows:

> "In addressing the jury, among other matters, the prosecuting officer said: 'This trunk was not searched for this theft in Chico, but for another theft that I know of to my own knowledge.' This statement was in the nature of testimony. It was the assertion of a damaging fact not only not proven, but in regard to matters which had been expressly ruled out. The misconduct was much more flagrant than that in People v. Bowers, 79 Cal. 415 [21 P. 752]. Indeed, among the numerous cases discussed in People v. Wells, 100 Cal. 459 [34 P. 1078], there is none worse. In my opinion, the examination was inexcusable, and the statements contained in the closing address were an outrage upon justice, which ought not to be allowed to pass. The court promptly rebuked the attorney, but that did not cure the injury. Rebukes do not seem to have any effect upon pros-

ecuting officers, and probably as little upon juries. The only way to secure fair trials is to set verdicts so procured aside."

And also in People v. Westcott (Cal. App.) 260 P. 901, wherein it is said:

> "The argument which we have quoted shows a persistent disregard by the district attorney of the directions and admonitions of the court, and an apparent intent so to impress the matter on the jury that they could not forget it, no matter what the instructions of the court might be. It manifests a complete departure from the spirit of fairness which should animate the conduct of that officer, and must be regarded as prejudicial misconduct. People v. Derwae, 155 Cal. 592, 102 P. 266; People v. Hail, 25 Cal. App. 342, 358, 143 P. 803; People v. Keko, 27 Cal. App. 351, 149 P. 1003; People v. Irby, 67 Cal. App. 520, 528, 227 P. 920; People v. Fleming, 166 Cal. 357, 381, 136 P. 291, Ann. Cas. 1915B, 881; People v. Tufts, 167 Cal. 266, 273, 139 P. 78; People v. Anthony, 185 Cal. 152, 196 P. 47. * * * In short, we are unable to determine whether appellant would or would not have been convicted had the testimony as to that declaration not been admitted and the argument of the district attorney thereon not been made. In such case section 4½ of article VI has no application to uphold the judgment. People v. MacPhee, 26 Cal. App. 218, 226, 146 P. 522; People v. Irby, 67 Cal. App. 520, 530, 227 P. 920; People v. Degnen, 70 Cal. App. 567–606, 234 P. 129; People v. Black, 73 Cal. App. 13, 38, 238 P. 374."

We have examined all of the authorities cited by the attorney general, and in none of them wherein the error was held either to have been cured or unprejudicial, do we find misconduct so repeated and persisted in as in the present case. We cannot fail to agree to the statement found in People v. Edgar, 34 Cal. App. 459, 167 P. 891, that where the misconduct "is so pronounced and pernicious that it is not in human nature to forget or disregard its prejudicial effect, then manifestly a mere admonition or any number of admonitions will not suffice to right the wrong done, and the only remedy remaining is to be found in a reversal of the judgment." Here the evidence is not of such a character that this court can say that the appellant would have been convicted had it not been for the argument of the prosecutor. In fact, when he added his testimony by way of argument in so persistent a fashion he must have had a tremendous effect upon the mind of the jury. And in our consideration of whether the provisions of section 4½ of article 6 of the Constitution may be invoked as a protecting mantle to cover up the shortcomings of the deputy district attorney, we advert to the language of our present Chief Justice while on the District Court of Appeal, in the case of People v. De Vries, 52 Cal. App. 705, 199 P. 867, as follows:

> "The records in appealed criminal cases disclose an increasing persistence on the part of prosecuting attorneys to go beyond the line of proper conduct in their arguments. So frequently is this being done, that while we disavow any imputation of willful misconduct in the instant case, we are becoming convinced that overzealous prosecutors sometimes do it intentionally, and rely on the appellate court to save a conviction by the application of section 4½ of article 6 of the Constitution. There are bounds beyond which the saving grace of that provision may not pass, and the appellate courts should not be called upon to spread it, like 'a mantle of sweet charity,' over intentional acts of misconduct. Frequent warnings in relation to the practice proving ineffectual reversals on appeal must be anticipated if right of defendants to a fair trial is to prevail."

And also in this same respect we cannot fail to observe that the deputy district attorney in his argument in the present case again passed beyond the bounds of legitimate argument, although it is not assigned as misconduct, in his implied indorsement of the righteousness of a father in taking the law into his own hands when he said:

> "*Were he in that beautiful southland where his counsel says he was nurtured and reared I do not believe, gentlemen and ladies, that this would be the kind of case that would be tried in court, but true to the tradition of the southland that has protected womanhood, I assume that if this case were in the southland from whence he came that the father of this girl would be on trial to-day for his life probably, protecting the honor of his daughter.*" (Italics ours.)

Altogether this case is such that the constitutional provision cannot save it from a reversal.

[2] Appellant complains of the admission in evidence of the substance of the complaint made by prosecutrix to her father, mother, and grandmother. In effect it was that appellant had "ruined her" and that "he did it." According to her testimony, these statements were made within a very few minutes after the alleged offense and when for the first time she was not afraid that if she gave an alarm "he might come after" her "again." A complete answer to this claim of appellant is found in the case of People v. Lopez, 33 Cal. App. 530, 165 P. 722, wherein it is determined upon the authority of People v. Wilmot, 139 Cal. 103, 72 P. 838, that the witness may tell what the nature or subject of her complaint was and "whether he phrased it as that she complained of a rape, or that she said, as he stated, that she had had sexual intercourse with the defendant, is not material." It is undoubtedly true that where the complaint made is not a part of the res gestæ, the witness may not relate a conversation detailing the offense said to have been committed, but here we find no such objectionable recital. It is therefore not necessary for us to determine whether the complaint was a part of the res gestæ, although made shortly after the al-

leged occurrence and when the witness says she was still laboring under its excitement.

[3] We have heretofore recited sufficient of the testimony concerning the offer said to have been made to settle with appellant without publicity for $5,000 to understand the nature of his objection to an instruction given by the court as follows:

> "You are instructed that the court has permitted the examination of witnesses and the introduction of evidence relative to a proposed settlement. In this connection, you are instructed that the testimony of the prosecutrix may be impeached by evidence of a conspiracy to extort money or property from the defendant, in which she is a coconspirator. She cannot be impeached upon the theory that a conspiracy existed to extort money or property from the defendant, by showing acts and conversations of others in which she had no part, unless it is proven that she authorized the same or the same was done by her authorized agent. In this same connection, you are instructed that this line of examination and the introduction of testimony in this respect was permitted for the sole purpose of impeaching the credibility of the testimony of the prosecutrix. A settlement, if there was any such settlement, or a proposal for such settlement, if there was any, is not of itself a defense to the crime charged, and even after hearing such evidence, if you believe beyond a reasonable doubt that the defendant has committed the crime charged against him, you should find the defendant guilty as charged, even though you may believe that there was a proposal to make a settlement with the defendant."

It is clear that the instruction would have been more accurate had the words O. T. Halley, Mrs. O. T. Halley, and Mrs. Emma Herndon been added thereto following the word prosecutrix, or had it been so framed as to state that the testimony was permitted for the sole purpose of impeachment, but not as constituting a defense to the crime charged. While in and of itself the failure to accurately word the instruction might not be sufficiently prejudicial to warrant a reversal, we call attention to its defect in order that on a retrial such care may be taken in its construction as to obviate an attack upon it

[4] Appellant urges that the verdict of the jury, which reads, "We the jury in the above-entitled action, find the defendant guilty of rape," is insufficient because it fails to specify the kind of rape, and as he says, "without making any recommendation as to the punishment in the event by their verdict they intended to find the defendant guilty of statutory rape." The information in this action charged the commission of rape and that it was accomplished without the consent of prosecutrix and "when her resistance was forcibly overcome by said defendant." The uncontradicted evidence shows that she was 21 years of age. In other words, there was but one offense of which the defendant could be found guilty. Under section 1151 of the Penal Code, which provides that a general verdict of guilty "imports a conviction of the offense charged in the indictment" and the authorities which declare that the form of the verdict is immaterial if the intention to convict of the crime charged is unmistakably expressed (People v. Tilley, 135 Cal. 61, 67 P. 42; People v. Mercado, 59 Cal. App. 74, 209 P. 1035; and People v. West, 73 Cal. 345, 14 P. 848), it is apparent that the verdict is sufficient in form and substance.

[5, 6] Appellant also assails the judgment because the judge of the trial court examined the prospective jurors and at the conclusion of his examination stated that in his opinion the examination for grounds upon which to base a challenge for cause was sufficient and asked counsel to proceed with the exercise of their peremptory challenges. Nowhere does it appear that counsel desired to ask a question not covered by the examination theretofore conducted, and nowhere does it appear that such a question would have been disallowed if counsel had made the request. Under these circumstances and on the authority of People v. Edenburg (Cal. App.) 263 P. 857, we cannot say that error was committed by the court in this regard. Counsel also complains, and the transcript discloses, that the questions by the trial judge were propounded to the prospective jurors collectively and not individually. The record also discloses that the questions were not so framed as to call for some physical manifestation upon the part of the individuals betokening affirmation or negation which might be translated by the reporter into the record. We have had occasion heretofore to doubt the wisdom of collectively examining prospective jurors (People v. Riordan, 79 Cal. App. 488, 250 P. 190; People v. Edenburg, supra), and especially is this true where the record is not so kept that we may be able, or counsel might have been able at the time of the trial, to ascertain the minds of those whom the court was questioning. We cannot say, however, from the state of the record, particularly in view of the silence of counsel and their apparent understanding and assent to the proceeding, that the defendant was denied a trial by a fair and impartial jury. So far as is manifest from the record, each and all of the twelve jurors were entirely satisfactory to the defendant. Indeed, counsel after exercising six peremptory challenges stated, "We pass the jury for cause." With these facts before us it does not appear that defendant was deprived of any substantial right in the questioning of prospective jurors. People v. Schafer, 161 Cal. 573, 119 P. 920, and People v. Craig, 196 Cal. 19, 235 P. 721.

[7] The last ground assigned by appellant relates solely to the motion for a new trial based upon the fact, as was made to appear by affidavits, that some time after the pronouncement of sentence the appellant was adjudged insane and committed to the Southern Cali-

fornia State Hospital for treatment, whence he was subsequently discharged as restored to sanity. Coupled with these averments, the affidavits set forth that the appellant conducted himself strangely during the course of the trial. It might possibly be that if the testimony made it positively clear to us that the defendant was not of sound mind at the time of the trial, we should be authorized to interfere with the sound discretion lodged in the trial court. It does not, however, make such impression upon us, and the fact that the trial judge had ample opportunity to observe his actions and demeanor during the course of the trial makes patent the reason why the discretion is lodged there rather than in the appellate tribunal.

Judgment and order reversed.

We concur: WORKS, P. J.; CRAIG, J.

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92 Cal. App. 270

CLAPP et ux. v. LORRAINE et al.★

CLAPP et al. v. CLAPP et al.

(Civ. 3524.)

District Court of Appeal, Third District, California. May 29, 1928.

Hearing Denied by Supreme Court July 26, 1928.

1. Husband and wife 🔑262(1)—Where property was conveyed to wife by instrument in writing, presumption is title vested in wife as her separate property (Civ. Code, § 164).

Where property was conveyed to wife by an instrument in writing, presumption is that title was thereby vested in her as her separate property, under Civ. Code, § 164.

2. Trusts 🔑44(2)—In action to quiet title, evidence supported finding that plaintiff bought property from mother outright, and did not hold property in trust.

In action to quiet title, evidence *held* to support finding that transaction between plaintiff and mother was an absolute sale to plaintiff, and not a transaction whereby plaintiff was to hold title to property in trust for benefit of himself and brothers, share and share alike.

3. Quieting title 🔑46—Whether plaintiff obtained deed from mother and brothers' consent to sale by mother through fraud were immaterial in suit between plaintiff and brothers while mother was still living (Civ. Code, § 700).

Whether plaintiff had obtained deed from mother, who was living at time of trial, through fraud and misrepresentation, and whether plaintiff's brothers were induced by fraud and misrepresentations to consent to sale of property by mother to plaintiff, as immaterial in suit between plaintiff and brothers to quiet title, since plaintiff's brothers, having mere expectancy as heirs, had no interest in subject-matter of suit, under Civ. Code, § 700, and their consent to sale by mother was unnecessary to its consummation and added nothing to its validity.

4. Appeal and error 🔑1071(1)—Where evidence supported finding that defendants had no interest in property involved, they cannot attack other findings.

Where evidence in action to quiet title supported finding that defendants had no interest in property involved in suit, they were not in position to attack the other findings.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action to quiet title by Ralph B. Clapp and wife against Grant M. Lorraine, Robert M. Clapp, Randall C. Clapp, and others, in which Robert M. Clapp and Randall C. Clapp filed cross-complaint. From the judgment, cross-complainants appeal. Affirmed.

James B. Ogg, of Alhambra, and Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for appellants.

Walter M. Campbell, of Los Angeles, for respondents.

FINCH, P. J. The plaintiffs were given judgment, in accordance with the prayer of their complaint, quieting their title to the real property described in the complaint, subject only to a lien in favor of defendant Cynthia B. Clapp for support and maintenance during the remainder of her life and a mortgage lien in her favor securing the payment to her of the plaintiff's promissory note. Robert M. Clapp and Randall C. Clapp, defendants and cross-complainants, have appealed from the judgment. The plaintiff Ralph B. Clapp, the cross-defendants Archibald W. Clapp and Albert A. Clapp, and the appellants are the sons of Cynthia B. Clapp, who is a widow. The property in suit was purchased in the year 1897 with community funds of Cynthia B. Clapp and her husband, the father of the other parties named, and was conveyed to Mrs. Clapp, in whom the record title thereafter stood until February 23, 1923, at which time she conveyed the same to plaintiff Ralph B. Clapp. The husband died in the year 1911. In their answer the appellants alleged that "Cynthia B. Clapp acquired and held title in said real property in trust for her five sons, * * * under the agreement with their deceased father that the title thereto would vest in said sons, share and share alike, upon her death," and that the conveyance from Cynthia B. Clapp to Ralph B. Clapp "was made with the verbal understanding and agreement between them" that the plaintiff "would hold the title thereto in trust for the benefit of said five sons, share and share alike." In their cross-complaint, appellants alleged that the property in suit was the community property of their parents at the time of their father's death, and that they each succeeded to and now own an undivided one-fifteenth thereof, and that their mother's said conveyance of February 23,

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★Hearing denied by Supreme Court.

1923, "was made upon the express understanding that the title to said property was being vested in Ralph B. Clapp, in trust for her support" and for her said five sons, "and that said Ralph B. Clapp would manage and control the same, and distribute the issues and profits thereof to said beneficiaries, and upon a sale of all or any part would distribute the proceeds to the beneficiaries." Appellants also alleged that Cynthia B. Clapp was induced to make the conveyance of February 23, 1923, and they to consent thereto, by certain false representations made by plaintiff Ralph B. Clapp.

In no sense did the appellants represent their mother in the action. She was duly served with summons, but failed to answer the complaint, and her default was entered. She appeared as a witness for the plaintiffs, and testified in their behalf.

[1] The property having been conveyed to her by an instrument in writing, the presumption is that the title was thereby vested in her as her separate property. Civ. Code, § 164. There is no evidence that she ever held the property in trust for her sons or that it was at any time the community property of herself and husband, and the court found against appellants on those issues. Unless, therefore, the conveyance of the property by Cynthia B. Clapp to Ralph was intended to create a trust, as alleged by the appellants, they have no interest therein or in the outcome of this action. The deed of conveyance is absolute in form. It is conceded, however, that the deed and two other writings are to be construed together as a single instrument. One of these writings is in the form of identical letters from Ralph to his four brothers. The other is in the form of an agreement, to which is attached a copy of the letters. Omitting dates and immaterial parts, they are as follows:

> "In accordance with my letter of February 14, 1923, to my brothers, as per copy attached hereto, regarding the purchase of Mother's place by me, I hereby agree to pay $21,000 for the place, under the terms stipulated, and to carry out the proposals in that letter. In the event of my death while Mother is still alive, Florence will carry out the provisions of this agreement. In accordance we have signed our names as follows: Ralph B. Clapp.
> "Florence H. Clapp."

> "I have a proposition to make which I believe will solve one of our problems. * * * The plan, therefore, that I believe will solve the prolem is for us (plaintiffs) to build on Mother's place and move there and be responsible for her care. We can do this by selling our own place which is now on the market. If we carry this out, we should want to buy Mother's place outright, pay off the mortgage, fix up her house for her, and put the grounds into presentable condition and keep the place as it should be. As to the price, * * * we will be willing to take it at $21,000. * * * providing you will all agree as to terms and conditions. As a first payment, will apply the $1,100 mentioned below which I have advanced. We will agree to build on the place just as soon as possible and to pay off or assume the mortgage, and to fix up Mother's house as soon as possible and to make it comfortable for her, and to immediately assume complete responsibility for her care and maintain her on the place as long as she is with us. It is to be understood that we would not pay interest, as such, to Mother but that our care of her would offset this as long as she lives and for a period of 5 years thereafter. At her passing on I would become indebted to her estate for $20,000, for which I would give a note secured by a mortgage on the place or other acceptable security, this note to bear interest in accordance with statement above, and to be for such time as would be mutually agreeable. It would, of course, be understood that we would not sell the place while Mother is alive and that she would have a home there for that time or as long as she desired. * * * We have talked this over very fully with Mother, and she has a copy of this letter to which she agrees, and she is anxious to have the plan carried out, but I don't want to go ahead with it unless it meets with the approval of all you."

[2] It is very clear that the foregoing writings do not create or prove a trust in favor of the appellants. It appears therefrom unequivocally that Ralph was "to buy Mother's place outright," and to pay "her estate" the unpaid part of the purchase price. Since the mother is still living, the appellants have no interest in "her estate," and may never succeed to any part thereof, because it is within her power to dispose of all her property, by deed or will, to others. The mere "expectancy of an heir apparent, is not to be deemed an interest of any kind." Civ. Code, § 700. Ralph testified that the transaction was "an outright sale of the property" to him. Cynthia B. Clapp, who was of the age of 81 years at the time of the trial, testified that she saw the letter referred to before Ralph sent it to her other sons, that she made the deed "according to the terms of that letter," and that she was "actually conveying the ownership to the property to Ralph" when she made the deed. As might well be expected from one of her age, some of Mrs. Clapp's testimony, given on cross-examination, is somewhat inconsistent with parts of her foregoing statements, but her testimony as a whole tends strongly to show that the transaction with Ralph was what the written evidence thereof indicates. Appellants rely upon the following statement contained in a letter from the mother to Robert, under date of February 17, 1923, as showing her intention in making the conveyance to Ralph:

> "I am writing to you all regarding a letter that will come to you from Ralph—and which I *fully approve* of—and I hope you and the other boys will look at it as I do—you will none of you lose a dollar by means of it—the place will—by being put in order and kept so—rise in value—and it is not to go out of the family—only as you all agree later on—and you will

share according to my will—just the same—and very much more to your advantage."

While some of the statements in the letter, considered alone, may tend to show that the mother intended to retain ownership of the property, there is nothing therein to show that she intended to create a trust in favor of her sons. The statement that Randall "will share according to my will" tends to show that it was not the mother's intention to give him any interest in the property during her lifetime, and her declaration that she fully approved of Ralph's letter, which contained the statement that he desired "to buy Mother's place outright," strongly tends to show that she understood the transaction to be what it purports to be on the face of the writings evidencing it. Transactions which have been reduced to writing are not to be lightly overthrown, and in this case the evidence abundantly supports the findings of the court to the effect that the transaction in question was an absolute sale, and that the appellants have no interest in the property or in the moneys due from Ralph to the mother on account of the selling price thereof.

Appellants offered in evidence a letter written by the mother in 1914 and her will executed in 1917. The court sustained the plaintiff's objections thereto. The parts of the letter relied on by appellants are as follows:

> "Some time ago I wrote a letter to be opened by you after my death, in which I tried to make everything plain as to what I wanted done about the property. * * * Ralph has the papers, and I leave it for you all to settle among yourselves—whatever is left after everything is square I wish divided equally among you. * * * I want you each to have the same."

The will contains the following:

> "I give, devise and bequeath all of my estate of which I shall die possessed of every kind and character unto my sons (naming all of them) share and share alike."

There is nothing in either writing inconsistent with the mother's action in selling the property to Ralph. At the trial she testified that it always had been and then was her desire that all of her sons share equally in whatever property she might own at the time of her death.

[3, 4] Appellants attempted to prove that Ralph obtained the deed from the mother through fraud and misrepresentation, and that the agreed price of the property was more than that stated by him. However important these issues would have been if tendered by the mother, they were wholly immaterial as between Ralph and the appellants; they not having shown that they had any interest in the subject-matter of the suit. It is immaterial in this action whether appellants were induced by fraud or misrepresentations to consent to the sale of the property by the mother to Ralph, because their consent to the sale was unnecessary to its consummation and added nothing to its validity. Objection is made to some of the findings. The findings are sufficient, and fully supported by the evidence, to the effect that the appellants have no interest in the property involved in the suit. Having no interest therein, they are not in a position to attack the other findings.

The judgment is affirmed.

We concur: PLUMMER, J.; BARTLETT, Justice pro tem.

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92 Cal. App. 176

MOUNTAIN v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.★

(Civ. 5927.)

District Court of Appeal, Second District, Division 1, California. May 23, 1928.

Hearing Denied by Supreme Court July 19, 1928.

Master and servant ⟹375(1)—Injury to employee while deviating from course in performing errand held not one "arising out of and in course of employment."

Where employee was sent in course of his employment to get a suitcase for employer, and after procuring suitcase deviated from course to place of delivery of suitcase by going in opposite direction to obtain cigarettes for himself and was injured on return and while at a point outside of any direct course from place suitcase was obtained to that of its intended destination, *held* that injury did not arise out of and in the course of employment, entitling employee to compensation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

Application for certiorari by J. M. Mountain against the Industrial Accident Commission of California and others to annul an order of the Commission denying petitioner compensation for injuries. Order affirmed.

Clyde C. Shoemaker, of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

Culver & Nourse and Alfred T. Hutchins, all of Los Angeles, for respondent Standard Acc. Ins. Co.

HOUSER, J. By this proceeding petitioner seeks the annulment of an order made by the respondent Industrial Accident Commission by which petitioner was denied compensation for an injury sustained by him, alleged to have arisen out of and in the course of his employment.

The evidence adduced at the hearing of the application for compensation in substance was that in the course of petitioner's employ-

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★Hearing denied by Supreme Court.

ment he was sent in an automobile on an errand of getting a suitcase for his employer; that after procuring the suitcase, instead of returning in a direct course to the appointed place of the delivery thereof, petitioner deviated from such course by going seven blocks in an opposite direction for the purpose of obtaining a package of cigarettes for his own satisfaction and enjoyment. On his way back from such deviation, but nevertheless at a point at least four blocks outside of any direct or reasonable course from the place the suitcase was obtained, to the place of its intended destination, the accident occurred for which petitioner claimed compensation.

Much has been written and great learning displayed by various courts and text-writers concerning the legal questions affecting a situation such as is presented in the instant matter. So exhaustively has the subject been treated it is thought that nothing that this court might contribute would either add to the net result of such discussions, or advance or retard the development of the legal principles involved. While authorities from other jurisdictions are not entirely harmonious one with the other, so far as this state is concerned, the correctness of the ruling by the respondent commission is attested by the following authorities: Employers' Liability Assurance Corp. v. Industrial Acc. Com'n, 182 Cal. 612, 187 P. 42; California C. I. Exchange v. Industrial Acc. Com'n, 190 Cal. 433, 213 P. 257; Balboa Amusement P. Co. v. Industrial Acc. Com'n, 35 Cal. App. 793, 171 P. 108; Continental Casualty Co. v. Industrial Acc. Com'n, 47 Cal. App. 387, 190 P. 849; Fidelity & Casualty Co. v. Industrial Acc. Com'n, 48 Cal. App. 572, 192 P. 166.

The order of the respondent commission is affirmed.

We concur: CONREY, P. J.; YORK, J.

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92 Cal. App. 258

SCOTT et ux. v. LOS ANGELES MOUNTAIN PARK CO. (Civ. 3533.)

District Court of Appeal, Third District, California. May 29, 1928.

1. Appeal and error 🔑1078(1)—Sufficiency of identification of property in agreement to convey or complaint in action for breach thereof, need not be considered, where not argued on appeal (Civ. Code, § 1624).

Whether memorandum of agreement to convey land and allegations of complaint in action for breach thereof are sufficient to comply with Civ. Code, § 1624, need not be considered, where want of identification of property, either in agreement or complaint, is not argued on appeal.

2. Corporations 🔑426(6)—Agent's signing of corporation's name to memorandum of agreement to convey land held not ratified, where conditions and restrictions referred to in directors' resolution authorizing sale were not agreed on.

Where conditions and restrictions, referred to in corporation directors' resolution authorizing president and secretary to consummate sale of land, subject to such conditions and restrictions as they deem necessary, were not agreed upon, there was no unconditional ratification of agent's act in signing corporation's name to memorandum of agreement relied on by plaintiffs in action for breach of contract.

3. Vendor and purchaser 🔑17—Buyers, not agreeing to conditions to be inserted in corporation's deed according to directors' resolution authorizing sale, were not entitled to specific performance, and hence could not recover damages for breach of contract.

As corporate seller would have to show, in suit against buyers for specific performance, that conditions and restrictions, to be inserted in instrument conveying land according to directors' resolution authorizing certain officers to consummate sale, were agreed to, buyers, not having agreed thereto, were not entitled to specific performance, and hence could not maintain action for damages for breach of contract.

4. Evidence 🔑317(14)—Plaintiff's testimony as to third person's identification of landowner and his agent held inadmissible as hearsay in action against corporation for breach of contract signed by such agent in its name.

In action for breach of contract to convey land, plaintiff's testimony as to another's statement that certain person owned land and that one signing contract in name of defendant corporation would be man to see, because he had charge of such owner's business, *held* properly stricken as hearsay.

5. Corporations 🔑432(6)—Plaintiff's testimony as to representations of person signing contract as defendant corporation's agent held inadmissible to show his authority.

In action for breach of contract to convey land, plaintiff's testimony as to representations made by person signing contract as defendant corporation's agent with reference to his connection with defendant and property conveyed *held* inadmissible to show his authority to act as defendant's agent.

6. Corporations 🔑432(12)—That one signing contract in corporation's name was director does not establish his agency.

That person signing contract to convey land in name of corporation sued for breach thereof was a director of such corporation does not establish his agency.

7. Corporations 🔑298(1)—Power to manage corporation's affairs is vested in directors as board, not as individuals (Civ. Code, § 305).

The power and authority to manage the affairs of a corporation is vested in the board of directors as a board, not as individual members, under Civ. Code, § 305.

8. Vendor and purchaser ⚿17—Directors' resolution, authorizing corporation officers to sell land subject to conditions and restrictions deemed necessary, did not constitute acceptance of offer (Civ. Code, § 1585).

Resolution of board of directors that corporation accept offer for land owned by it, and that president and secretary be authorized to consummate sale, fixing such conditions and restrictions as they deem necessary, did not constitute an acceptance, under Civ. Code, § 1585; not being absolute.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action by B. W. Scott and wife against the Los Angeles Mountain Park Company. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

A. J. Bledsoe, of Los Angeles, for appellants.

Overton, Lyman & Plumb and Irving H. Prince, all of Los Angeles, for respondent.

PLUMMER, J. Plaintiffs began this action to recover from the defendant the sum of $96,000 as damages alleged to have been suffered by the plaintiffs by reason of the failure of the defendant to convey a certain tract of land in the county of Los Angeles, embracing about 2½ acres, being a part of a larger tract of land alleged to belong to the defendant, situate northwest of Santa Monica, in said county. At the conclusion of the plaintiff's case, the defendant's motion for a nonsuit was granted and judgment thereon entered. From this judgment the plaintiffs appeal.

The complaint alleges that during the times mentioned therein the defendant was the owner in fee of a large tract of land consisting of several hundred acres in the county of Los Angeles, and that on or about the 7th day of January, 1925, the defendant entered into an agreement with the plaintiffs whereby the defendant agreed to sell to the plaintiffs, and the plaintiffs agreed to buy from the defendant, a part of said tract of land, consisting of 2½ acres, more or less, for the sum of $12,000 per acre, one-quarter in cash and the balance due in one, two, and three year equal payments; the unpaid portion of the purchase price bearing interest at the rate of 7 per cent. per annum. The complaint then sets forth at length a purported agreement between the defendant and the plaintiffs concerning the execution of escrow papers, the placing of the escrow papers with the Title Insurance & Trust Company of Los Angeles, and then alleges that the agreement for the sale of the premises referred to was executed and delivered on the 17th day of January, 1925, setting forth the memorandum of agreement, which is as follows:

"Receipt for Deposit on Sale of Property.

"Los Angeles, California, January 17, 1925.

"Received of B. W. Scott one thousand dollars ($1,000.00), as deposit out of escrow on purchase of approximately two and one-half (2½) acres of land fronting on state highway and Marquez road northwest of Santa Monica, as per sketch showing approximate east and west lines. North line extends to the south side of Marquez road, and south line of property extends to state highway fronting Pacific Ocean.

"It is understood and agreed that the Beverly boulevard highway is proposed to go through the south side of this property, and, if the Beverly boulevard is constructed as proposed and shown in sketch, the purchaser of this tract is to contribute this right of way without cost to the city or county.

"Price and terms: Twelve thousand dollars ($12,000.00) per acre for the approximate acreage of two and one-half (2½) acres.

"Option payments: Cash, or one-fourth cash and the balance one, two, and three years, equal payment, at seven per cent. (7%) interest from date.

"Los Angeles Mountain Park Company,
"By H. A. Lloyd, Agent.
"B. W. Scott.
"L. Vivia Scott."

[1, 2] It is further set forth in the complaint that the plaintiffs offered to perform all their part of the agreement in accordance with the terms of the memorandum thereof just set forth herein; that the defendant has refused and neglected to make conveyance of the said 2½ acres of land; that the plaintiffs have been damaged by reason thereof in the sum of $96,000. To this complaint the defendant interposed a general demurrer that it did not state a cause of action, and also that the complaint was ambiguous and uncertain in certain particulars. The demurrer was overruled, and the defendant answered denying that the corporation executed the memorandum of agreement set forth in plaintiffs' complaint. While it would appear that neither the memorandum of agreement with the sketch attached, nor the allegations of the complaint are sufficient to comply with the provisions of section 1624 of the Civil Code, under the decisions of the Supreme Court in the cases of Craig v. Zelian, 137 Cal. 105, 69 P. 853, Eaton v. Wilkins, 163 Cal. 742, 127 P. 71, Proulx v. Sacramento Land Co., 19 Cal. App. 529, 126 P. 509, and other cases having to do with the same questions, but, as the want of identification of the property, either in the agreement or in the complaint is not argued upon this appeal, we pass this question by. The memorandum of agreement upon which the plaintiffs rely was signed in the following manner: "Los Angeles Mountain Park Company, by H. A. Lloyd, Agent"—and the defense was in the court below, and is here, that there is no showing of agency on the part of H. A. Lloyd, and no showing of any ratification by and on the part of the de-

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

fendant of any action taken in relation to said 2½ acres of land by H. A. Lloyd, or of anything done by him.

A careful reading of the transcript fails to disclose any testimony showing any act on the part of the corporation appointing H. A. Lloyd its agent or authorizing him to enter into any contracts or agreements by or on behalf of the defendant corporation. The minutes of the corporation of a special meeting of its board of directors, under date of January 26, 1925, contains the following:

> "Resolved that the Los Angeles Mountain Park Company accept the offer of $12,000.00 an acre for approximately 2½ acres of land situated between Marquez avenue and the Malibu state highway in parcel 7, subject, however, to the location of Beverly boulevard at that point.
>
> "Resolved, further, that the president and secretary be and are hereby authorized to consummate the sale fixing such conditions and restrictions as they deem necessary, and to execute in the name of this corporation the necessary papers.
>
> "There being no further business, the meeting was adjourned at 2:30 p. m.
>
> "Respectfully submitted,
>
> "Claude A. Wayne, Secretary."

[3] The record shows that the $1,000 mentioned in the memorandum of agreement was delivered by the plaintiffs to H. A. Lloyd in the form of two checks, one for $100 and one for $900; that these checks were never delivered by him to the corporation, but were held by him for a considerable period of time, and, after the date of the institution of this suit, redelivered to the plaintiffs. The record fails to show, in such a form as can be considered herein, the conditions and restrictions which were, or may have been considered necessary by the president and secretary of the corporation, the conditions and restrictions appearing in the record only by way of statement of counsel to the effect that they were intended to prohibit boring for oil and other like explorations upon the premises referred to, and that an offer was made by the defendant to convey by a deed containing such conditions and restrictions, and acceptance thereof refused by the appellants. The only point which we can consider here is the fact that, whatever the conditions and restrictions may have been that were to be written into the instrument of conveyance do not appear to have been agreed upon between the parties or accepted by the plaintiffs herein, and to that extent the record fails to show that there ever was a meeting of the minds of the respective parties referred to relative to the sale and purchase of the 2½ acres of land. In other words, the alleged ratification was subject to conditions and restrictions which do not appear to have been agreed upon, and to that extent there never was an unconditional ratification by the defendant of the act of H. A. Lloyd in signing the name of the corporation to the memorandum of agreement relied upon by the plaintiffs. To show that this is true we have only to reverse the situation. In a suit for specific performance by the corporation against the plaintiffs, it would have been necessary to show that the conditions and restrictions to be contained or inserted in the instrument of conveyance had been agreed to by the plaintiffs. Thus, if an enforcement could not be had by the defendant against the plaintiffs, it results that a situation is presented where specific performance or enforcement could not be had by the plaintiffs against the defendant. If this is true, no action for damages can be maintained.

[4, 5] In so far as the complaint contains allegations relative to an agreement between the plaintiffs and the defendant acting through H. A. Lloyd for the signing of escrow papers, it is sufficient to state that there is not one word of testimony in the record showing that H. A. Lloyd was ever authorized to act by and on behalf of the defendant in negotiating or consummating any such agreements, or was at any time the authorized agent of the defendant. In this particular we will consider the appellants' contention that the court erred in excluding certain testimony. While the plaintiff Mrs. Scott was on the witness stand, she was asked as to a conversation had with a Mr. Myers relative to land situate along the ocean shore. The question asked of the witness was: "Did he tell you who he thought owned it? A. He said that Mr. Bell owned it. Mr. Lloyd would be the man that he would have to see because he had charge of Mr. Bell's business; that he was his confidential man." Upon motion of counsel for the defendant, this answer was stricken out as hearsay. The testimony called for was so clearly hearsay that no citation of authorities is necessary to show the correctness of the ruling of the trial court. While the same witness was on the stand, she was asked the following question, intended to elicit a statement of representations made to her by Mr. H. A. Lloyd: "Q. What representations did he make to you with reference to his connection with the defendant in this case?" To which question the respondent objected that it was incompetent, irrelevant, and immaterial, and that the statements made by an alleged agent are not admissible for the purpose of proving his authority. Mrs. Scott was further asked the following question: "Q. What representations (referring to Mr. Lloyd) did he make to you, if any, about the property described in your complaint?" To which the court also sustained the defendant's objection. The court further sustained an objection to a question asked Mrs. Scott as to whether the defendant Lloyd was a director of the defendant company, but afterwards the secretary of the defendant company was permitted to testify that H. A. Lloyd was a director of the company as shown by the records thereof.

The court also sustained an objection to the admission in evidence of a by-law of the corporation which reads as follows:

> "The directors shall have power to conduct, manage, and control all affairs and business of the corporation and to make rules and regulations not inconsistent with these by-laws for the guidance of the affairs and management of the affairs of the corporation."

In support of their contention that the testimony referred to and sought to be elicited was admissible to prove the agency of H. A. Lloyd, the appellants cite the rule stated in 2 Corpus Juris, 933, which reads as follows:

> "The rule that the declarations of an agent are as against his principal inadmissible to prove the fact of his agency does not apply to his testimony as a witness on the trial in which such fact is in issue; and consequently the testimony of the agent, unless he is disqualified for some other reason, is competent to establish the fact of his agency, and the existence of facts from which the agency may be inferred,"—citing, also, Raftis v. McCloud River Lumber Co., 35 Cal. App. 397, 170 P. 176.

[6, 7] That the witness Lloyd might have been placed upon the witness stand and asked as to all the facts tending to show his authorization to act as an agent for the defendant is really what is supported by the rule just stated, and not what he may have told somebody in relation thereto. This action being between the plaintiffs and the defendant, the witness Lloyd could have testified directly as to his agency by stating whatever there was, if anything, tending to show his appointment or authorization to act as agent, but to put a witness on the stand to testify to what she had heard Mr. Lloyd state or what representations he had made was an entirely different matter and not in any wise supported by the authorities cited, but absolutely contrary thereto. As a matter of fact, the record shows that Mr. Lloyd was placed upon the witness stand by the appellant, and our attention has not been called to any testimony given by him tending to show his agency for the defendant. The fact that H. A. Lloyd was a director of the corporation does not establish agency. The case of Maynard v. F. F. Insurance Co., 34 Cal. 48, 91 Am. Dec. 672, upon which the appellant relies in support of its contention that proof that one is a director tends to show agency, and from the opinion in which case a considerable excerpt is taken, does not support the appellants' contention. What is there said has to do only with the powers of the board of directors, not individual directors. The rule is that the power and authority to manage the affairs of the corporation is vested in the board of directors as a board and not as individual members. Section 305, Civ. Code. We may also cite Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607, and Alta Silver Mining Co. v. Alta Placer Mining Co., 78 Cal. 629, 21 P. 373; also, Citizens' Securities Co. v. Hammel, 14 Cal. App. 564, 112 P. 731. To the same effect is the case of Hotaling v. Hotaling, 193 Cal. 368, 224 P. 455. In line with the cases which we have cited is the case also of Matheron v. Ramina Corp., 49 Cal. App. 690, 194 P. 86, dealing with the authority of officers of a corporation to bind the corporation by contract for the purchase of real property.

[8] That the resolution relied upon by the appellants did not constitute an acceptance, not being absolute, appears by section 1585 of the Civil Code, which reads:

> "*Acceptance Must be Absolute.* An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will conclude the person accepting. A qualified acceptance is a new proposal."

See Four Oil Co. v. United Oil Producers, 145 Cal. 623, 79 P. 366, 68 L. R. A. 226; Niles v. Hancock, 140 Cal. 157, 73 P. 840, and cases cited on page 161 (73 P. 841, 842). Other authorities might be cited, but these state the accepted rule.

We need not consider the appellants' argument relative to their offer to comply with the memorandum of agreement, for the reason that, as we have stated, the record is silent as to the conditions and restrictions to be contained in the deed of conveyance and of any acceptance thereof. Nor do we need to consider the appellants' tender of proof to the trial court that they had been offered a sum of money for the 2½ acres of land in excess of the agreed purchase price. Neither do we need to consider the question of estoppel, for the reason that the testimony in the records shows that the two checks representing the $1,000 were never accepted by the defendant.

The judgment is affirmed.

We concur: FINCH, P. J.; BARTLETT, Justice pro tem.

92 Cal. App. 44

HUFF v. COMPTON CITY GRAMMAR SCHOOL DIST. et al. (Civ. 3521.)

District Court of Appeal, Third District, California. May 19, 1928.

1. Schools and school districts 🔑89—Incinerator in school yard held "dangerous or defective condition," within statute prescribing liability of school district for injuries (St. 1923, p. 675, § 2).

Incinerator in school yard *held* "dangerous or defective condition of * * * grounds, works, and property," within St. 1923, p. 675, § 2, relative to liability of school districts for injuries, notwithstanding that it did not contain fire at all times, where it was used daily for purpose of burning rubbish.

2. Schools and school districts 🔑89—Burning of rubbish in schoolyard while children were playing near by constituted negligence.

Burning of rubbish in incinerator in schoolyard while little children were playing around it *held* to constitute negligence.

3. Schools and school districts 🔑121—In action for schoolgirl's injuries, evidence held to show that school trustees knew of maintenance of incinerator in schoolyard (Pol. Code, § 1609).

In action for schoolgirl's injuries from burns due to incinerator in schoolyard, evidence *held* to show that trustees and district superintendent of school district, employed under Pol. Code, § 1609, knew of maintenance of incinerator in schoolyard in manner described in petition.

4. Pleading 🔑253—In action for schoolgirl's injuries, amendment alleging that incinerator was dangerous agency maintained by defendants, who had knowledge of its maintenance and dangerous character, held admitted by failure to answer amendment.

In action for injuries to schoolgirl from burns caused by incinerator in schoolyard, in which defendants failed to answer amendment to complaint alleging negligent maintenance of dangerous agency of which defendants had knowledge, allegations that incinerator was maintained by defendants, that it was dangerous agency, and that defendants had knowledge of maintenance and dangerous character *held* admitted by pleadings.

5. Negligence 🔑85(2)—In determining contributory negligence of child, jury must consider its age and inexperience.

In determining question of contributory negligence in action for schoolgirl's injuries from burns from incinerator in schoolyard, jury must consider age and inexperience of plaintiff.

6. Schools and school districts 🔑122—Contributory negligence of schoolgirl receiving burns from incinerator in schoolyard held for jury.

In action for injuries to schoolgirl from burns due to incinerator in schoolyard, question whether plaintiff was guilty of contributory negligence *held* for jury.

7. Trial 🔑296(3)—In schoolgirl's action for injuries, instruction authorizing recovery for isolated act of negligence by district's employee held not prejudicial, in view of another instruction, pleadings, and proof (St. 1923, p. 675, § 2).

In action for injuries to schoolgirl receiving burns from incinerator in schoolyard, instruction authorizing recovery for injuries caused by isolated act of negligence by employee of district *held* not prejudicial, in view of another instruction substantially in language of St. 1923, p. 675, § 2, and fact that complaint was based on maintenance of dangerous condition which was admitted by pleadings and proved without contradiction.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action by Ruth Huff, a minor, by John Huff and wife, as guardians ad litem, against the Compton City Grammar School District and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Everett W. Mattoon, Co. Counsel, and J. A. Tucker, Deputy Co. Counsel, both of Los Angeles, for appellants.

Joseph Scott, A. G. Ritter, and Leo B. Ward, all of Los Angeles, for respondent.

FINCH, P. J. The plaintiff was given judgment against the defendant district for damages resulting from serious burns alleged to have been caused by the negligence of the defendants. The school district has appealed from the judgment.

The evidence shows that upon the school grounds, and about 20 feet from the steps leading into a lunch shed, was located what is termed by the parties an "incinerator," in which "waste papers and trash accumulated on the grounds were disposed of." This incinerator was in the form of an ordinary garbage can, "from 30 to 36 inches high." There was a lid over the top and the sides were perforated with numerous round holes about the size of the average index finger. The can was located on a mound of ashes and rubbish about 6 to 8 inches in height and about "6 feet across." It was in a portion of the grounds frequented by the school children. "The children had to go by there when they went to the playground. They passed there as they came out from the buildings." "There were no protecting mechanical arrangements around the incinerator in any way." The school grounds were about 700 by 600 feet in area, upon which there were two school buildings and "some other buildings." The grounds were all "used as a playground by the children except what was covered by the buildings." At about 1:15 o'clock in the afternoon of the day of the accident the janitor "filled the incinerator about two-thirds full" with lunch bags and papers and set them on fire. He remained there for about 5 minutes "until the flames disappeared." There were "smouldering pieces of paper in the incinerator" when he left and "smoke was coming out." At 3 o'clock that afternoon the plaintiff, then 9 years of age, and another girl of about the same age "came out at recess * * * to play hopscotch." The latter testified:

> "We made a hopscotch, and then we were going to start to play. Ruth was first, and she wanted to get her glass. She went to find one. She went to the incinerator. She went up to pick up a glass. When she stooped over, her dress caught fire. Her back was to the incinerator. * * * You could see fire in it. * * *
>
> "Q. Was it coming out of those little holes? A. Yes."

There is testimony that the location of the incinerator had not been changed for at least 18 months prior to the accident. The janitor testified that:

> He had been accustomed to burn, "every day, in the same incinerator, approximately the same amount of trash of the same character as that trash was. It took about one-half hour to burn the trash up so that there were no flames. * * * It would not consume the entire amount—it would leave a kind of charred coals in the center, but the loose paper and everything would be burned out so that there would be flames breaking through. Sometimes the charred debris or refuse would remain three or four hours—sometimes remained all night, depending upon the nature of the stuff that was put in there."

Section 2 of chapter 328 of the Statutes of 1923 (Stats. 1923, p. 675) reads as follows:

> "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

[1, 2] Appellant contends that the incinerator was not dangerous in itself, but dangerous only when it contained fire and was left unguarded, and that, therefore, the evidence does not show a "dangerous or defective condition of * * * grounds, works, and property" of the defendant. But the evidence shows that the incinerator was maintained for the sole purpose of burning rubbish therein, and that it had been daily used for that purpose for many months. The defendants maintained the fire in the incinerator as well as the incinerator itself. If fires had been kept constantly burning therein, no one would contend that the district could escape liability on the ground that the incinerator would not be dangerous without fire therein. The fact that fire was maintained therein only part of the time can make no difference as to liability. It was necessary for the children to pass the incinerator on their way from the school building to the playground. It would be a very narrow construction of the statute to hold that the case made by the plaintiff does not come within its terms. It needs no argument to show that the burning of rubbish in the incinerator while little children were playing around it constituted negligence.

[3, 4] Appellant contends that the evidence does not show that the trustees knew of the maintenance of the incinerator in the manner described. The evidence shows that the district superintendent of the defendant was a "person having authority to remedy such condition," and that he "had knowledge * * * of the defective or dangerous condition, * * * and failed or neglected, for a reasonable time after acquiring such knowledge, * * * to remedy such condition." He was called as a witness by defendants, and testified:

> "My duties were * * * to give the teachers and janitors instructions as seemed necessary. * * * My duties as regards the school buildings and school grounds, in so far as they were to be kept clean and in repair, was that I was to report those things to the trustees and see that the school buildings and school grounds were kept in a clean, sanitary, and wholesome condition. I was to a certain extent responsible in a general way for what you might call the condition of the grounds in so far as an employee is responsible to his employer for the condition of the building that he might be superintendent of. I followed whatever instructions the trustees gave regarding the building and grounds, and, when they did not give instructions, I was supposed to use my own discretion. * * * I determined upon what portion of the school grounds the incinerator should be located. * * * There were at that time two distinct school buildings on the property. It was not my duty to act as principal as well as superintendent. I was superintendent of both schools and had a principal in each one of those buildings."

The trustees of the district and the district superintendent are named as defendants. Section 1609 of the Political Code provides that boards of trustees "may employ a district superintendent for one or more schools employing eight teachers or more under their control." Paragraph III of the complaint as originally filed alleged that on or about the 13th day of March, 1924, "through the negligence and carelessness of the agents and employees of said defendants herein, an incinerator situated and located on the playground of said Compton City grammar school was so negligently and unlawfully attended and operated by the employees of said defendants that a fire was permitted to be burning in said incinerator contrary to section 152 of the ordinances of the city of Compton; * * * that as a direct and proximate result of the negligent and unlawful operation of said incinerator and while said incinerator was unattended and while the plaintiff herein, Ruth Huff, was playing upon the school grounds, fire shot out from said incinerator," causing the alleged injuries. The defendants' answer to said paragraph III of the complaint admits the location of the incinerator on the school grounds and denies, on information and belief, "that a fire was burning in said incinerator due to the negligence and/or carelessness of the agents and/or employees of said defendants," or "that any injuries plaintiff may have received were a direct and/or proximate and/or any result of the alleged negligent and/or unlawful and/or any operation of said incinerator by the agents and/or employees of the defendants herein, or any of them." Nearly three months before the trial the plaintiff, by leave of the court, served and filed an amendment to the complaint, by which amendment a new paragraph was substituted for the original paragraph III thereof. The amendment alleged:

> "That at said time and place said defendants, their servants, agents, and employees, were negligently, recklessly and carelessly maintaining and allowing to be maintained under the direction and control of said defendants, and with the knowledge of said defendants, an incinerator for the burning of rubbish, papers, and trash, said incinerator being situated and located on the playground of said Compton City grammar school where the children attending said grammar school would come in contact with said incinerator; that said incinerator was at all times a dangerous agency and was so known to said defendants, but that said defendants nevertheless maintained, constructed, and allowed to be maintained and constructed said dangerous agency and said incinerator on said school grounds; that said incinerator did not have any shield or guard around the same to prevent persons from coming in contact therewith, all of which was to the knowledge of said defendants; that at said time and place said defendants, their servants, agents, and employees, so negligently, carelessly, and unlawfully operated and attended said incinerator that they allowed and caused rubbish, trash, and papers to be burned in said incinerator at said time and place, so that the children present on said playgrounds could come in contact with said incinerator, and so that said incinerator became so hot as to be capable of inflicting burns upon any one coming in contact therewith, and so that fire shot forth from said incinerator and the material being burned therein, and so that said incinerator thereby became a dangerous agency and instrumentality, all to the knowledge of said defendants; that at said time and place, and as a direct and proximate result of the negligent, unlawful, careless, and reckless maintenance, construction, and operation of said incinerator, and the failure on the part of said defendants to keep the same properly guarded by shields or by an attendant, said plaintiff, Ruth Huff, while playing upon said school grounds, came in contact with said incinerator and with the fire issuing therefrom while said incinerator was burning, and, as a direct and proximate result of said negligence, carelessness, and recklessness on the part of said defendants, received the burns herein complained of; that at said times herein mentioned said defendants had knowledge and notice of the maintenance and existence of said incinerator, and of the negligent, unlawful, reckless, and careless operation and maintenance of said incinerator by the servants, agents, and employees of said defendants, and of the fact that said incinerator was not guarded by any shields to prevent injury to the children who might be playing near by, and was not attended by any employee to prevent the children from coming in contact therewith while said fire was burning, and had knowledge of the fact that said incinerator was being used during the hours when children were on said playgrounds and might come in contact therewith."

The defendants failed to answer this amendment to the complaint. The complaint as originally filed counted on the negligent acts of the agents and employees of the defendants in the operation of the incinerator, while the amendment alleges the negligent maintenance of a dangerous agency or condition on the school grounds, of which the defendants had knowledge. The allegations, therefore, that the incinerator was maintained by the defendants, that it was a dangerous agency, and that the defendants had knowledge of its maintenance and dangerous character, stand admitted by the pleadings. The dangerous character of the situation was such as to demand its immediate remedy. Both the board of trustees and the district superintendent had authority to remedy the condition.

[5, 6] Appellant contends that the plaintiff was guilty of contributory negligence. She testified, on cross-examination:

> "I saw the incinerator there before. It was there all the time. I did not see any fire in it the day I went up there. I was not looking for fire. I don't know whether I looked at the incinerator or not. My mother and father had told me to keep away from fire. * * * I was not supposed to go near the incinerator. I never went to the incinerator. I went over to the ashes about 3 feet away from the incinerator."

Plaintiff's teacher gave her class instruction "about safety first rules * * * about three times a week." She had warned the class, including the plaintiff, three or four times prior to the day of the accident, "of the danger of playing near the incinerator." In determining the question of contributory negligence, it was the duty of the jury to take into consideration the age and inexperience of the plaintiff. Whether the plaintiff was guilty of contributory negligence, under the circumstances disclosed by the evidence, was clearly a question of fact for the jury.

[7] The court gave certain instructions which, standing alone, would authorize a verdict in favor of the plaintiff for injuries caused by a mere isolated act of negligence by an employee of the district, even though such act had no relation to any dangerous or defective condition maintained by the district. The court also instructed the jury, at the request of the defendants, substantially in the language of said section 2 of the statute. The complaint, as amended, is based on the maintenance of the dangerous condition in the manner stated, and not on a mere act of negligence of an employee. Such maintenance was not only admitted by the pleadings, but proved without contradiction. The evidence shows without conflict that the district superintendent at all times had knowledge thereof, and the pleadings admit that all the defendants had such knowledge. Under such circumstances, it does not appear that the district could have been prejudiced by the instructions. In fact, it appears, as a matter of law, from the allegations of the complaint which are not denied and the uncontradicted evidence given at the trial, that the appellant was maintaining a dangerous condition upon its school grounds, with the knowledge of its trustees and its superintendent, and that they had authority to remedy the condition. The evidence also shows without conflict that the plaintiff's clothing was ignited by coming in contact with the fire in the incinerator, and the jury has found, on sufficient evidence, against the plea of contributory negligence. In that state of the record it is clear that the alleged error in the instructions has not resulted in a miscarriage of justice.

Respondent contends that the plaintiff was entitled to judgment, without showing knowledge of the dangerous condition on the part of the trustees or superintendent, under the provisions of section 1623 of the Political Code. That section provides:

> "Boards of school trustees, * * * are liable as such in the name of the district * * * for any judgment against the district on account of injury to any pupil arising because of the negligence of the district or its officers or employees."

Appellant contends that this section does not authorize an action for damages by an injured pupil on account of the negligence of an employee, but only creates a liability "for any judgment against the district" recovered pursuant to the provisions of the aforesaid statute of 1923. In view of the conclusion already reached and stated, it is unnecessary to consider whether section 1623 is applicable to the facts of this case.

The judgment is affirmed.

We concur: BARTLETT, Justice pro tem.; PLUMMER, J.

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92 Cal. App. 242

DALY v. OTIS et al., Pension Board, etc.

(Civ. 5909.)

District Court of Appeal, First District, Division 2, California. May 29, 1928.

1. Appeal and error 🔑714(5)—Only questions of fact quoted from transcripts on file may be presented in briefs.

No question of fact may be presented to courts of appeal in the briefs except such matters as may be quoted from the transcripts on file.

2. Municipal corporations 🔑187—Where only cause appearing for discharge was absence without leave, policeman was entitled to pension which ordinance denied on conviction for felony or notorious or consecutive insubordination or neglect (Alameda City Charter, art. 7, §§ 8, 10).

Where only offense appearing of record as cause for policeman's discharge was that he was absent without leave, right to pension was not forfeited by discharge, in view of Alameda City Charter (St. 1917, p. 1752), art. 7, §§ 8, 10, under city pension ordinance providing that removal of policeman who had served over ten years should not affect right to pension, if for any other cause than "conviction of felony, notorious or consecutive insubordination or neglect of duty, or in case of voluntary or involuntary resignation."

Appeal from Superior Court, Alameda County; S. L. Strother, Judge.

Action for a writ of mandamus by George A. Daly against Frank Otis and others, as members of the Pension Board of the Police and Fire Departments of the City of Alameda. Judgment for defendants, and plaintiff appeals. Reversed.

L. R. Weinmann, of Alameda, for appellant.

Wm. J. Locke, City Atty., of Alameda, for respondents.

STURTEVANT, J. The plaintiff commenced an action against the defendants to obtain a writ of mandamus commanding the defendants to draw a warrant in favor of the plaintiff in payment of an alleged pension. The defendants answered, and a trial was had before the court sitting without a jury. The trial court caused a judgment to be entered in favor of the defendants, and the plaintiff has appealed. He has brought up what purports to be the judgment roll, but it contains no findings.

[1, 2] The city of Alameda is governed under a freeholders' charter. Stats. 1917, p. 1752. That charter created the office of city manager. The city manager has the power to appoint a chief of police and subordinate police officers, to make rules and regulations for the government of the police department, and to remove by dismissal officers from the police department. Article 7, § 8. It is pro-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

vided in section 10 of the same article as follows:

> "Any charge brought by the city manager against a member of the police department or fire department who has been in the service of the city for five years at the time of the taking effect of this charter, which charge, if sustained, would warrant dismissal, shall be heard and determined by a board to be known as the police and fire board. Said board shall consist of the mayor, the police judge and the city attorney. A majority vote shall control. Any charge involving a penalty less than dismissal shall be determined by the city manager."

It is not required by the provisions of any statute, ordinance, or rule, properly before us, that any of the proceedings regarding a charge be reduced to writing, nor that any records be made thereon. By an initiative measure, a pension ordinance was adopted March 21, 1925. The plaintiff entered the police department November 10, 1911, and continued to act until November 9, 1925. From anything contained in the transcript it does not appear whether the city manager had promulgated any rules. Under the settled law of this state, no question of fact may be presented to courts of appeal in the briefs of counsel except such matters as may be quoted from the transcripts on file. Johnston v. Callahan, 146 Cal. 212, 214, 79 P. 870; Morris v. Iden, 23 Cal. App. 388, 392, 138 P. 120. The plaintiff frankly admits that he was legally dismissed; but he contends that the nature of his dismissal did not work a forfeiture of his pension. The pension ordinance was pleaded by the plaintiff in haec verba. Plaintiff's right, if any, depends on the provisions of sections 2 and 5 of the ordinance. Section 2 provides how the amount of a pension will be ascertained and determined. Section 5 provides as follows:

> "Any person having served ten (10) years or more as a member of the regularly constituted fire and police department, shall, if he be removed from said fire or police department for any cause other than conviction of a felony, notorious or consecutive insubordination or neglect of duty; or in case of voluntary or involuntary resignation; be entitled to all the provisions of section two (2) of this ordinance, in the proportion that the number of years he has served bears to twenty-five (25) years."

The question then arises: Was the plaintiff dismissed for any one of the causes just mentioned? But that issue is not before this court, and was not before the trial court. This is so because of the peculiar state of the record. On November 17, 1925, the city manager filed before the police and fire board a charge against the plaintiff. The charge was in writing. Later a trial was had, and on February 6, 1926, the board filed written findings. It may be conceded that the written charge and the findings thereon were highly ambiguous. Be that as it may, in paragraph 5 of the complaint in this action the plaintiff alleged the nature of his dismissal to be "absence without leave." In their answer, the defendants admitted the entire paragraph. Neither party alleged any other offense. Whether the plaintiff ever at any other time committed any offense does not appear; neither does it appear that at any time the offense which was pleaded, or any other offense, was "notorious" or "consecutive." Nor does it appear that the plaintiff voluntarily or involuntarily resigned. Nor does it appear that he has ever been convicted of a felony. From what we have said it thus appears that a member of the police force may not be dismissed on any charge until the charge has been heard and determined by the board. Stats. 1917, p. 1752, art. 7, § 10, supra. Furthermore, before the officer will forfeit his pension, it must appear from the charge found that the dismissed officer has suffered a conviction as for a felony or that he has been guilty of notorious or consecutive insubordination or neglect of duty. Ordinance, § 5, supra. The latter fact nowhere appears in this record.

The defendants earnestly contend that the ordinance is unreasonable. We think that under the facts of this case they have not brought themselves in a position where they are entitled to have that question determined. Presenting a record which contains no more of the facts surrounding a dismissal than are presented by this record does not even purport to show anything unreasonable.

It thus appears that on the undisputed facts the plaintiff heretofore became eligible to receive a pension, and nothing appears on the face of the record showing that he has forfeited that right.

It follows that the judgment should be reversed. It is so ordered.

We concur: KOFORD, P. J.; NOURSE, J.

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92 Cal. App. 119

EMPLOYERS' LIABILITY ASSUR. CORPORATION, Limited, of London, England, v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 5891.)

District Court of Appeal, Second District, Division 1, California. May 22, 1928.

1. Master and servant 🔑361—One employed to render personal service otherwise than in independent calling, who remains entirely under employer's control, is servant or employee (Civ. Code, § 2009; Workmen's Compensation, Insurance and Safety Act 1917, § 8(a).

Under Civ. Code, § 2009, and Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831), § 8(a), one who is employed to render personal service to his employer otherwise than in pursuit of an independent calling, and in such service remains entirely under the control and direction of the employer, is a servant or employee.

2. Master and servant ⚷403—Presumption is that one serving other than as independent contractor, or as expressly excluded by act, is employee (Workmen's Compensation Insurance and Safety Act 1917, § 8(a).

The presumption is that any person rendering services for another other than as an independent contractor or as expressly excluded by Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831), § 8(a), is an employee.

3. Master and servant ⚷403—Burden rests on person served to establish that one serving was acting as independent contractor (Workmen's Compensation, Insurance and Safety Act 1917, § 8(b), (c).

In proceeding for compensation under Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831), burden of proof because of section 8(b), (c), rests on the person to whom services were being rendered to establish fact that the one rendering services was acting in capacity of an independent contractor.

4. Master and servant ⚷417(7)—Appellate court may interfere with trial tribunal's determination whether injured workman was independent contractor only where there was no substantial evidence thereon or, from evidence, fact finding was necessarily based on conclusion of law (Workmen's Compensation, Insurance and Safety Act 1917).

Appellate court may interfere with trial tribunal's determination of question whether injured person was employee or independent contractor, under Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831), only where there was no substantial evidence thereon or, from evidence, finding of fact was necessarily based on conclusion of law.

5. Master and servant ⚷414—Evidence adduced, with inferences, held to make determination of golf instructor's status as club's employee question of law and fact for Industrial Accident Commission (Workmen's Compensation, Insurance and Safety Act 1917, especially § 60(a).

Evidence adduced, together with inferences deducible therefrom, *held*, under Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831), especially in view of section 60 (a), to make determination of question whether club golf instructor was club's employee a mixed question of law and fact for determination of the Industrial Accident Commission.

6. Master and servant ⚷417(7)—Commission's finding, supported by evidence, as to club golf instructor's assistant being club's employee, held binding on appellate court (Workmen's Compensation, Insurance and Safety Act, especially § 8(a).

Industrial Accident Commission's finding, supported by evidence, as to club golf instructor's assistant being club's employee, within Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831), especially section 8 (a), *held* binding on appellate court.

Certiorari by the Employers' Liability Assurance Corporation, Limited, of London, England, to review an order of the Industrial Accident Commission of California, awarding Lorne M. Campbell compensation for injuries. Award affirmed.

George H. Moore and Hubert Starr, both of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

HOUSER, J. The question presented for review herein is whether a person engaged to assist a professional golf instructor in the performance of his duties under a contract with a country club, as well as to assist such golf instructor in the conduct of a golf business located on the premises of the country club, the profits of which became the sole property of the golf instructor, was an employee of the country club and as such entitled to compensation for injuries received by him in the course of his employment, as provided by the Workmen's Compensation, Insurance and Safety Act (Stats. 1917, p. 831).

The facts appear to be that one Hunter, who was a professional golf instructor, had a contract with the Brentwood Country Club evidenced by the following communication:

"December 10, 1924.

"Mr. Willie I. Hunter, Ambassador Gardens, Los Angeles, Calif.—Dear Sir: This will confirm the verbal arrangements made with you relative to your employment by this club as club professional, for one year, beginning January 1, 1925, at a salary of $100.00 per month; in addition to which you are to have the privilege of selling golf supplies of every kind, including club making, repairing, cleaning, and giving lessons. Your charge for lessons to members and their families, however, is to be limited to $4.00 per hour, or $2.00 per half hour, these being the rates already established by this club.

"In consideration of our paying you a salary, you are to give us the benefit of your knowledge, experience and time, whenever called upon in connection with the upkeep of the golf course or any changes or improvements to same.

"You are to employ a competent assistant and club maker at your own expense, and one of you is to be on duty at all times so as to serve the members of this club.

"Your acceptance of this letter will constitute an agreement between you and the Brentwood Country Club.

"Yours very truly,
"The Brentwood Country Club,
"[Signed] M. A. Leach,
"Chairman, Green Committee.

"Accepted:
"W. I. Hunter."

It further appears that under the provisions of such contract Hunter employed a man

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

named Campbell to assist him in the performance of his duties as "club professional," as well as in the conduct of his "privilege to sell golf supplies," etc.; that in the course of business a golf club was sold to one of the members of the Brentwood Country Club, which golf club later required some repairs or alterations; and that in performing said work the employee, Campbell, was injured. Following an application to the respondent Industrial Accident Commission for adjustment of claim for compensation, an award as for permanent disability was made in favor of Campbell; and the insurer of the Brentwood Country Club has made application to this court to review the proceedings before the respondent commission leading to the order of such award.

The objection made by petitioner to the award in effect is that the evidence before the respondent commission was insufficient to sustain its finding of fact that Campbell "while employed as a club maker, * * * by the Brentwood Country Club, sustained injury in the course of and arising out of his employment."

It is conceded by petitioner that as to certain of the services rendered by Hunter to the Brentwood Country Club he was an employee of that association, as well as that when persons employed by Hunter were rendering such services in his stead they were engaged in the service of the Brentwood Country Club, and for any injuries which might be received in the course of or arising from such employment would be entitled to the benefit of the provisions of the Workmen's Compensation, Insurance and Safety Act. But the specific objection of petitioner is based upon the alleged fact that, in addition to the salary paid to Hunter, he was granted the distinct and unrelated "privilege" of conducting the business of selling, manufacturing, and repairing golf clubs and supplies on the grounds of the Brentwood Country Club, and that it was while Campbell was engaged in the service of Hunter in connection with the conduct of such business that he received the injury of which he complains.

On the hearing before the commission of the application for adjustment of compensation, among other things, one of the directors of the Brentwood Country Club testified in substance that it was necessary, "in order to take care of the requirements of the members, that one or more men be on duty there at all times, to attend to their wants in the shop and about the place. The members have clubs that have to be cleaned and repaired, and looked after; also have to be supplied with the necessary implements that go with the game of golf, in addition to which they, as a matter of course, instruct the people in the lessons." Furthermore, that Hunter personally employed Campbell and paid him his wages. "* * * * Rather than have the club itself state the wages of these different individuals (including Campbell), why, that is left to the professional, and in fixing the professional's compensation that is taken into consideration, that he has to employ a certain number of men, and in turn it has to come out of the revenue being paid to the professional in his salary and his profits to be made in the handling of the shop, and the like of that; * * *" that, if Campbell or any man whom Hunter might employ did not give satisfaction to the members of the Brentwood Country Club, Hunter would be compelled to get other suitable help; that, while Hunter was the owner of the stock of golf goods and supplies kept on the premises of the Brentwood Country Club and derived the immediate profits from the sale of such merchandise, that fact was "taken into consideration with his main compensation that is being paid to Mr. Hunter for his services and that of his men"; and that, if Hunter did not receive the revenue derived from such source, "he would have to be paid an annual amount of from ten to fifteen thousand dollars." The president of the Brentwood Country Club, in substance, testified to the same effect; and Hunter corroborated their testimony so far as concerned the "control and jurisdiction" which the Brentwood Country Club had over the assistants employed by him.

[1-3] By section 8 (a) of the Workmen's Compensation, Insurance and Safety Act an employee is defined as any one "under any appointment or contract of hire. * * *" And if he be employed "to render personal service to his employer, otherwise than in the pursuit of an independent calling, and * * * in such service remains entirely under the control and direction of the latter, who is called his master," he is a servant or employee. Section 2009, Civ. Code; Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 810, 159 P. 723; Press Publishing Co. v. Industrial Acc. Com., 190 Cal. 114, 122, 210 P. 820. The presumption is that any person rendering service for another other than as an independent contractor, or as expressly excluded by the provisions of the Workmen's Compensation, Insurance and Safety Act, is an employee; and the burden of proof rests upon the person to whom the services were being rendered to establish the fact that the person rendering the services was acting in the capacity of an independent contractor. Section 8 (c), (b), Workmen's Compensation, Insurance and Safety Act, Stats. 1917, p. 831; Hillen v. Industrial Acc. Com., 199 Cal. 577, 580, 250 P. 570.

[4] The authorities indicate that ordinarily the determination of the question of whether an injured person was an employee or was an independent contractor rests with the trial tribunal. It is only either where no substantial evidence was introduced on the

point, or where from the evidence the finding of fact was necessarily based on a conclusion of law, that an appellate court is authorized to interfere.

In the case of Roman Catholic Archbishop of San Francisco v. Industrial Acc. Com., 194 Cal. 660, 667, 230 P. 1, 4, one of the questions before the commission was whether a man who had been engaged at a fixed wage per hour to do a job of reshingling a building was an employee or was an independent contractor. Touching the point with reference to the conclusiveness of the finding of the Industrial Accident Commission in the matter, in part, the court said:

> " 'Whether a workman is an employee within the Workmen's Compensation Act or an independent contractor is a question of fact upon which the judgment of the Industrial Commission is conclusive where the facts are in dispute, and becomes a question of law only when but one inference can reasonably be drawn from the facts.' Federal Mining & Smelting Co. v. Thomas [99 Okl. 4], 225 P. 967. It was said in Western Pac. R. R. Co. v. Industrial Acc. Com., 193 Cal. 413, 224 P. 754: 'It is the rule that where from the evidence two opposing inferences may be drawn, that inference which is accepted by the commission must be sustained if there is evidence in the record to support it and if it is a reasonable inference to be drawn from that evidence. Eastman v. Industrial Acc. Com., 186 Cal. 587, 589 [200 P. 17]; Polar Ice, etc., Co. v. Mulray, 67 Ind. App. 270, 119 N. E. 149.' See, also, Tartar v. Industrial Acc. Com., 191 Cal. 703 [218 P. 39]; Employers' Liability Assur. Corp. v. Industrial Acc. Com., 182 Cal. 612 [187 P. 42]."

In the case of Hillen v. Industrial Accident Commission, 199 Cal. 577, 250 P. 570, it appeared that Hillen was a builder; that one Downing, who was a shingler by trade, was engaged by Hillen at the rate of $1.25 per thousand shingles to place the shingles upon certain houses being built by Hillen. For the purpose of "rushing" on several different jobs, Downing procured other workmen to assist him. When each of the several jobs was completed, Downing collected compensation from Hillen in accordance with the specified rate and thereafter paid himself, as well as any extra workmen whom he had employed. During his employment, Downing was injured and thereupon, in an application presented by him to the Industrial Accident Commission for adjustment of compensation, the question arose as to whether he was an employee or an independent contractor. In considering the point, the court, in part, said that one of the best tests to determine whether the relation existing between the parties was that of independent contractor or that of employer and employee was the right on the part of the employer to direct the details—to control, to interfere—in the conduct of the work, and, finally, the legal right, without liability to the employer, to terminate the relationship or to discharge the employee. But, so far as concerns the instant proceeding, the important point decided in the Hillen Case is that the decision by the Industrial Accident Commission as to what relationship existed between the parties was binding on an appellate court. In treating that particular matter, the opinion contains the following language:

> "* * * Whether or not the relation of employer and employee existed in this case, under the oral contract entered into, is a question of mixed law and fact, to be proved like any other question. The finding of the commission, in effect, that the relation existed between Hillen and Downing, is binding on this court. Pacific Gas & Elec. Co. v. Industrial Accident Com., 180 Cal. 497, 499 [181 P. 788]. Unless there is such an entire absence of evidence in the record as to render the finding unreasonable, or in excess of the powers of the commission, the court is not empowered to set it aside. Eastman Co. v. Industrial Accident Com., 186 Cal. 587, 598 [200 P. 17]. The award of the commission may be annulled only if there is no substantial evidence in support of its findings. Press Pub. Co. v. Industrial Accident Com., 190 Cal. 114, 124 [210 P. 820]."

In the case of Montezuma Mountain Ranch School v. Industrial Acc. Com. (Cal.) 258 P. 84, the salient facts were that a man who owned a wood-sawing outfit was employed by the manager of a school district to saw certain wood. An oral contract was made whereby a stipulated sum per hour was to be paid not only to the owner of the wood-sawing outfit, but as well to certain of his employees. The manager of the school district reserved the right to terminate the work at will; also "the right of placing more men at work on the job than was necessary to complete the [ordinary] crew complement of three men." In the course of the employment a son of the owner of the wood-sawing outfit, who was one of the men working on the job, was injured and he sought from, and was awarded by, the Industrial Accident Commission compensation under the provisions of the Workmen's Compensation, Insurance and Safety Act. In a proceeding to review the findings and award of the commission in the matter, it was held that:

> "The burden of proving that claimant was an employee of an independent contractor and not a compensable employee was upon petitioners. * * * This burden they did not fully overcome, in the view of the commission, and we are not convinced that the award stands wholly unsupported by proof."

In the case of New York Indemnity Co. v. Industrial Accident Com., 80 Cal. App. 713, 252 P. 775, it was held that the evidence was sufficient to support the finding by the Industrial Accident Commission to the effect that a fellow employee, under whom the injured employee performed his work, was a foreman of his employer and not an independent subcontractor, where both the injured employee and the foreman received their compensation as wages and where the employer who contracted on the cost-plus basis retained the right to discharge the injured employee at any time, notwithstanding the injured employee received his instructions and wages directly from the foreman and the foreman furnished the material and charged the employer for the material, labor, and $1 per day extra for every man under him.

While from the ordinary legal standpoint it may be that in some respects the evidence to which reference has been had herein was not of the most satisfactory character for the purpose of establishing the question of whether Campbell, the man employed by Hunter, was an employee of the Brentwood Country Club, it should be remembered that in hearings before the Industrial Accident Commission the statute expressly provides that:

> Neither such commission nor its referees "shall be bound by the common law or statutory rules of evidence and procedure, * * * nor shall any order, award, rule or regulation be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the said common law or statutory rules of evidence and procedure." Stats. 1917, pp. 831, 871, § 60(a).

See, also, Pacific Gas & Elec. Co. v. Industrial Acc. Com., 180 Cal. 497, 181 P. 788; Western Indemnity Co. v. Industrial Acc. Com., 174 Cal. 315, 163 P. 60; Employers L. A. Corp. v. Industrial Acc. Com., 179 Cal. 432, 177 P. 273.

[5, 6] Considering the evidence adduced, together with the inferences deducible therefrom, it becomes clear that the determination of the status of Campbell, the man employed by Hunter, involved "a question of mixed law and fact." The authorities to which attention has been directed, and especially the case of Hillen v. Industrial Acc. Com., 199 Cal. 577, 580, 250 P. 570, announce the rule with clarity and positiveness that such a situation must be met and proved like any other question of fact. With such an issue before the trial tribunal, where supported by substantial evidence, and in the absence of lack of jurisdiction, or of unreasonableness in its conclusions, the finding by such tribunal is conclusive on an appellate court.

As the evidence appears sufficient to justify the findings and award, and as neither the jurisdiction of the commission nor the reasonableness of its conclusion is the subject of attack, it follows that the award should be affirmed.

It is so ordered.

We concur: CONREY, P. J.; YORK, J.

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92 Cal. App. 266

ADAMS v. TUXEDO LAND CO. et al.

(Civ. 3446.)

District Court of Appeal, Third District, California. May 29, 1928.

1. Appeal and error ⚷1040(12)—Defendant having recovered no judgment for damages, whether court erred in overruling plaintiff's demurrer to cross-complaint for damages was immaterial.

Whether trial court erred in overruling plaintiff's demurrer to defendant's cross-complaint, wherein judgment was asked against plaintiff in specified sum, was immaterial, where no judgment for damages was awarded defendant.

2. Automobiles ⚷244(43)—Evidence held to warrant finding that automobile collision at intersection resulted from plaintiff's negligence in violating right of way rule (Motor Vehicle Act, § 12).

In action for injuries sustained in automobile collision at intersection, evidence *held* to warrant finding that collision was proximate result of plaintiff's own negligence in violating right of way rule of Motor Vehicle Act (St. 1919, p. 215) § 12.

3. Automobiles ⚷244(28)—Evidence held to warrant finding that employee was using his own automobile for own purposes, not in employer's business, at time of collision.

In action for injuries sustained in automobile collision at intersection, while defendant employee was driving his own automobile to defendant employer's pumping plant for purpose of eating his noon lunch, evidence *held* to warrant finding that defendant employee was using car for his own purposes, and not in defendant employer's business, and that employer was therefore not liable.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by J. R. Adams against the Tuxedo Land Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant.

Louttit, Stewart & Louttit and McNoble & Arndt, all of Stockton, for respondents.

PER CURIAM. Plaintiff began this action to recover damages for injuries sustained in an automobile collision alleged to have been due to the negligence of John Stange, an employee of the Tuxedo Land Company. The defendants had judgment and the plaintiff appeals.

[1] Only two questions are presented for consideration: First, was the defendant John Stange guilty of negligence, proximately causing the injury? And, second, was he, at the time of the collision, acting within the scope of his employment as a laborer of the Tuxedo Land Company? The appellant urges an additional point for consideration, to wit, that the court erred in overruling plaintiff's de-

murrer to the cross-complaint by John Stange, wherein judgment was asked against the plaintiff in the sum of $57. As no judgment for damages was awarded the defendant Stange, whether the court erred in so ruling is wholly immaterial.

The transcript shows that the Tuxedo Land Company is a corporation and the owner of a subdivision within the corporate limits of the city of Stockton. Its business was the sale of lots, laying of sidewalks, water pipes, setting out trees, and other work in connection with improving the subdivision known as Tuxedo Park. John Stange was an employee of the company. His duties were those of a laborer, and his work, principally, was laying sidewalks, planting trees, laying pipes, etc. The Tuxedo Land Company owned and maintained a pumping plant in the subdivision. At this place they had a storehouse. The defendant Stange drove to his work each morning in a Ford car owned by himself. The testimony shows that he would go to the storehouse, get such tools as he needed, put them in his car, and drive to the place where the work was to be done; that about 12 o'clock he would quit his work, get into his Ford car, and drive to the pumping plant, and there eat his lunch, after which, at about 1 o'clock, he would return to his work. The company owned and furnished a wheelbarrow for the transportation of tools, etc., but, as a matter of convenience, the defendant Stange usually transported such tools in his Ford car. At the time of the accident, which occurred during the noon hour, the defendant Stange was driving in his own Ford car from his work to the pumping plant for the purpose of eating his lunch. The testimony shows that at that time he was not transacting any business for the company. He was not going to the pumping plant on any mission for the company, nor was he transporting any property belonging to the company, but was going there to eat his own lunch, as herein stated.

At the time of the collision he was driving south on a certain street in Tuxedo Park known as and called Alston Way, while the plaintiff at the time of the collision was driving easterly on North Tuxedo avenue. The defendant was accompanied by a fellow workman named John Condon. At the time of the collision the Motor Vehicle Act provided that:

> "An operator of a vehicle shall yield the right of way at the intersection of their paths to a vehicle approaching from the right, unless such vehicle approaching from the right is further from the point of the intersection of their paths than the first named vehicle." St. 1919, p. 215, § 12.

The court found, among other things, that at the time of the collision the defendant John Stange was operating his Ford car at a speed of not more than 15 miles per hour, and that the plaintiff, at that period of time, was operating his automobile at a speed in excess of 25 miles per hour, and carelessly and negligently drove his automobile in front of the Ford car operated by the defendant Stange, and that at the time of the collision the plaintiff was negligently and carelessly operating his automobile, in violation of the provisions of the Motor Vehicle Act, and that such negligent operation was the proximate cause of the collision and contributed directly to the plaintiff's injuries. The court further found that at the time of the collision the defendant John Stange was not operating his Ford car in the service of the defendant corporation, but was operating the same upon his own independent mission. And as a result of such findings it was adjudged that the plaintiff take nothing as against either defendant.

[2, 3] The testimony of the defendant Stange and of the witness Condon, who was riding with him, is to the effect that the defendant Stange, at the time he entered the intersection where the collision occurred, was driving the Ford car at a speed between 12 and 15 miles per hour, and that the plaintiff, at the time the Ford car, driven by Stange, entered the intersection, was some 75 feet distant therefrom, and, according to the testimony of Stange, traveling at the rate of 30 miles per hour. There is also testimony in the transcript to the effect that the plaintiff, after the collision, stated that he was to blame; that he was in a hurry, and wanted to catch a train; that he was intending to go up to the mountains to do some surveying. The testimony of the defendant Stange and the witness Condon is also to the effect that they were on their way from work to the pumping plant to eat their lunch; that they were riding in a Ford car belonging to the defendant Stange; that they were not transporting any property belonging to the company. The testimony to which we have referred, if believed by the trial court, amply supports the findings, and the findings support the judgment. That there may have been some conflicting testimony is wholly immaterial here. The evidence is likewise sufficient, if believed by the trial court, to show that at the time of the accident the defendant Stange was upon his own independent mission, and was not in the service of the defendant Tuxedo Land Company. The cases cited by the appellant, while applicable to the facts presented in each case, are not pertinent here by reason of the facts shown by the testimony as herein referred to. Under the facts presented by the record before us, the following cases set forth the law, showing that unless the defendant Stange, at the very time of the accident, was in the service of the Tuxedo Land Company, then and in that case the Tuxedo Land Company would not be responsible for his negligence. Mauchle v. Panama-Pacific International Exposition Co., 37 Cal. App. 715, 174 P. 400; Nussbaum v. Traung

Label Co., 46 Cal. App. 561, 189 P. 728; Kish v. State Automobile Assn., 190 Cal. 246, 212 P. 27. Other cases might be cited, but these state the law applicable here.

The judgment is affirmed.

92 Cal. App. 161

WATT v. COPELAND. (Civ. 6084.)★

District Court of Appeal, First District, Division 2, California. May 23, 1928.

Hearing Denied by Supreme Court July 19, 1928.

1. Appeal and error ⇨1011(1)—Trial court's findings on conflicting evidence are conclusive, and all reasonable inferences are to be indulged in their support.

Findings of trial court on conflicting evidence are conclusive, and all reasonable inferences are to be indulged in support of the findings.

2. Appeal and error ⇨901—Appellant claiming error has burden of showing its existence.

The burden is on appellant who claims error to show its existence.

3. Appeal and error ⇨996—Reviewing court cannot substitute its deductions for those of trial court, where two inferences may reasonably be deduced.

Where two inferences may reasonably be deduced from a certain set of facts or circumstances, a reviewing court is not permitted to substitute its deductions for those of trial court.

4. Deeds ⇨208(1)—Finding that there was no irrevocable delivery of deed with intent to transfer title held fair inference from facts.

Finding that there had been no delivery of deed with intent on part of grantor to surrender all control and dominion over it, and to immediately vest in grantee title to property, *held* a fair and reasonable inference to be deducted from all the facts.

5. Deeds ⇨200—Acts and declarations of grantor while deed was in escrow held properly admitted on question whether there was effective delivery of deed in escrow.

Where controlling issue in case was whether or not grantor had parted with her title to property by making an effective delivery of the deed in escrow, facts and circumstances occurring at time of making of deed and grantor's acts and statements material to question of delivery during entire period that deed was in escrow were properly admitted.

6. Deeds ⇨200—Oral instructions by agent of grantor at time deed was deposited in escrow held properly admitted on question whether there was an effective delivery of deed.

In action involving question whether grantor made effective delivery of deed in escrow with intent to transfer title, evidence of oral instructions, given by one who was agent and attorney of grantor in preparation and delivery of deed, to bank cashier at time deed was deposited, which were in accord with subsequent acts and declarations of grantor, *held* properly admitted.

7. Appeal and error ⇨931(6)—Appellate court will assume that trial court disregarded incompetent evidence which it was impossible to prevent from finding its way into record.

Appellate court will assume that trial court, in reaching its conclusion, disregarded incompetent evidence which it was difficult, if not impossible, for trial judge to prevent from finding its way into record.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action to quiet title by Richard L. Watt against Octavia Copeland. Judgment for defendant, and plaintiff appeals. Affirmed.

Roy A. Bronson and E. D. Bronson, Jr., both of San Francisco, and W. F. Cowan, of Santa Rosa, for appellant.

Barrett & McConnell, of Santa Rosa, for respondent.

PRESTON, Presiding Justice pro tem. Plaintiff brought this action to quiet title to an undivided one-half interest in a tract of land situate near the town of Sonoma, in Sonoma county, and also to cancel a deed made in 1923 by Sarah Ellen Watt, as grantor, to defendant, Octavia Copeland, as grantee.

The case was tried by the court sitting without a jury, and judgment was rendered quieting the title of defendant, Octavia Copeland, in and to said undivided one-half interest in said land, and canceling a deed made in 1911 by Sarah Ellen Watt, as grantor, to plaintiff, Richard L. Watt, as grantee. From this judgment the plaintiff prosecutes this appeal.

The facts are briefly these: Richard L. Watt, Sr., was the husband of Sarah Ellen Watt, and the uncle of plaintiff and appellant, and the owner of the entire tract of land in question. The property was community property. Richard L. Watt, Sr., died testate in 1889, and his estate was probated, and this land distributed as follows: An undivided one-half interest to appellant, Richard L. Watt, Jr., subject to a life estate therein to Sarah Ellen Watt, and the remaining undivided one-half interest to Sarah Ellen Watt in fee simple. Following the death of Richard L. Watt, Sr., Mathew Watt, the father of appellant, was the tenant in possession of the land for twelve years. In 1901 the appellant went into possession of the premises under a verbal lease from Mrs. Watt at an agreed rental of $450 per annum. This lease was renewed from year to year; the only change being that about the year 1911 the rent was raised to $550 per annum. Appellant remained in possession of the ranch as tenant from 1901 until the death of Mrs. Watt in September of 1924. Mrs. Watt, after her husband's death, and continuously until her death, resided with her cousin Octavia Copeland, the respondent herein. In 1911 Mrs.

★Hearing denied by Supreme Court.

Watt signed and acknowledged a deed, purporting to convey to appellant Richard L. Watt her undivided one-half interest in and to said property, and caused said deed to be deposited in the Sonoma Valley Bank, at Sonoma, Cal. This deed was prepared by Robert A. Poppe, an attorney of Sonoma, acknowledged before him as notary public, placed in an envelope and sealed, and upon the envelope Mr. Poppe wrote: "From Sarah Ellen Watt to Richard L. Watt. To be delivered upon my death." Immediately below this writing appeared the signature of Mrs. Sarah Ellen Watt. Mr. Poppe then took this envelope containing the deed and instructions to the Sonoma Valley Bank, in Sonoma City, and delivered it to Mr. Burris, the cashier of the bank. What took place between Mr. Burris and Mr. Poppe can best be related by quoting a portion of the testimony of Mr. Burris:

> "Q. Do you recall the occasion, Mr. Burris, some time about the year of 1911, when Robert Poppe, now deceased, but then a practicing attorney of Sonoma, came to your bank and delivered to you a paper in connection with some business for Mrs. Watt? A. I do.
>
> "Q. * * * Was any one else present within hearing, as far as you know? A. Not that I know of.
>
> "Q. Did Col. Poppe say to you at that time what the paper was that he was giving to you? A. He did not designate the paper as a deed, or bond, or anything of that kind.
>
> "Q. Did Mrs. Watt come to the bank with Col. Poppe at that time? A. I think not.
>
> "Q. Did you ever see or talk with Mrs. Watt in connection with that transaction? A. I never did.
>
> "Q. You say that at this time Col. Poppe handed you this paper? A. That is my recollection.
>
> "Q. And what was the paper? A. Well, it was simply an envelope.
>
> "Q. Do you know whether or not there was any writing on it? A. There was writing on the back of the envelope.
>
> "Q. To the best of your recollection, what was that writing? A. Well, it was simply, 'To be delivered to Mr. Watt' at her death.
>
> "The Court: You say, Mr. Burris, that the name, Richard Watt, and also Sarah Watt; how would her name come there, how did that appear, do you recall? A. I do not recollect only that he handed it to me and told me that that was a document that Mrs. Watt wanted placed in safe-keeping.
>
> "Q. What, if anything, did Mr. Poppe say to you in regard to that document when he handed it to you? A. Well, he handed me the document and told me, 'That is a document from Mrs. Watt,' and that he wished us to keep it there for safe-keeping until she called for it. * * *
>
> "Q. You did take the document? A. Yes, sir.
>
> "Q. And it was thereafter kept in the custody of the bank? A. Yes, sir.
>
> "Q. Did you issue any receipt for the document to Col. Poppe for Mrs. Watt? A. No receipt.
>
> "Q. Where was the deed or that envelope kept? A. It was kept in the vault in a pigeonhole where we kept other deeds and wills and other various papers that were left with us for safe-keeping."

There is some little conflict as to the handwriting and also as to the exact wording on the envelope containing the deed. The witness Perkins, an employee of the bank, testified in part as follows:

> "Q. Where was that envelope when you first saw it? A. That envelope was in a pigeonhole in a wooden case in the bank box with other papers.
>
> "Q. Now, what was the character of the other papers with which it was kept? A. Oh, deeds, and mortgages and satisfaction of mortgages.
>
> "Q. Papers belonging to the bank, or belonging to the bank's customers? A. Belonging to the bank's customers. * * *
>
> "Q. Just give us your best recollection of what the indorsement was, Mr. Perkins? A. Across the top of the envelope was marked 'Deed,' and just below, 'From Sarah E. Watt, to Richard L. Watt, to be delivered to him upon my death,' signed, 'Sarah E. Watt.' * * * I might state that the writing on the envelope was in the handwriting of the late Robert A. Poppe, except the signature of Mrs. Watt.
>
> "Q. You were familiar, were you, with Col. Poppe's handwriting? A. Very familiar.
>
> "Q. No question about that being his handwriting? A. No question at all."

Henry Webster, Jr., another employee of the bank, testified that the wording on the envelope containing the deed was as follows:

> "This deed to be delivered to Richard L. Watt by the Sonoma Valley Bank on my death. [Signed] Mrs. S. E. Watt."

Mr. Webster further testified that all the writing was in the handwriting of Mrs. Watt.

This deed was held by the bank from the time of its deposit in 1911 until the first week in September, 1923, at which time it was delivered by the bank to Miss Copeland upon the written order of Mrs. Watt. Miss Copeland took the envelope containing the deed and delivered the same to Mrs. Watt. The envelope, unopened, was deposited in a drawer in Mrs. Watt's home, where it remained for about two months. On or about November 1, 1923, Mrs. Watt sent for Mr. Grinstead, an attorney residing and practicing in Sonoma City, and who had taken over the practice of Mr. Poppe, who had died. Thereafter, and on the same day, Mr. Grinstead came to Mrs. Watt's home, and the envelope containing the deed was then opened by him and, after some conversation with Mrs. Watt, Mr. Grinstead drew a will for her, which she at that time duly executed, and in which she devised and bequeathed her entire estate to Miss Octavia Copeland, the respondent herein, and in said will recited that she was the owner of an undivided one-half interest in the lands in question. Mr. Grinstead took the deed and the envelope with the instructions indorsed thereon to his office. Thereafter, and on

November 6th, at the request of Mrs. Watt, Mr. Grinstead drew a new deed conveying the undivided one-half interest in the land in question from Sarah Ellen Watt, as grantor, to Miss Octavia Copeland, as grantee, which deed was duly executed and delivered. This latter deed was held by Mr. Grinstead and recorded upon the death of Mrs. Watt. The envelope containing the instructions as to the deed of 1911 was torn up by Mr. Grinstead, and the deed itself was returned by him to Mrs. Watt through the mail and she thereupon destroyed it.

Evidence of statements, acts, and conduct on the part of Mrs. Watt was received in evidence as bearing upon the question of her intention at the time the deed to appellant was deposited with the bank in 1911. The respondent testified that in November, 1923, Mrs. Watt stated to her "that she did not know what was on the envelope; that she had never read it, and that said property was hers, and she had the right to do with it as she pleased."

On another occasion Mrs. Watt stated to the respondent "that she could mortgage her half of the property, or sell it, if it was necessary."

The witness Sophia Kramer, an intimate friend and neighbor for many years of Mrs. Watt, testified that in the year 1917 or 1918 she had a conversation with Mrs. Watt, in which Mrs. Watt urged her to deposit her bonds and other papers for safe-keeping in the bank, saying, "I have my papers there for safe-keeping, and you can get them for the asking; I can get them any time I want to and you can do the same." On another occasion the witness testified that Mrs. Watt stated to her that she had a right to sell her half of the ranch, if she so desired.

Another witness, Mrs. Burns, a nurse who cared for Mrs. Watt from time to time during the last years of her life, testified that Mrs. Watt told her "that her husband had left a will leaving Richard Watt half of her property, and had requested her to leave her other half to him also, and she intended doing so, although Mr. Poppe, the lawyer, told her she did not have to, as the will was not a just one. He said that she had the right to her own property and to half of his to do with as she pleased, but she thought she would carry out his wishes for some years afterwards, and did finally make a deed in favor of Richard Watt, and put it in the bank for safe-keeping, because there might be a fire or anything, and would destroy it if she kept it at home. She said she always kept any papers she had in the bank, but in later years Miss Copeland and she had lived together for 36 or 37 years, I think she said, and she had done so much for her, and had given up her business, so she could take care of her, and she said she would not be able to make a living by sewing, so, if I have anything to leave, she has the right to half of it, and I am making a new deed in her favor."

There were other witnesses who testified to similar conversations.

Appellant testified that Mrs. Watt had on several occasions told him that she was going to give him her half of the property upon her death, and that she had made a deed to him, and had deposited it in the Sonoma Valley Bank.

From all these facts and circumstances the trial court found, among other things:

> "That at the time said deed was so deposited with said Sonoma Valley Bank, and at all times thereafter until her death, it was the purpose and intention of said Sarah Ellen Watt that she should have dominion and control over said deed, and the right to withdraw and revoke the same, and that said Sarah Ellen Watt at the time said alleged deed was so deposited with the said Sonoma Valley Bank, and at all times thereafter until her death, did not intend to make absolute delivery of said deed or to make any delivery whatever of said deed other than to deposit the same for safe-keeping as aforesaid."

[1-3] Appellant contends that this finding is not supported by the evidence. The law is well settled that the findings of the trial court upon conflicting evidence are conclusive, and all reasonable inferences are to be indulged in support of the findings. Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Wilbur v. Wilbur, 197 Cal. 1, 239 P. 332. The law is equally well settled that the burden is upon appellant, who claims error, to show its existence. Hayne on New Trial and Appeal (Rev. Ed.) § 285, p. 1574; Wilbur v. Wilbur, supra. Where two inferences may reasonably be deduced from a certain set of facts or circumstances, a reviewing court is not permitted to substitute its deductions for those of the trial court. Wilbur v. Wilbur, supra, and cases there cited.

[4] The evidence in this case is not particularly conflicting, but it presents a state of facts from which the inference may be reasonably drawn that there had been no delivery of the deed with intent on the part of Mrs. Watt to surrender all control and dominion over the same, and to immediately vest in the grantee, Richard L. Watt, the title to the property; or the inference could also be drawn from the same facts and circumstances that Mrs. Watt, when she caused the deed to be deposited in the bank, intended to surrender all dominion and control over the deed, and that the title to the property should vest absolutely and immediately in the grantee, Richard L. Watt. Under such circumstances, we are not permitted to disturb the findings of the trial court.

The legal requirements to effect a valid delivery of a deed has often been stated by the Supreme Court of this state. In Williams v. Kidd, 170 Cal. 638, 151 P. 3, Ann. Cas. 1916E, 703, the Supreme Court states the rule as follows:

"It is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title, and the true test under which delivery is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor intended thereby to divest himself of title. If he did, there was an effective delivery of the deed. If not, there was no delivery. The solution of this question is grounded entirely on the intention of the grantor, and this essential matter of intention is a question of fact to be determined by the trial court from a consideration of all the evidence in a given case bearing upon the question." Bury v. Young, 98 Cal. 451, 33 P. 338, 35 Am. St. Rep. 186; Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803; Estate of Cornelius, 151 Cal. 552, 91 P. 329; Follmer v. Rohrer, 158 Cal. 757, 112 P. 544; Reed v. Smith, 125 Cal. 491, 58 P. 139; Black v. Sharkey, 104 Cal. 279, 37 P. 939; Hibberd v. Smith, 67 Cal. 547, 4 P. 473, 8 P. 46, 56 Am. Rep. 726; Denis v. Velati, 96 Cal. 227, 31 P. 1; Hotaling v. Hotaling, 193 Cal. 382, 224 P. 455; Blackledge v. McIntosh (Cal. App.) 259 P. 770.

[5] Appellant contends that the trial court erred in admitting in evidence acts and declarations of Sarah Ellen Watt, made after the deposit of the deed in the bank, because her instructions to the bank were in writing, and were complete upon their face, and could not be varied or changed by parol evidence. We think this contention is without merit. The very question in issue in this case was whether or not Mrs. Watt, the grantor, had parted with her title by making an effective delivery of the deed in escrow. Therefore her acts and statements, material to the question of delivery during the entire period that the deed was in escrow, may be shown. Williams v. Kidd, supra, and cases cited; Smith v. Smith, 173 Cal. 725, 161 P. 495. Furthermore, the written instructions to the bank did not purport to be all the instructions given by Mrs. Watt. Mr. Burris, the only living person present when the deed was deposited with the bank, testified that Mr. Poppe handed him the document, saying: "She (Mrs. Watt) wants you to hold this document for safe-keeping until she calls for it if she sees fit." From this language alone, if it be given any consideration, it might well be concluded that the delivery *was conditional, being merely deposited with the bank for safekeeping.*

The rule that a written instrument may not be varied by oral testimony has no application in a case of this character. The vital question is, What was the intention of Mrs. Watt when she signed and acknowledged the deed, and caused it to be placed in the possession of the bank? and the law says that this can best be ascertained by showing all the facts and circumstances occurring at the time of the making of the deed, and also all the subsequent acts and declarations of the grantor in relation to the property. Smith v. Smith, supra; Gaston v. City of Portland, 16 Or. 255, 19 P. 127.

The case of Moore v. Trott, 156 Cal. 353, 104 P. 578, 134 Am. St. Rep. 131, relied upon by appellant, is not in conflict with the rule that oral instructions may be proved in connection with written instructions, if, as a matter of fact, such oral instructions were actually given. In Moore v. Trott, supra, the *only instructions*, as far as the record discloses, were in writing, and there the court properly held that the question of delivery depended upon a true construction of the writing. There was no other evidence in the case from which the real intention of the grantor could be determined. Furthermore, on the second trial of Moore v. Trott, supra, the subsequent acts and declarations of the grantor made to persons other than the depositor were admitted in evidence, notwithstanding the written letter of instructions, and the Supreme Court sustained the judgment of the lower court. Moore v. Trott, 162 Cal, 268, 122 P. 462.

[6] Appellant further contends that the court erred in admitting in evidence the oral instructions given by Mr. Poppe to Mr. Burris, the cashier of the bank, at the time the deed was deposited with the bank, for the additional reason that Mr. Poppe was not shown to have any authority to speak for Mrs. Watt. There is no merit in this contention. The record shows clearly that Mr. Poppe was the agent and attorney of Mrs. Watt in the preparation and delivery of the deed, and had implied, if not actual, authority to add oral instructions on her part to the written instructions given to the bank. Moreover, the instructions that Mr. Poppe gave to Mr. Burris are in accord with the subsequent acts and declarations of Mrs. Watt.

The appellant also contends that the court erred in other respects in the admission of certain evidence. We have examined all these alleged errors, and we find none of them of sufficient importance to demand particular mention.

[7] In a case of this character, it is difficult, if not impossible, for the trial judge to prevent some incompetent testimony from finding its way into the record, but it is to be assumed that the court in reaching its conclusion disregarded any such incompetent evidence. Roth v. Thomson, 40 Cal. App. 208, 180 P. 656.

We have examined the entire record with care, and find no prejudicial error therein. The case was carefully tried, and the conclusion reached by the trial court that there had been no delivery of the deed in question, with the intent to transfer the title is a fair and reasonable inference to be deduced from all the facts.

We think the judgment should be affirmed, and it is so ordered.

We concur: STURTEVANT, J.; NOURSE, J.

92 Cal. App. 227

ARATA & PETERS, Inc., v. SNOW MOUNTAIN WATER & POWER CO. et al.★

(Civ. 6397.)

District Court of Appeal, First District, Division 2, California. May 28, 1928.

Hearing Denied by Supreme Court July 26, 1928.

Mechanics' liens ⚬=45—One who furnished food to contractor, used during construction of dam, held not entitled to lien; "materials;" "provisions" (Code Civ. Proc. § 1183).

One furnishing articles of food, consisting of fruit, vegetables, onions, beans, and tomatoes, to contractor erecting dam, which were used and consumed in the construction work, *held* not entitled to mechanic's lien under Code Civ. Proc. § 1183, giving lien to persons furnishing materials; "materials" being distinguished from "provisions," which relates to a stock of food.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Materials; Provisions.]

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by Arata & Peters, Inc., against the Snow Mountain Water & Power Company and others. Judgment for defendant named, and plaintiff appeals. Affirmed.

W. T. Plunkett, of San Francisco, for appellant.

Max Thelen, of San Francisco, Benjamin C. Jones, of Lakeport, and Thelen & Marrin, of San Francisco (Pillsbury, Madison & Sutro, of San Francisco, of counsel), for respondent Snow Mountain Water & Power Co.

NOURSE, J. Plaintiff sued to foreclose a mechanic's lien for foodstuffs furnished the contractor under a private contract. A demurrer to the third amended complaint was sustained without leave to amend, and a judgment of dismissal as to the water company followed. Plaintiff appeals upon a typewritten record.

The amended complaint alleges that the plaintiff furnished to the contractor certain articles of food consisting of fruit, vegetables, onions, beans, and potatoes, all of which "were actually used and consumed in the construction work" on a dam which the contractor was building for the water company under written contract. The usual allegations as to the failure to pay, the filing of a lien, and the amount due the contractor from the owner followed, but these do not call for consideration on this appeal. The essential question is whether a mechanic's lien will lie under our statutes for the character of supplies alleged to have been furnished.

Section 1183, Code of Civil Procedure, permits "mechanics, materialmen, * * * and all persons * * * furnishing materials to be used or consumed in * * * the construction, * * * of any building, * * * or other structure" to have a lien upon the property "upon which they have bestowed labor or furnished materials, for the value of such * * * materials furnished and for the value of the use of such appliances, teams or power." Prior to the amendment of the section in 1911, it was held that the section did not authorize a lien for the wages of a cook engaged to cook meals for the employees of a contractor under a private contract (McCormick v. L. A. C. W. Co., 40 Cal. 185, 187), or for one who supplied meat to be consumed by the employees of a mine (Malone v. Big Flat G. M. Co., 76 Cal. 578, 586, 18 P. 772). The purport of the decisions is that the materials which are made lienable are those only which have entered into the construction of the structure under contract. Ensele v. Jolley, 188 Cal. 297, 300, 204 P. 1085, and cases cited. This rule has been uniformly followed in other states. Carson & Co. v. Shelton, 128 Ky. 248, 107 S. W. 793, 15 L. R. A. (N. S.) 509; Ferguson v. Despo, 8 Ind. App. 523, 34 N. E. 575, 576; Pennsylvania Co. v. Mehaffey, 75 Ohio St. 432, 80 N. E. 177, 181, 116 Am. St. Rep. 746, 9 Ann. Cas. 305; Armour & Co. v. Western Construction Co., 36 Wash. 529, 78 P. 1106, 1107; Tsutakawa v. Kumamoto, 53 Wash. 231, 101 P. 869, 871, 102 P. 766; Dudley v. Toledo, A. A. & N. M. Ry. Co., 65 Mich. 655, 32 N. W. 884, 886.

Appellant argues that the rule of these cases is no longer applicable because the amendment to section 1183, Code of Civil Procedure, in 1911, broadened the scope of the Mechanic's Lien Act so as to include all persons "bestowing skill or other necessary services" or furnishing materials to be used "or consumed" in the construction or alteration of any building or structure, and because the Legislature declared that the act of 1911 should be liberally construed. Section 14, St. 1911, p. 1313. The addition of the words "or consumed" has led to the ruling that a lien may be enforced for the value of lumber used as forms for holding concrete in place where such use destroyed the value of the lumber. Cons. Lumber Co. v. Bosworth, Inc., 40 Cal. App. 80, 91, 180 P. 60; Olson-Mahoney Lumber Co. v. Dunne Inv. Co., 30 Cal. App. 332, 344, 159 P. 178. But the rule of these cases is that the lumber was "material" used in the actual work of construction, and the word "materials" as used in the mechanic's lien statutes has been interpreted and applied to include "the substance or matter of which anything is made or may be made." Webster Dict. There is a well-defined distinction between the word "materials" as used in statutes of this nature, and the word "provisions," which relates to "a stock of food." Webster Dict. This distinction having been recognized long prior to the amendment of 1911, it is fair to assume that the Legislature used the word "materials" in accordance with the accepted

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★Hearing denied by Supreme Court.

meaning of the term, and that, if it had intended to grant a lien to one who has furnished provisions, such as foodstuffs, to be used and consumed by the employees of a contractor under a private contract, it would have used the term in the amendment.

Appellant insists that we should apply the rule of Bricker v. Rollins & Jarecki, 178 Cal. 347, 173 P. 592, where recovery was allowed for provisions furnished a contractor performing work under a public contract with a county. The case is not in point. It was a suit against the surety on a bond of the contractor, which was given under a special statute (Stats. 1897, pp. 201, 202), which required a bond conditioned that, if the contractor failed to pay for materials "or supplies" furnished under the contract, the surety would pay for them. The rule of the decision is that provisions furnished to be consumed by the men or the teams during the progress of the work came under the head of "supplies" as used in the bond. The distinction between the mechanic's lien statute and this statute relating to bonds required of contractors in public work is pointed out in Sherman v. American Surety Co., 178 Cal. 286, 289, 173 P. 161, and Pac. Wood & Coal Co. v. Oswald, 179 Cal. 712, 715, 178 P. 854. It is true that, in the latter case, the court said that an action would lie on the bond for feed furnished for the teams used by a subcontractor on the work, though the statute under which the bond was given did not expressly require surety for payment of "supplies," but the court took particular care to limit the holding to actions on bonds as distinguished from actions on liens filed under the mechanic's lien statutes.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

92 Cal. App. 792

ARATA & PETERS, Inc. (a Corporation), Plaintiff and Appellant, v. SNOW MOUNTAIN WATER & POWER COMPANY (a Corporation) et al., Defendants and Respondents. (Civ. 6398.) ★

District Court of Appeal, First District, Division 2, California. May 28, 1928.

Hearing Denied by Supreme Court July 26, 1928.

Appeal by plaintiff from a judgment of the Superior Court of Lake County, M. S. Sayre, Judge, in an action to foreclose mechanic's lien. Affirmed.

W. T. Plunkett, of San Francisco, for appellant.

Max Thelen, of San Francisco, Benjamin C. Jones, of Lakeport, and Thelen & Marrin, of San Francisco (Pillsbury, Madison & Sutro, of San Francisco, of counsel), for respondent Snow Mountain Water & Power Co.

PER CURIAM. This action involves a similar lien for the same supplies covered by case No. 6397, 267 P. 932, and, upon the authority of that decision, the judgment herein is affirmed.

92 Cal. App. 792

ARATA & PETERS, Inc. (a Corporation), Plaintiff and Appellant, v. SNOW MOUNTAIN WATER & POWER COMPANY (a Corporation) et al., Defendants and Respondents. (Civ. 6399.) ★

District Court of Appeal, First District, Division 2, California. May 28, 1928.

Hearing Denied by Supreme Court July 26, 1928.

Appeal by plaintiff from a judgment of the Superior Court of Lake County, M. S. Sayre, Judge, in an action to foreclose mechanic's lien. Affirmed.

W. T. Plunkett, of San Francisco, for appellant.

Max Thelen, of San Francisco, Benjamin C. Jones, of Lakeport, and Thelen & Marrin, of San Francisco (Pillsbury, Madison & Sutro, of San Francisco, of counsel), for respondent Snow Mountain Water & Power Co.

PER CURIAM. This action involves a similar lien for the same supplies covered by case No. 6397, 267 P. 932, and, upon the authority of that decision, the judgment herein is affirmed.

92 Cal. App. 216

DUNGER et al. v. WHITNEY et al.
(Civ. 3449.)

District Court of Appeal, Third District, California. May 26, 1928.

1. Vendor and purchaser 🔑299(3)—Rescission of contract would not be allowed purchasers, where they neither restored nor offered to restore land received (Civ. Code, § 1691).

In vendor's action to foreclose purchasers' rights arising out of contract of purchase and sale of real estate, rescission of such contract would not be, because of Civ. Code, § 1691, allowed the purchasers on their cross-complaint, where they neither had restored nor offered to restore what they had received.

2. Vendor and purchaser 🔑299(3)—In vendor's action to foreclose purchasers' rights, purchasers' allegations of disclaimer held insufficient to take place, in purchasers' rescission, of offer to restore (Civ. Code, § 1691).

In vendor's action to foreclose purchasers' rights in property, in which action purchasers filed their cross-complaint, purchasers' allegations disclaiming any interest in the property which was basis of plaintiff's suit *held* insufficient to take the place of the necessary offer, on rescission, to restore what one has received before he can rescind, as provided by Civ. Code, § 1691.

★Hearing denied by Supreme Court.

3. Vendor and purchaser ⚷44, 299(3)—Purchaser relying, as defense to vendor's suit, on falsity of and fraud in vendor's promise must not only allege fraud, but must show damage therefrom.

Purchaser alleging fraud as defense to vendor's suit relative to land sale must, in addition to alleging that statement made was false and fraudulent, show damage therefrom.

4. Vendor and purchaser ⚷37(1)—Vendor's failure to perform parol agreement, made in good faith, held not fraud.

Where, in vendor's suit to foreclose purchasers' rights, defendants set up vendor's fraud, *held*, that the mere failure of the vendor to perform parol agreement relative to lending purchasers stated amount of money was not fraud.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Walter Dunger and another against M. L. Whitney and another, in which defendants filed a cross-complaint. From the judgment, plaintiffs appeal. Reversed.

C. W. Braswell, of Long Beach, for appellants.

J. C. Thomas, of Visalia, for respondents.

BUCK, Justice pro tem. This action was brought for the purpose of foreclosing the rights of certain vendees arising out of a contract of purchase and sale of real estate. The form of the complaint was that of an ordinary action to quiet title. In their final pleadings the defendants, by way of cross-complaint, "disclaimed any interest in the aforesaid property upon which the plaintiffs have brought suit to quiet title," and alleged the contract in question was procured through the fraud of the plaintiffs, to the damage of the defendants in the sum of $5,500.

The court gave judgment that the defendants "have no interest in or to the aforesaid real property, and plaintiffs are hereby adjudged to own and possess the aforesaid real property," and also decreed that the defendants and cross-complainants recover damages from the plaintiffs in the sum of $5,500, together with interest and costs. From this judgment the plaintiffs appeal.

By the contract out of which the action arose, the plaintiffs agreed to sell to the defendants 160 acres of land lying in the county of Tulare, for the sum or price of $8,000, to be paid as follows, to wit, by the transfer by execution of a deed from the defendants to the plaintiffs of a house and lot in the town of Lindsay, "which is taken and received on the consideration herein of $8,000" for the sum of $2,000, and the remainder of said $8,000 to be paid "on or before 10 years from the date of this agreement." It was further agreed that the deferred payments shall bear interest for the first year at the rate of 3 per cent. per annum payable annually, for the second year at the rate of 4 per cent. payable annually, and for each succeeding year at the rate of 7 per cent. payable annually; and it was further agreed that the defendants should have the right to immediate possession of the premises, and in consideration thereof should pay the second installment of taxes for 1922–23, and, also, subsequent taxes, assessments, liens, levies, or charges which may be laid or placed upon said property, and not allow the same to become delinquent; and it was further agreed that the plaintiffs should execute to the defendants a deed of the above-described property when the defendants had kept and performed all the terms and conditions of the agreement; and the defendants also agreed "to make the payments as herein specified upon the dates and in the amounts as herein provided, and upon their failure so to do, the said parties of the first part shall be relieved from all and any obligations to deliver said deed and shall be relivered from" the return of any payment either of principal or interest made upon the purchase price as herein provided, and all payments upon the principal or interest shall be deemed and agreed to be liquidated damages for the use and occupancy of said premises during the continuance of the agreement, and the parties of the first part shall have the right to make entry in the event of the failure to perform the terms and conditions of the agreement, and shall be entitled to peaceable and quiet possession without court order or decree. And it was further provided that time should be the essence of the agreement. This agreement was executed on January 2, 1923, at which time defendants executed their deed to the lot in Lindsay and entered into possession of the land in question and commenced to cultivate the same. The lot in Lindsay was afterwards sold by plaintiffs.

The action was commenced on January 10, 1925, and the trial was had on September 26, 1925, and by leave of court afterwards obtained the defendants filed on January 19, 1926, their second amended cross-complaint which was used by the court as the basis of the findings that were filed herein on March 22, 1926. It was stipulated that the answer filed by the plaintiffs to the first amended cross-complaint should be deemed to be applicable to the second amended cross-complaint. In this cross-complaint plaintiffs, after alleging the contract of purchase and sale, allege that at the date of said exchange the plaintiffs did, in answer to the questions of the defendants, state the following:

> "That there was no black alkali upon the 160 acres aforesaid; that there was no hardpan thereon; that said quarter section of 160 acres was fine land, and very productive and good for farming purposes, and good to procure and grow alfalfa thereon, and other farm products, that the soil was the very best; as further induce-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ment to obtain the signatures of cross-plaintiffs to the aforesaid contract of exchange, the plaintiffs did then and there promise and agree that if cross-complainants would sign the said contract aforesaid, he, the said plaintiff, Walter Dunger, would loan the defendants and cross-complainants the sum of $500 for the purpose of improving the said 160 acres of land mentioned in the aforesaid contract; that he utterly failed and refused to do so, and thereafter, to wit, stated that he did not have the $500, but if these cross-complainants would obtain the said $500 from some one, he, the said Walter Dunger, would cause a good and sufficient deed to be made to these cross-plaintiffs and let the cross-plaintiffs execute the first mortgage on the aforesaid 160 acres described in the contract aforesaid, and that the said Walter Dunger would take a second mortgage for what was due him on the said real estate; that the cross-plaintiffs did procure the said loan for the purpose of improving the said property, and then the said Walter Dunger refused and failed to make the deed to these cross-plaintiffs, and has continued to refuse hitherto."

The aforesaid matters are set out in paragraph IV of the second amended cross-complaint, and cross-complainants then further allege that:

> "By reason of the allegations, which were false guaranties and assurances, mentioned in paragraph IV of this amended cross-complaint, the cross-plaintiffs were induced to and did sign the aforesaid contract, and would not have signed it had not the plaintiff Walter Dunger made the said promises and assurances, and by reason of the said guaranties, assurances, and promises of said plaintiffs, the said cross-complainants did sign and convey away the aforesaid property."

The cross-complainants further allege: That by reason of "the aforesaid false and fraudulent promises by the plaintiffs" defendants did spend in work and labor the sum of $3,500, and did part with their house and lot aforesaid—that the value of said house is $2,000, with and including the lot upon which it is situated. That the cross-plaintiffs were damaged $2,000 by reason of being induced by plaintiff to exchange the premises at Lindsay. The aforesaid 160 acres described in the contract is worthless for farming purposes and is strongly impregnated with black alkali, except in small patches, and that for farming purposes the same is worthless.

Cross-plaintiffs further allege:

> "That the cross-complainants have been damaged as follows: In the fact that the plaintiff refused to loan the cross-complainants the sum of $500, as aforesaid, for the improvements, and the sum of $3,500 for work and labor performed in the improvements of the said property, expending thereon the sum of $3,500, as aforesaid, in improvements."

In its findings, based upon the foregoing pleading, the learned trial judge finds that "the defendants and cross-complainants have disclaimed any right, title, or interest in and to the real estate upon which the plaintiffs brought action to quiet title," and the court finds "that each and every allegation of the defendants' second amended cross-complaint are true"; and the court further finds that the plaintiffs did make the representations charged in the cross-complaint, and did further find that "by reason of such allegations, guaranties, and assurances" that the defendants were induced to and did sign the contract, and that by reason of the "aforesaid false and fraudulent promises by the said plaintiff, defendants did expend in work and labor the sum of $3,500 and did part with their house and lot, as aforesaid, and that the value of the house and lot is $2,000, and that the defendants were damaged $2,000 by reason of being induced by the plaintiff to exchange the property at Lindsay, and that the aforesaid 160 acres is worthless for farming purposes and is strongly impregnated with black alkali except in small patches, and that for farming purposes the same is worthless," and the court further found "that each and all of the statements and averments were untrue and known by the plaintiff to be untrue; that neither of the defendants or either defendant knew that any of the said statements or averments were untrue, but believed said statements of the plaintiff and averments to be true and acted upon them, and but for them having been made by the plaintiff, defendants and cross-complainants would not have executed and delivered the aforesaid agreement." And as its conclusions of law the court found that the defendants and cross-complainants are entitled to $5,500 as prayed for in their second amended cross-complaint.

From the evidence taken at the trial it appears that immediately upon the signing of the contract in January of 1923, the defendants went into possession of the premises, and there is no evidence that they have ever surrendered, or offered to surrender, the premises to the plaintiffs, or have vacated them. Also, there is evidence tending to show that defendants, as early as the spring of 1923, were aware of the fact that the land was impregnated with alkali, and that the hardpan was very near the surface and that it was not suitable for the raising of alfalfa; also, the evidence shows, without conflict, that as a part of the consideration for their purchase, the defendants received personal property of the value of $550. The evidence also shows, without conflict, that no part of the annual interest on the balance of $6,000 was ever paid; and the evidence also shows, without conflict, that no part of the taxes due since 1923 have been paid by the defendant, but that they went delinquent and the plaintiff was obliged to pay them and, furthermore, that nothing has been paid on the contract since it was signed.

In the recent case of Paolini v. Sulprizio, decided July 29, 1927, 258 P. 380, our Supreme Court in bank, after a full review of the authorities, stated that:

> "Three remedies are open to a party defrauded in a contract for the purchase of real estate. One is rescission, whereby, upon the discovery of the fraud, he repudiates the contract, offers to return what he has received, and seeks a restoration to his original position, claiming whatever damage he may have suffered by reason of the unconscionable conduct of the party; or, too, he may affirm the contract, retain what he has received, and sue for his damages in an action for deceit. * * * He consents to be bound by the provisions of the agreement, but does not thereby release or waive his claim for damages arising from a fraud collateral to the agreement. He must, himself, be willing and able to perform on his part, and it must be conclusively taken that he stands ready and willing to pay the full consideration called for by the contract. * * * From any award which may be made because of the fraud must be deducted any unpaid part of the purchase price. * * * In harmony with this principle, which permits the buyer to retain the property and bring suit for the recovery of the damages which he has sustained, there is a third course open to a defrauded vendee. He may set up the seller's fraud as a partial defense or counterclaim without any offer of restitution, and recoup his damages in the action brought by the guilty party to the contract."

[1] It is unmistakably evident, both from the evidence and findings touching his proposed measure of damage as well as from the position which counsel takes in his pleadings and argument, that the defendant and cross-complainant is not affirming the contract and is not treating his cross-complaint as an action for deceit. In his brief, learned counsel argues, "We practically rescind the contract by our disclaimer." On the other hand, the measure of damage which he seeks to apply and sustain is nowise responsive to any plea of deceit. Pembrook v. Houston, 41 Cal. App. 54, 56, 181 P. 828; Foster v. Gorham, 63 Cal. App. 601, 219 P. 476; Paolini v. Sulprizio, supra, citing Pierce v. Hellenic Co., 76 Misc. Rep. 473, 135 N. Y. S. 605; and Stearns v. Kennedy, 94 Minn. 439, 103 N. W. 212.

It is therefore evident that learned counsel is seeking to avail himself of the fraud of the plaintiff to rescind the agreement and obtain "a restoration to his original position, claiming whatever damage he may have suffered by reason of the unconscionable conduct of the plaintiff." But in assailing the unconscionable conduct of the plaintiff for purposes of rescission, he has failed to observe that portion of the rule which requires that he also do equity and restore or offer to restore what he has received under the contract which he is seeking to annul. Section 1691, Civ. Code; Gates v. McLean, 70 Cal. 42, 50, 11 P. 489. It is true, he has inserted in his cross-complaint the averment that:

> "The plaintiff herein has brought suit to quiet title to the aforesaid property, that the cross-complainants disclaim any interest in the aforesaid property upon which the plaintiffs have brought suit to quiet title thereto."

And in his brief counsel states:

> "We practically rescind the contract by our disclaimer."

[2] And it is true that the learned trial court apparently so found, and did decree that the cross-complainant "had no interest" in the aforesaid real property, and the plaintiffs were accordingly adjudged "to own and possess" the aforesaid real property. Such a mere allegation in the pleadings cannot be held to be sufficient to take the place of the necessary offer to restore possession. Hammond v. Wallace, 85 Cal. 522, 531, 532, 24 P. 837 (20 Am. St. Rep. 239); Zeller v. Milligan, 71 Cal. App. 617, 625, 626, 236 P. 349; Maddock v. Russell, 109 Cal. 417, 426, 42 P. 139. Also, there is no evidence in the record showing or tending to show that the cross-complainants have ever restored or offered to restore the personal property of the value of $550 which they received as a partial consideration for their agreement.

[3, 4] Furthermore, as regards the allegations and findings of fraud on the part of the plaintiff, while it is alleged that plaintiff promised to loan the defendant at the time of the agreement the sum of $500, there is no averment in the complaint to support any finding that such promise was made by the plaintiff without any intention on the part of the plaintiff to perform the same, or with intent to deceive or mislead the defendants. As stated in Hickman v. Johnson, 36 Cal. App. 342, at page 346, 178 P. 145, 147:

> "There is no such allegation. It is not sufficient to allege that such promise was false and fraudulent. Rheingans v. Smith, 161 Cal. 362 (119 P. 494, Ann. Cas. 1913B, 1140)."

But the trial court evidently allowed its finding of damage to be based to some extent upon the alleged breach of the merely collateral verbal promise to make the $500 advance. For the court does find that:

> "The cross-complainants were induced to and did sign the aforesaid contract and would not have signed it had not the plaintiff, Walter Dunger, made the said promises and assurances, and by reason of the said guaranties, assurances, and promises of the said plaintiffs the said cross-complainants did sign and convey away the aforesaid property. That by reason of the aforesaid false and fraudulent promise by plaintiffs, defendants and cross-complainants did expend in work and labor the sum of $3,500, and did part with their house and lot aforesaid. That the value of said house is $2,000, with and including the lot upon which it is situated."

But, as already indicated, to the extent that this resulting loss of $5,500 is charged to have been brought about by plaintiff's failure to keep his collateral promise to loan the $500, the finding of damage is uncertain and cannot be sustained. "The mere failure to perform a parol agreement * * * made in good faith is not fraud." Feeney v. Howard, 79 Cal. 525, 529, 21 P. 984, 986 (4 L. R. A. 826, 12 Am. St. Rep. 162).

If it be conceded, as learned counsel vigorously contends in his brief that the defendants have been defrauded by the plaintiffs, it fails to appear that the defendants, through their learned counsel, have chosen to avail themselves of some one of the plain and ample remedies that could and would have been given them by the court under the law of the land if properly invoked.

The judgment appealed from is therefore reversed.

We concur: HART, Acting P. J.; PLUMMER, J.

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92 Cal. App. 62

FIRST NAT. BANK OF TULARE v. ANDREAS et al. (Civ. 3437.)

District Court of Appeal, Third District, California. May 19, 1928.

1. Vendor and purchaser 🔑194—Purchaser let into possession has same general rights with respect to crops raised as mortgagor.

Purchaser let into possession has same general rights with respect to crops raised by him as mortgagor would have, and so long as there has been no default on his part or he is permitted to remain in possession, the crops raised and harvested belong to him.

2. Chattel mortgages 🔑139—Contract for sale of premises held to create secret lien for vendor on personalty, invalid against chattel mortgagee taking mortgage on crops in good faith and without notice.

Contract for sale of premises whereby vendor retained title and ownership of crops and profits to be received therefrom, but, contradictory thereto, obligating vendor to apply proceeds of crop to payment of existing indebtedness between himself and purchaser and to deliver the balance thereof to purchaser, latter provisions, being inconsistent with any claim of absolute ownership, *held* to create a secret lien on personal property invalid as against subsequent chattel mortgagee in good faith and without notice holding mortgage on crops grown.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by the First National Bank of Tulare against Jacob Andreas and another for replevin of crop of grapes. Judgment for plaintiff, and the defendant George Van Vleet appeals. Affirmed.

Frank Kauke, of Fresno, for appellant.

Russell & Heid, of Tulare, for respondent.

BUCK, Justice pro tem. Replevin by the holder of a chattel mortgage to recover a crop of grapes grown on land the subject of an unrecorded agreement of sale between the defendant owner of the land and one Andreas. The crop mortgage in question was executed to the plaintiff by Andreas while Andreas was in possession of the land under his agreement of purchase from the defendant.

Defendant, relying upon certain provisions pertaining to the crops in the agreement of sale, alleges in his answer that he is the sole owner of the crops of grapes and that plaintiff acquired no interest therein by reason of the crop mortgage from Andreas.

The case was tried by the court without a jury, and judgment was given for the plaintiff. Defendant appeals. The facts are fully set out in the findings, and the appeal is on the judgment roll alone.

The contract of sale and purchase of land between the defendant and Andreas is, so far as the land is concerned, in the usual form. The purchase price was to be paid in yearly installments and the vendee, Andreas, entered into possession.

From the beginning, the courts have held that the position of a vendor where the purchaser is in possession under the contract is "analogous to that of a mortgagee." Salmon v. Hoffman, 2 Cal. 143, 56 Am. Dec. 322, and Willis v. Wozencraft, 22 Cal. 607, at page 616. Also, as stated in the recent case of Orange Cove Water Co. v. Sampson, 78 Cal. App. 334, at page 341, 248 P. 526, 529, with numerous citations:

> "Such a contract to convey, if enforceable, has the effect of vesting the equitable estate in the vendee, leaving in the vendor the dry legal title. It is in effect a grant of the whole beneficial interest in the land. * * * The rule in equity is that by a contract of sale of real property for an adequate and sufficient consideration the vendee acquires an equitable title to such property and thereby becomes the equitable owner. The vendee, from the time of the making of such contract, is by equity treated as trustee of the purchase money for the vendor, while the latter is regarded as holding the land in trust for the purchaser as security for the payment of the purchase price until a conveyance of the legal title to the vendee is finally made."

And, as regards the situation of a mortgagor and mortgagee touching the crops growing on mortgaged lands, the rule in this state is fully stated in the cases of Simpson v. Ferguson, 112 Cal. 180, 40 P. 104, 44 P. 484, 53 Am. St. Rep. 201; Modesto Bank v. Owens, 121 Cal. 223, 53 P. 552; Cowdery v. London, etc., Bank, 139 Cal. 298, at page 309, 73 P. 196, 96 Am. St. Rep. 115, and the recent case of Binney v. San Dimas, etc. (Cal. App.) 253 P. 346.

[1] In its general effect, the rule is that until foreclosure, the mortgage creates no estate in the mortgagee and the mortgagor

is entitled to such an absolute right and dominion over the crops that a crop mortgage executed by him to a third party takes precedence over any terms in the original mortgage seeking to give a prior security on the crops to the mortgagee. "A purchaser let into possession has, it is said, the same general rights with respect to crops raised by him as a mortgagor would have, and so long as there has been no default on his part or he is permitted to remain in the possession, the crops raised and harvested belong to him." 27 R. C. L. p. 541, citing Killebrew v. Hines, 104 N. C. 182, 10 S. E. 159, 251, 17 Am. St. Rep. 672, where the rule is applied in a case somewhat analogous to the one at bar. See, also, Able v. Gunter, 174 Ala. 389, 57 So. 464, and Speicher v. Lacy, 28 Okl. 541, 115 P. 271, 35 L. R. A. (N. S.) 1066.

But it is defendant's contention that, by reason of certain provisions inserted in the agreement of purchase and sale of the lands, Andreas, the vendee therein, became divested of his right to dispose of the crops while in possession of the premises, while it is the contention of the respondent that, by virtue of the provisions inserted in the contract construed as a whole, the vendor at the most was attempting to acquire a secret lien on the crops, which was void and invalid as against the properly recorded crop mortgage of the plaintiff.

As already noted, the land was to be paid for in yearly installments, and the contract also provided that the vendor might make advances to the vendee, and it was provided that all such advances made or indebtedness due from the vendee to the vendor or interest on such amounts from date of loan or advancement shall be payable to the vendor on the 1st day of November of each year, and may be kept and retained out of and from the moneys received from the marketing and sale of the crops. It was also provided as follows:

> "That each year the (vendee) will protect the crops of fruit and grapes growing and to be grown on said premises and when the same are in a condition for harvesting (he) will in a first-class, good and farmer-like manner, pick and prepare all said crops for market and will deliver all said crops in the market in the name of and as the property of the said Geo. Van Vleet (the vendor), and that at all times while said crops are growing and thereafter when harvested and delivered in the markets, the title and ownership thereof and the proceeds to be received therefrom shall be deemed to be and shall be vested in the said Geo. Van Vleet, and shall not be incumbered or disposed of, save and except as marketed in his name and his property, and all payments made on the sale thereof shall be payable to and shall be made to him by the respective purchasers thereof. * * *
>
> "That as money and proceeds from the marketing and sale of said crops are received, the said first parties (the vendor) may and shall take therefrom any and all moneys that may have been advanced by them, or either of them, as hereinabove provided for, and may and shall also take therefrom the amounts due or to become due in such year as installment of principal and interest on the purchase price of said property, *and shall thereupon credit and apply same* in payment of said sums respectively, and whenever the said first parties (the vendor) shall have received and applied the proceeds from the crops in any such year, or have otherwise received from the said second parties (the vendee) all amounts to be paid by them in such year, whereby all amounts due and to become due in such year for said advances and installments of principal and interest on said purchase price have been satisfied and discharged, *then* the said first parties (the vendor) will deliver over the *balance* of the proceeds from the sale of said crops to the second parties or to their order; or in the event that the full amount of said proceeds have not been collected and received by the said first parties, but are owing from the purchaser of any of said crops then such remaining balance (after said first parties have received the amounts so to be received by them in such year) shall be released unto and transferred over to and shall belong to the said second parties whereby collection of such balance may thereupon be made direct by the said second parties. * * * That should the gross proceeds from the sale of all the crops grown and produced on said premises in any year (through no neglect or fault of the said second parties) be insufficient to pay and discharge the installments of interest and principal of said purchase price to be paid in any such year as hereinabove set forth, then the said first parties will not require the said second parties to make up the deficiency from other sources, but the amount of such deficiency shall be added to or remain a part of the unpaid portion of said purchase price and bear interest at the rate hereinabove specified (7 per cent. per annum) until paid."

[2] An examination of the foregoing provisions relating to the crops growing on the premises would indicate that though in good, set terms the vendor has stated that "the title and ownership" of the crops and the proceeds to be received therefrom "shall be deemed to be and shall be vested in the vendor," that nevertheless the vendor has by the same contract assumed obligations which are inconsistent with and nugatory of his asserted claim of absolute ownership. For, first, after he has had the crops marketed by his vendee, he ceases to enjoy any right as owner to apply the proceeds thereof to his own benefit generally, but he becomes immediately obligated to apply such proceeds to the payment of the existing indebtedness between himself and the vendee; and, second, the vendor further obligates himself, after he has made such application for the benefit of the vendee, to "then * * * deliver over the balance of the proceeds from the sale of such crops to" the vendee. To say the least, these provisions are each of them inconsistent with any claim of absolute ownership, and are consistent only with the position of a creditor who is attempting only to secure the payment

of a specific debt. As was stated in the case of Stockton Savings & Loan Society v. Purvis, 112 Cal. 236, 44 P. 561, 53 Am. St. Rep. 210, where a similar question was involved:

> "It further appears that the grain was to be hauled to a certain warehouse when harvested, and thereupon sold by plaintiff [the asserted owner as here], and the proceeds applied, first, to the payment of its cash rent of $2,140.00, and the balance, if any, to go to the lessee. It would be a peculiar construction of this contract, and even an absurd one, to hold that plaintiff was to sell his own crop of grain, and apply the proceeds to the payment of a claim owned and held by it against its lessee. This clause of the contract plainly indicates an attempt by the lessor to hold the crop, when harvested, as security for the rent."

Also, the provisions of the contract relating to the crop fail to create a conditional sale of the crop for the reason that they nowhere provide that the vendee may or shall by the fulfilment of any condition ever become the buyer or owner of said crop. Therefore no analogy arising out of cases upholding conditional sales exists in this case, since the reason for the rule favoring conditional sales is not applicable herein. As stated in the case of Marker v. Williams, 39 Cal. App. 674, at page 679, 179 P. 735, 737:

> "The law of California very properly favors the conditional contract of sale. It has become very largely a factor in the purchase and sale of personal property, and, too, of that class of machinery and appliances commonly used in connection with real estate. It should be the policy of courts to afford every proper protection to upholding the conditions of such sales, both in the interest of the buying and selling classes."

Also, the cases cited by counsel pertaining to the relation of landlord and tenant are not entirely applicable. It is true, of course, that the law does uphold provisions in an agreement between landlord and tenant, by which the landlord, in order to obviate the strict terms of the lease, protects himself by making himself a tenant in common of the crop prior to its severance. Baughman v. Reed, 75 Cal. 319, 17 P. 222, 7 Am. St. Rep. 170; Woodsend v. Chaton, 191 Cal. 72, 214 P. 965. But our courts have not gone to the extent of allowing the landlord, by the use of words in conflict with the actual substance of the contract, to secure himself by a secret lien on all the crops for advances made by himself, as against a third party holding a properly executed chattel mortgage on the crops. In this particular, the rule applied by our courts is not in harmony with the rule applied in the North Dakota cases cited by counsel, notably the case of Merchants' State Bank v. Sawyer Farmers' Co-operative Association, 47 N. D. 375, 182 N. W. 263 (also reported with annotations on pages 1362 to 1368 of 14 A. L. R.). See, also, Ferguson v. Murphy, 117 Cal. 134, 48 P. 1018, and Stockton Savings & Loan Society v. Purvis, 112 Cal. 236, 44 P. 561, 53 Am. St. Rep. 210; also, Kelley v. Goodwin, 95 Me. 538, 50 A. 711, and McNeal v. Rider, 79 Minn. 153, 81 N. W. 830, 79 Am. St. Rep. 437. In fact, the rule applied in our courts seems to be in full harmony with the vigorous dissenting opinion reported in the Dakota Case relied upon by the appellant herein.

Since, therefore, the contract in the case at bar is in substance and effect no more than an attempt, in contravention of the statute, to create a secret lien on personal property against a subsequent incumbrancer in good faith and without notice, the judgment of the lower court herein is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

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92 Cal. App. 236

GLUCKSTEIN v. RAPPAPORT et al.
(Civ. 6283.)

District Court of Appeal, First District, Division 1. California. May 29, 1928.

1. Landlord and tenant 🔑80(3)—Rescission by subtenants is deemed effective as of date of rescission.

Act of rescission of contract by subtenants is deemed to take effect as of date of rescission, notwithstanding subsequent commencement of action to have court declare sublease canceled, since any judgment confirming rescission must have declared rights terminated as of date of rescission.

2. Landlord and tenant 🔑34(1)—Lessor's rescission held not invalid for failure to restore or offer to restore everything of value received, though sublease was still of record (Civ. Code, § 1691).

Rescission of hotel lease on ground that hotel was not built according to specifications *held* not invalid under Civ. Code, § 1691, on ground that lessee did not restore or offer to restore everything of value received, where sublease was rescinded by undertenant and lessor entered premises and relet them, notwithstanding outstanding record of sublease in county recorder's office.

3. New trial 🔑70—Trial court has absolute discretion in granting new trial for insufficiency of evidence, where it would have supported verdict for unsuccessful party.

Where verdict for plaintiff would have had support in evidence, trial court is invested with absolute discretion in matter of granting new trial for insufficiency of evidence after verdict and judgment for defendant.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Joseph Gluckstein against Morris Rappaport and another, in which defendants filed a cross-complaint. The action was dismissed as to defendant Amelia Rappaport, and after judgment had been entered for defendant Morris Rappaport a new trial was granted for insufficiency of evidence, and defendant Morris Rappaport appeals. Affirmed.

Isaac Pacht and Clore Warne, both of Los Angeles, for appellant.

Haas & Dunnigan, H. E. Forster, and J. Marion Wright, all of Los Angeles, for respondent.

CAMPBELL, Justice pro tem. In this action plaintiff prayed judgment against defendants Morris Rappaport and Amelia Rappaport for money had and received in the sum of $12,500. By their answer defendants made specific denial of the allegations of the complaint and filed a cross-complaint for attorney's fees wherein it was sought to enforce the provisions of a certain lease alleged to be a part of the transaction and contract upon which the action was brought. Plaintiff filed appropriate answer thereto. Thereafter the action was dismissed as to the defendant Amelia Rappaport, and the jury before which the action was tried returned a verdict in favor of defendant Morris Rappaport, whereupon judgment on the verdict was entered. Subsequently, upon due notice a motion for a new trial was granted by the court on the ground of insufficiency of the evidence to sustain the verdict, and from this order granting a new trial defendant Morris Rappaport has appealed.

The facts show that on February 6, 1924, appellant, being the owner of certain lots situated at Seventh street and Ceres avenue in the city of Los Angeles, intended to improve such lots by erecting thereon a hotel building, and entered into a lease agreement with respondent under the provisions of which appellant covenanted to cause to be erected and ready for occupancy by October 1, 1924, a building for hotel purposes of Class A construction containing 83 rooms and to have such building erected according to plans submitted and approved before the execution of the lease and constituting part of the lease, it being further agreed that any changes in the plans or specifications should only be made upon the written consent of respondent as lessee. Under the terms of the lease respondent paid to appellant $12,500. The lease gave to respondent the right to assign the lease or sublet the premises to Japanese or other financially responsible people on payment to appellant of the sum of $200. On March 10, 1924, respondent sublet the entire premises to K. Fukuda and S. Miyoshi, Japanese, paying to appellant $200 for his consent to the making of the sublease. Notice was duly given to respondent and the sublessees that the building would be ready for occupancy on or about July 15, 1924, and subsequently a further notice was given that occupancy could be had on August 1, 1924.

On July 15, 1924, the Japanese lessees, after inspecting the building, became aware of the irregular shape of many of the rooms and sent to respondent a notice of rescission of the sublease, setting forth in such notice that the building was not built according to the plans and specifications agreed upon and left with Fukuda and Miyoshi, upon which were set forth and delineated the shape of the building to be erected and setting forth the size and shape of the rooms in the hotel building, showing the rooms to be of certain designated size and showing all of the rooms to be rectangular in form, 38 of which could be occupied by two persons, yet that in the building as actually constructed there are only 26 of such rooms. Fukuda and Miyoshi in such notice offered to reconvey and assign back the lease and offered to return everything of value they had received in connection with the sublease, and demanded the return of $3,500 paid thereon and the cancellation and return of a promissory note given by them for $2,000.

Respondent, who had been in New York since the early part of June, 1924, discovered on his return towards the end of July that the Japanese sublessees had rescinded the sublease on the ground that the building had not been erected according to the plans approved, and on August 1, 1924, served on appellant a notice of rescission of the main lease, setting forth the facts wherein the building was not constructed in accordance with the plans and specifications agreed upon, demanding repayment of $12,500 paid on entering into the lease agreement on February 6, 1924, and offering to return appellant everything of value received from him. On August 19, 1924, appellant entered into the premises and relet the same for the full term demised to respondent.

Three separate actions arose out of these facts. Respondent instituted the action which is the subject of this appeal; appellant brought an action against respondent, alleging that because of respondent's failure to take possession of the premises he had relet the same for the term demised to Max Kirschbaum, that by reason of certain expenses, counsel fees, etc., he has suffered damage; while Fukuda and Miyoshi brought suit against respondent seeking enforcement of the rescission of their sublease. The first two actions were by stipulation of the parties ordered consolidated and were tried together. The jury rendered its verdict in each case for the defendant, and in each case a new trial was granted.

Appellant urges:

> "(1) That in order to accomplish a rescission it was incumbent on respondent to first place appellant in status quo and deliver up to him everything of value received by him, or offer so to do. (2) That respondent did not place nor

offer to place appellant in status quo. (3) That therefore no rescission accomplished, no judgment other than in favor of appellant could be rendered or given, and the trial court erred in granting motion for new trial."

[1, 2] The contention that respondent did not restore to appellant everything of value received or make an offer to do so is without merit. The sublease was rescinded by the undertenant on July 15, 1924, the rescission itself being based on the same failure of consideration relied on by respondent in his notice of rescission given on a subsequent date. The act of rescission by the subtenants is deemed to take effect as of the date of the rescission, to wit, July 15, 1924, and this must be so irrespective of the fact that the Japanese sublessees later commenced an action to have the court declare the sublease canceled, as any judgment of the court confirming the rescission of the sublease must have declared the rights terminated under the sublease as of the date of rescission. Wilcox v. Lattin, 93 Cal. 588, 595, 29 P. 226.

The testimony admitted on the trial of the two actions consolidated shows that appellant was fully aware that the subtenants had rescinded the sublease because of the numerous changes made in constructing the hotel. This is further demonstrated by the fact that appellant relet the premises on August 19, 1924, to one Max Kirschbaum for the full demised term. No property under the lease ever came into respondent's possession, nor in fact into the possession of the subtenants, as both the lessee and the sublessees refused to accept the building due to the unauthorized departures from the plans agreed on and made a part of the lease.

In Lupton v. Domestic Utilities Mfg. Co., 173 Cal. 415, 160 P. 241, cited by appellant, the facts are not analogous to the facts here. The opinion in that case discloses that the plaintiff had transferred title to 1,667 washers to her husband, and that he still held title at the time of attempted rescission by plaintiff, his wife. The opinion of the court reversing the judgment shows that at the date of rescission the plaintiff had divested herself of the title to part of the property received from defendant, and that the plaintiff made no tender or offer to restore title to the property she had parted with, but in fact rested her defense for failure to return on the ground of fraud, which the court held could not be sustained.

In Herman v. Haffenegger, 54 Cal. 161, cited by appellant, while plaintiff received something of value from defendant, he made no return or offer to return what he had received. Bailey v. Fox, 78 Cal. 389, 20 P. 868, was an action to rescind a contract of sale of a one-third interest in a business the stock of goods of which had been depleted in the interim between the contract and attempted rescission, and Kelley v. Owens, 120 Cal. 502, 47 P. 369, 52 P. 797, cited, sustains the general rule that there can be no rescission of an executed contract upon the ground of fraudulent misrepresentation without restoration before suit by the party seeking to rescind of everything of value he had received.

Section 1691 of the Civil Code requires as a condition in rescinding that everything of value received be restored, *or an offer must be made to restore the same upon the condition that such party shall do likewise.* It appears that there has been a sufficient compliance with the italicized portion of the section of the Code in both instances of rescission. The notices of rescission by the sublessees and the main lessee are sufficiently clear in respect to the offer to restore everything of value to satisfy the Code provisions and the many decisions of this state.

An analysis of the facts presented reduces the issues on this appeal to the bare proposition of whether or not the outstanding record in the county recorder's office in Los Angeles county affecting the sublease was sufficient to defeat the right of plaintiff to rescind.

In Kelley v. Owens, supra, cited by appellant, the court, in discussing those cases where restoration or an offer to restore before suit is not necessary, says:

> "There are exceptional cases where restoration or an offer to restore before suit brought is not necessary—as, for instance, where the thing received by the plaintiff is of no value whatever to either of the parties; or wherein plaintiff has merely received the individual promissory note of the defendant; or where the contract is absolutely void; *or where it clearly appears that defendant could not possibly have been injuriously affected by a failure to restore.*"

The closing portion of this quotation, italicized, seems apropos here when considered in relation to the facts presented. While appellant insists that respondent could not by his offer succeed in effectually rescinding the contract, the appellant himself on the 19th day of August, while the sublease was still of record, entered into the premises and relet the same for the full demised term without prejudice or injury resulting from the fact that the sublease was of record. Section 1691 of the Civil Code provides in alternative terms either for the restoration of everything received or a clear offer to restore. In the present case we think the notice of rescission is sufficient in its offer to restore everything of value received from the defendant.

[3] Furthermore, the rule is well recognized in this state that the appellate court will not reverse an order of the trial court granting a new trial, where there is any conflict in the evidence, unless from a review of the record furnished on appeal it clearly appears that no other judgment but one in favor of appellant could be granted. Here a verdict in favor of respondent would have had support in the evidence, and therefore the trial court is invested with absolute discretion in the matter of granting a new trial. Wendling,

etc., Co. v. Glenwood, etc., Co., 153 Cal. 411, 416, 95 P. 1029.

The order appealed from is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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92 Cal. App. 245

PEOPLE v. HARRINGTON. (Cr. 1587.)

District Court of Appeal, Second District, Division 2, California. May 29, 1928.

1. False pretenses ⚷49(1)—Evidence held to sustain conviction of obtaining property by false pretenses.

Evidence *held* sufficient to sustain conviction of obtaining property by false pretenses, as showing that complaining witness was induced to part with valuable corporation stock by defendant's false representations that she would be amply secured by another corporation's stock, which had no market value and was not delivered to her.

2. False pretenses ⚷4—Essence of obtaining property by false pretenses is deception for purpose of unfairly and unjustly obtaining property.

The essence of the offense of obtaining property by false pretenses is deception practiced on victim for purpose of unfairly and unjustly obtaining latter's property.

3. False pretenses ⚷38—Proof of one material misrepresentation warrants conviction of obtaining property by false pretenses.

To authorize conviction of obtaining property by false pretenses, it is sufficient if one material misrepresentation be proved.

4. False pretenses ⚷49(3)—Contract for transfer of corporation stock, defendant's and his witness' testimony, and other circumstances, held sufficient corroboration of complaining witness in trial for obtaining property by false pretenses.

In trial for obtaining property by false pretenses, contract for transfer of corporation stock, defendant's testimony, and that of his witness, together with other circumstances, *held* sufficient corroboration of complaining witness, under Pen. Code, § 1110.

5. False pretenses ⚷49(6)—Evidence held to show that complaining witness parted with title to, not merely possession of, corporation stock alleged to have been obtained by false pretenses.

In trial for obtaining property by false pretenses, defendant's testimony that he wanted complaining witness' stock for purpose of selling it and buying it back at lower figure, and contract reciting that complaining witness "hereby assigns, transfers, and sets over all her right, title, and interest in and to" such stock, and authorizing defendant to sell or dispose of it as he sees fit, being obliged only to return like number of shares at end of year, sufficiently showed that complaining witness parted with title thereto, not merely with possession.

6. Indictment and information ⚷171—Evidence supports conviction, notwithstanding immaterial variance between particular allegation and proof, if otherwise sufficient.

If variance between particular allegation and proof is immaterial, evidence is sufficient to sustain conviction, if otherwise so, though failing to support such allegation.

7. False pretenses ⚷4—Elements of offense of "obtaining property by false pretenses" are intent to defraud, and actual fraud accomplished by false pretenses used for such purpose.

The elements of the offense of obtaining property by false pretenses are intent to defraud, actual fraud committed, false pretenses used for accomplishing fraud, and accomplishment thereof by means of such pretenses.

8. False pretenses ⚷38—Variance between allegation and proof as to exchange of corporation stock held immaterial, in trial for obtaining stock by false pretenses.

Where defendant's promise to deliver corporation stock without market value to complaining witness was not alleged as false representation, accomplishment of fraud by means of false pretenses would have been proven on showing that defendant obtained possession of and title to complaining witness' valuable stock by means of false representations, whether on promise to hypothecate such worthless stock as security for promise to return same or equal number of shares of stock obtained at some future date, or on promise to exchange, so that variance between allegation and proof respecting exchange was immaterial, as acquittal of offense charged would have barred prosecution for offense based on promise to hypothecate security, and defendant was not prejudiced.

9. Indictment and information ⚷171—Whether variance between allegation and proof is material depends on whether defendant was misled or placed in danger of being twice in jeopardy.

The test of whether variance between allegation and proof is material depends on whether defendant was misled in making defense or placed in danger of being twice in jeopardy, considering proof introduced against him.

10. Criminal law ⚷1169(3)—Admission of evidence of market value of corporation stock at time of trial, rather than transaction complained of held not prejudicial error, in view of defendant's testimony that it had no market value.

In trial for obtaining property by false pretenses, error, if any, in permitting witnesses to testify to market value of corporation stock, which defendant promised to exchange for, or hypothecate as security for promise to return same number of, shares of stock obtained from complaining witness, at time of trial, rather than of transaction, *held* not prejudicial to defendant, in view of his testimony that he told complaining witness that former stock had no market value.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

11. Criminal law 🔑829(1)—Refusal of instructions covered by instructions given is not error.

The refusal of instructions which are covered by instructions given is not error.

12. Criminal law 🔑763, 764(6)—Instruction in trial for obtaining property by false pretenses, that contract was not false token, but circumstance for consideration in determining whether complaining witness' testimony was corroborated, held not erroneous or misleading as commenting on facts (Pen. Code, § 1110).

In trial for obtaining property by false pretenses, instruction that complaining witness' contract to assign her stock in corporation for one year to defendant, who was to loan, sell, or pledge it and return same, or like amount of same, securities at end of such time, and deliver other stock as security for performance of agreement, was not a false token or written document contemplated by statute, requiring corroboration of complaining witness' testimony (Pen. Code, § 1110), but a circumstance to be considered in determining whether such testimony was corroborated, *held* not erroneous or misleading as commenting on facts, in view of instructions on necessity of corroborative testimony in absence of false token or writing.

13. Criminal law 🔑823(4)—Instruction quoting statute, defining fraud as including promise without intention of performing, held not erroneous nor prejudicial, in view of instructions given (Civ. Code, § 1572, subd. 4).

In trial for obtaining property by false pretenses, instruction setting forth verbatim Civ. Code, § 1572, subd. 4, providing that promise made without intention of performing it constitutes actual fraud, *held* not erroneous or prejudicial to defendant as violating rule that misrepresentation must be of existing or past fact, and cannot relate to future or be mere promise to pay, nor as warranting jury in believing that they should convict, if promises to pay complaining witness stated monthly sum and dividends on stock assigned by her to defendant and return such stock or same number of shares at end of year, were made without intention to perform, in view of instructions indicating that at least one of specific misrepresentations alleged in indictment must be proven and shown to be inducing cause of complaining witness parting with her stock.

14. False pretenses 🔑51—Whether exchange of corporation stock was essential element of offense of obtaining property by false pretenses, held question of law improperly submitted to jury.

In trial for obtaining property by false pretenses, court erred in instructing jury that it was for them to say whether exchange of corporation stock was essential element in case; that being purely a question of law, not of fact.

15. Criminal law 🔑1172(1)—Instruction submitting question whether exchange of corporation stock was essential element of offense of obtaining property by false pretenses held not prejudicial error.

In trial for obtaining property by false pretenses, instruction that it was for jury to say whether exchange of corporation stock was essential element in case *held* not prejudicial error, particularly as variance between allegations and proof respecting exchange was immaterial.

Appeal from Superior Court, San Diego County; Shelley J. Higgins, Judge.

R. E. Harrington was convicted of obtaining property by false pretenses, and he appeals. Affirmed.

Henry G. Bodkin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

THOMPSON, J. The appellant was accused by indictment of the offense of obtaining property by false pretenses, in that he did, with intent to defraud, falsely and feloniously represent to one Cora I. Greene that he was possessed of 6,000 shares of class A, common stock of the Postage Press Corporation, which said shares exceeded in value 600 shares of the capital stock of Monolith Portland Cement Company; that the Postage Press Corporation was backed by the United States government; that the machine put out by the Postage Press Corporation was used by a large number of business houses; and that the stock was as good and safe as government bonds. It is also alleged that the defendant caused Cora I. Greene to believe these representations, and thereby induced her, relying thereupon, to deliver to him the 600 shares of the capital stock of the Monolith Company of the value of $6,000 in exchange for 6,000 shares of the Postage Press Company stock, which latter was of no value whatever, and there also follows the usual allegation that all of the representations were false, and that defendant knew that they were false. A second count of the indictment charging the defendant with larceny was dismissed by the trial court. The jury returned a verdict of guilty upon the first count, and this appeal is prosecuted from the judgment pronounced thereon and from the order denying defendant's motion for a new trial.

The first assault upon the judgment is upon the ground that the evidence is insufficient to sustain the verdict. The prosecuting witness testified that the appellant told her, with respect to the stock of the Postage Press Corporation:

> That "it was a very fine investment; that it was better than government bonds, and that it was backed by the government; * * * that they had a machine whereby they stamped envelopes; * * * that he showed" her "a long sheet that thousands of commercial firms, throughout the United States that were using that stamped envelope, purchased of them"; that the list of names "were business firms using it."

A contract was introduced which reads as follows:

"This agreement, made and entered into this eighteenth day of March, nineteen hundred and twenty-seven by and between Cora I. Greene, hereinafter referred to as party of the first part, and Patton & Co., hereinafter referred to as party of the second part, witnesseth:

"Whereas, the party of the first part, is the owner and holder of six hundred shares of preferred stock in the Monolith Portland Cement Company, hereinafter referred to as first party's stock and is desirous of obtaining a larger income than she is now receiving; and

"Whereas, the party of the second part, is conducting a business in the city of Los Angeles, state of California, and is in a position to use the aforesaid first party's stock to the mutual benefits of both parties to this agreement:

"Now, therefore, in consideration of the sum of fifty-four dollars ($54.00) per month payable on the seventeenth day of each month plus a sum equal to any and all dividends declared and paid on first party's stock and continuing for a period of one year or longer, the first party hereby assigns, transfers and sets over all her right, title, and interest in and to the above-mentioned first party's stock over unto the party of the second part for a period of not less than one year from date hereof or longer as agreed upon by both parties at the expiration of the aforesaid one year period. The party of the first part hereby agrees that the above-mentioned first party's stock may be loaned or sold by the party of the second part or may be pledged by it, either separately or together with other securities either for the full market value or for a lesser or greater sum, or may be used by the party of the second part in making deliveries or making substitutions in its business, all without further notice to the undersigned, provided, however, the above-mentioned first party's stock shall be delivered to the party of the first part on, but not before the expiration of this agreement, and the party of the second part shall not be obliged to return to the party of the first part the specific shares mentioned in this agreement, but may deliver in place thereof a like amount of the same securities.

"The party of the first part has obtained outside information, and has made her own independent investigation of this agreement, and has been informed and is of the opinion that its execution will be to her benefit.

"As collateral security for their performance of this agreement, the party of the second part will deliver to the party of the first part six thousand shares of the class A, common (REH C. I. G.) stock in the Postage Press Corporation, which is personally owned stock, which will be returned to the party of the second part at the expiration of this agreement or any additions hereto. It is understood that these shares are not to be sold or disposed of in any way or in any amount for any sum whatsoever but are a pledge and as such may be forfeited if the terms of this agreement are violated.

"This agreement contains the entire agreement between the parties hereto and all prior agreements are merged herein; and no person or persons has the power or any power to change or alter its terms, and any representatives other than those herein set out, and all representations upon which this agreement is based and not set out herein, are, by each of the parties hereto, hereby expressly waived.

"(Mrs.) Cora I. Greene,
"Party of the First Part.
"Patton & Co.,
"Party of the Second Part,
"By R. E. Harrington."

Mrs. Greene also testified that she signed this contract after the appellant had explained in detail his familiarity with stock investments and after he had elaborated upon the success he had had in this field and how he could make her a lot of money if she would transfer her stock to him; she was apparently lured by the bait of a larger income, but wanted to be secured by other stock. She says:

"I didn't know anything about that Postage Press Corporation stock, and he went on and told me what very fine security he was giving me, and he seemed to leave with me the impression that he had other securities also that he could give me, but, after speaking so finely on that particular Postage Press Corporation stock, it having the government backing it, and one thing and another, I did not see that anything else could excell it, so I took that."

However, at the time the contract was executed, the appellant apologized for not having the Postage Press stock with him, and promised to send it to her shortly; that, although she trusted him, he never delivered it to her. He paid $54 a month for three months, and then refused any further payments. Testimony was also adduced that the stock of the Monolith Company had a market value of between $9 and $10 per share, and that the Postage Press Corporation stock had no market value whatever.

In addition to the general contention that the evidence is insufficient, appellant argues that it fails because of the following particulars: (1) It shows that complainant parted merely with possession and not with the title to her property; (2) the corroboration was insufficient; (3) the evidence does not support the allegation that it was an exchange of stock. It must be observed that the appellant's testimony, as might be expected in this character of charge, is at variance with that of the complaining witness, although he does in some respects corroborate testimony adduced by the prosecution. For example, the appellant testified that the stock of the Postage Press Corporation had no market value; that he told Mrs. Greene that he did not want "the Postage Press stock" he "was giving to her as security to be used by her to be offered for sale or anything, because" they "did not try to create a market for it, because there was no reason for it"; that the reason he did not deliver the stock to her at the time of executing the contract was that he had sent it to Nevada for transfer on the books of the corporation; that he had other securities, but did not want to give her an active stock, one that was rising and falling on the market, because he could make money out of such a stock; that the market value of Monolith stock was artificial, and he was certain that it would drop.

A Mr. Spriggs, who introduced the appellant to the complainant, testified that a few days before the introduction appellant asked him if he knew anyone who owned Monolith stock, stating that he had an angle on it whereby he could make some money. This witness also testified that Mrs. Greene asked for security, and that appellant then told her about the Postage Press Corporation, in which he and four or five people were interested, which company was organized for the purpose of manufacturing and selling a machine for stamping envelopes; that appellant showed Mrs. Greene a list of business houses over the country which were using the stamped envelope; that appellant stated to Mrs. Greene that he thought so much of it that he wanted to keep it; that the day after the general conversation with Mrs. Greene the witness called upon her and secured the 600 shares of Monolith stock without indorsement. He testified that he immediately mailed the stock to the appellant, and on the next day Mrs. Greene called upon him and was worried because he had sent it on, and wanted the witness to wire for its return. On his assurance that the appellant would be back as soon as the stock could be back, she was willing to wait. The appellant did return on the following day, and, after again going into the details of the arrangement and telling the merits of the Postage Press Corporation stock, the contract was signed.

[1-4] It seems obvious from a recital of the testimony that there is ample evidence to uphold the verdict of the jury. There can be no doubt but that the controlling factor which induced Mrs. Greene to part with her property, delivering it over to the appellant to do with as he pleased, was her belief that she would be amply secured by the stock of the Postage Press Corporation, a stock of such great value that the appellant exacted from her the promise not to sell or trade it to any one, and by the fact that it was only one of many fine investments of which this gentleman of successful finance was possessed. That this was untrue, and that he imposed upon her unfamiliarity with transactions of this character is evident from his own lips, when he admitted that the latter stock had no market value. Also it might be asked why there was no delivery of this latter stock. The jury may have believed that it, as well as the other securities, existed only in his fruitful imagination. This would seem to establish the essence of the offense: Deception practiced upon Mrs. Greene for the purpose of unfairly and unjustly obtaining her property. People v. Wieger, 100 Cal. 352, 34 P. 826. It is sufficient if one material misrepresentation be proved. People v. Fraser (Cal. App.) 253 P. 340; People v. Griesheimer, 176 Cal. 44, 167 P. 521. Here the testimony of the complaining witness unequivocally supports the verdict on more than one allegation, and, as we have just observed, the contract, the appellant's testimony, and the testimony of his witness Spriggs, together with other circumstances, corroborate the complainant sufficiently to meet all the requirements of section 1110 of the Penal Code which provides that in order to convict of the offense here charged, there shall be either two witnesses or a witness and corroborating circumstances in the absence of a writing or false token. It is said in People v. Wymer, 53 Cal. App. 204, 199 P. 815:

> "In this class of cases the circumstances connected with the transaction, the entire conduct of the defendant, and his declarations to other persons are proper matters for the consideration of the jury, and may be looked to to furnish the corroborative evidence contemplated by the law. People v. Gibbs, 98 Cal. 661, 33 P. 630; People v. Martin, 102 Cal. 558, 565, 36 P. 952."

To the same effect may also be cited People v. Mace, 71 Cal. App. 10, 20, 234 P. 841, 844, and People v. Murray (Cal. App.) 261 P. 740.

[5] Nor can the appellant successfully urge that the evidence is insufficient because it shows that complainant parted merely with possession and not with the title to her property. Assuming the necessity for the state to establish that she did part with title, it appears that the burden was successfully shouldered. According to appellant's testimony, he wanted the stock for the purpose of selling it at its then high price, anticipating that he could buy it back at a lower figure; that he had in the past by that process made from $40 to $50 a share on stock obtained from other parties. The contract recites that Mrs. Greene "hereby assigns, transfers, and sets over all her right, title, and interest in and to" the stock for a period of not less than one year. It also provides in effect that appellant may sell, hypothecate, or dispose of the stock in any way he sees fit, being obliged only at the end of the time to produce a like number of, but not the same, shares of stock. It is difficult for us to understand how by this arrangement it can be seriously contended that appellant was not clothed with title. Suppose $600 in currency had been obtained instead of stock, to be dealt with as appellant saw fit and to be returned at the end of the time, it certainly could not be argued that the title to the specific money had not been transferred. To emphasize the situation here, we direct attention to the fact that the situation might have been altogether different had the appellant been under obligation to return the identical shares, and had he not

had the express power to transfer title to another.

[6-9] In determining the contention that the evidence was insufficient because it failed to support the allegation of an exchange, we shall first assume that the testimony fails in this particular. It will then be apparent that there is a variance between the allegations and the proof, and it becomes necessary to ascertain whether it is a material one. If not, we can say that the evidence is sufficient, if otherwise so, even though it fails to support the particular allegation. In People v. Rabe (Cal. Sup.) 261 P. 303, we read:

> "It is the act of getting possession of or of obtaining property by false and fraudulent representations which the law punishes as a crime."

In the earlier case of People v. Cadot, 138 Cal. 527, 71 P. 649, based upon the authority of People v. Wasservogle, 77 Cal. 173, 19 P. 270, it is determined that the elements of the offense are four, as follows: (1) An intent to defraud; (2) an actual fraud committed; (3) false pretenses used for the purpose of accomplishing the fraud; and (4) the accomplishment of the fraud by means of the pretenses used. In the instant case, bearing in mind that the promise to deliver to complainant 6,000 shares of Postage Press Corporation stock was not alleged as a false representation, the fourth element would have been proven upon showing that the appellant obtained possession and title to the 600 shares of Monolith stock by means of the false representations, and it would be of no consequence whether it was upon promise to hypothecate with complainant 6,000 shares of Postage Press Corporation stock as security for the promise to return her the same or a different 600 shares of the former at some future date, or whether it was upon promise to exchange. Under these conditions we fail to find that the variance is material, for the reason that it is obvious that an acquittal of the offense here charged would have been a complete bar to a prosecution for an offense framed in language indicating a promise to hypothecate the security. Taking into consideration also the proof here adduced, it is equally clear that the appellant was not misled to his prejudice in making his defense nor deprived of any substantial right. Since the test of whether a variance is material is made to depend upon whether the defendant is misled in making his defense or placed in danger of being twice in jeopardy, taking into consideration the proof introduced against him (People v. Terrill, 132 Cal. 497, 64 P. 894, People v. Terrill, 133 Cal. 120, 65 P. 303, and People v. Evanoff, 45 Cal. App. 108, 187 P. 54), we are compelled to say that there was not a material variance between the allegations and the proof.

[10] Appellant argues that the court erred in permitting two witnesses to testify to the market value of the Postage Press Corporation stock at the time of the trial rather than at the time of the transaction, and also complains that with one of these witnesses the proper foundation was not laid. The appellant testified while he was on the stand that he told Mrs. Greene that this "stock had no market value of any kind," and again that they "did not try to create or cause a market for it because there was no reason for it." It is immediately obvious, in view of this testimony, that if there were error in the introduction of the testimony complained of that appellant could not possibly have been prejudiced thereby or complain thereof.

[11] Lastly, the appellant asserts that the court erred in its refusal to give and in the giving of certain instructions. He specifies five refusals and eight instructions given. It would unduly lengthen an opinion already giving the appearance of violating the form of desirable brevity to treat each one of them separately. Suffice it to say that, after a painstaking examination of the first five specifications, two of the instructions offered were not pertinent to the cause on trial, that the other three were covered by instructions given, and that one of them involved a misstatement of law.

[12] We have also examined all of the instructions given, and find that it is not necessary to do more than call special attention to the three last complained of. In the first of these the court instructed the jury as follows:

> "You are instructed that the contract, Defendant's Exhibit A, is not a false token or written document as is contemplated by the statute requiring corroboration; but it is a circumstance to be considered by you in determining whether or not the testimony of Mrs. Greene is corroborated."

Appellant's objection to this instruction is that the latter portion is a comment upon the facts. It is said in People v. Martin, 102 Cal. 558, 566, 36 P. 952, 953, where a similar offense was under consideration and where a written contract had been executed:

> "The contract is simply a piece of evidence in the case, and stands upon the same plane as any other piece of evidence, and is weighed in the same scales."

As we read the instruction, it simply told the jury that the contract was not a false token required by law, but only a piece of evidence to be considered by them as any other piece of evidence in determining whether there was any corroborating testimony. The court had given full and explicit instructions covering the necessity of corroborative testimony, in the absence of a false token or writing, and in view of those instructions, we are of the opinion that the jury must have understood the instruction as we do.

[13] The next instruction which appellant assails is one which sets forth verbatim sec-

tion 1572 of the Civil Code, which section defines actual fraud and the fourth subdivision of which provides that "a promise made without any intention of performing it" constitutes actual fraud. Appellant, upon the authority of People v. Green, 22 Cal. App. 45, 133 P. 334, which says that "to constitute a false pretense in law the misrepresentation must be of an existing or past fact, and cannot relate to the future, or be a mere promise to pay," argues that it was error to include this fourth subdivision of the section in the instruction, and, further, that, in view of the promise of appellant to pay $54 per month and also return a like number of shares at the end of the year, the jury was warranted in believing that the court intended to tell them that, if these two promises were made without intention of performance, they should convict. However, in another instruction the court very properly said:

> "You are instructed that, if you find that Cora I. Greene was not induced by representations falsely made by defendant, to believe that (1) 6,000 shares of Postage Press Corporation stock exceeded in value 600 shares of Monolith Portland Cement Company stock, (2) that Postage Press Corporation was backed by the United States government, (3) that the machine put out by Postage Press Corporation was used by a large number of business houses, (4) that the stock in said corporation was fully as good and safe as a United States bond, or either or any of said alleged representations, and was then and thereby induced to part with her property, but you do find that the promise made by defendant in the written contract to pay $54 per month, to pay her the dividends accruing on the stock and to return said stock or an equivalent number of shares at the end of one year's time, was the main cause of inducing said Cora I. Greene to part with said stock, then it is your duty to acquit defendant of count I."

There were at least five other instructions which pointed their minds to the specific misrepresentations alleged in the indictment, and indicating that at least one of them must be proven and shown to be the inducing cause. It is difficult for us to believe that a reasonable juror could have placed the interpretation on a part of a general instruction defining fraud which counsel does. At least appellant could not possibly have been prejudiced by its statement in face of the care exercised to direct their minds to the allegations of the indictment.

[14, 15] It is apparent that the court was in error when it gave the following instruction:

> "You are instructed that the allegation 'exchange' in the indictment may or may not be an essential allegation in stating the offense charged; it is for you members of the jury to say whether or not the element of exchange is an essential element in this case, and then whether or not an exchange took place."

Whether the allegation of an "exchange" was or was not material or essential to the indictment was purely a question of law and not of fact, and was a matter of no concern to the jury. The instruction should not have been given. Counsel has not, however, suggested to us any manner in which it might have prejudiced or affected any substantial right of appellant, and we can conceive of none, particularly in view of the conclusion to which we have come that there was not a material variance between the allegations and the proof on this angle of the case.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

204 Cal. 329

FLACH v. FIKES. (S. F. 12287.)

Supreme Court of California. May 31, 1928.

1. Automobiles ⚷244(35)—Evidence of excessive speed held to show that car was negligently driven when it collided with pedestrian.

In action against driver of automobile for death of pedestrian, evidence *held* to show that car was being driven negligently at time it collided with pedestrian, in that it was being driven at an excessive speed.

2. Negligence ⚷119(6), 122(2)—Contributory negligence is affirmative defense, and, unless evidence of plaintiff shows contributory negligence, defendant must show it by preponderance of evidence.

Contributory negligence is an affirmative defense, and must be pleaded and proven by defendant, and, unless evidence on part of plaintiff shows injured party was guilty of contributory negligence, defendant must show by preponderance of evidence that injured party was guilty of such negligence.

3. Automobiles ⚷217(6)—Pedestrian is not contributorily negligent merely because he attempts to cross street when automobile is approaching.

Pedestrian cannot be said to be guilty of contributory negligence merely because he attempts to cross street when automobile is approaching.

4. Automobiles ⚷217(6)—Pedestrian may expect that those operating automobiles will operate them in customary manner and speed.

Pedestrian has right to expect that those operating automobiles on public street will operate them in manner and at speed customary at particular place.

5. Appeal and error ⚷909(1)—Reviewing court on appeal after judgment for plaintiff must assume that decedent looked for approaching automobile, where there was no proof that he did not do so.

In action for death of pedestrian struck by automobile, where there was no proof that deceased did not look in direction of defendant's approaching machine before he attempted to cross the street, reviewing court on appeal after judgment for plaintiff must assume that he did so.

6. Automobiles ⚷245(72)—Contributory negligence of pedestrian in crossing street in front of approaching automobile held for trial court.

Whether pedestrian attempting to cross street when automobile was approaching was guilty of contributory negligence *held* for trial court.

7. Appeal and error ⚷1008(1)—Trial court's finding as to negligence of decedent attempting to cross street in front of approaching automobile held conclusive on appeal.

In action for death of pedestrian struck by automobile, finding of trial court on whether decedent acted negligently in attempting to cross in front of defendant's approaching machine *held* conclusive on appeal.

8. Automobiles ⚷243(14)—Testimony of witnesses, not at scene of collision until four or five hours thereafter, as to skid marks on street, held admissible.

In action for death of pedestrian struck by automobile, admitting testimony of witnesses, who were not at scene of accident until four or five hours thereafter, that they observed skid marks on the street, *held* not error, where it appeared there had been no great amount of travel on street between time of collision and when witnesses observed the skid marks, and defendant's objection going more to weight of evidence than its competency.

9. Appeal and error ⚷1051(1)—Testimony that witnesses observed skid marks on street, if error, held not prejudicial in action for pedestrian's death, where case was established by other evidence.

In action for damages for death of pedestrian when struck by automobile, admission of testimony of witnesses that they observed skid marks on street morning of collision, if error, *held* not prejudicial, where, because of other testimony, proof of skid marks were not in any way essential to establishment of plaintiff's case.

Department One.

Appeal from Superior Court of Santa Cruz County; H. C. Lucas, Judge.

Action by Johannan Flach, as administratrix of the estate of Conrad Flach, deceased, against Charles J. Fikes for damages for death. Judgment for the plaintiff, and the defendant appeals. Affirmed.

J. Hampton Hoge, of San Francisco, and R. H. Smith, of Santa Cruz, for appellant.

H. J. Bias, of Santa Cruz, and J. E. Gardner and Wyckoff & Gardner, all of Watsonville, for respondent.

CURTIS, J. [1] Action brought by the administratrix of the estate of Conrad Flach, deceased, under section 377 of the Code of Civil Procedure to recover damages from defendant by reason of the death of said deceased, alleged to have resulted from the negligence of said defendant in the operation of the latter's automobile. The trial was had before the court without a jury, and resulted in a judgment in plaintiff's favor, from which the defendant has appealed. Defendant's first contention is that the evidence fails to show that he was negligent in the operation of his automobile. There is no contention but that the defendant, in driving his automobile, collided with and struck the deceased, inflicting upon him fatal injuries from which he died a few hours thereafter. The collision occurred at about half past 2 o'clock in the morning of January 8, 1922, on Soquel avenue, a business street in the city of Santa Cruz. The deceased had just alighted from

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

an automobile driven by F. K. Lang, and was in the act of crossing said street to his residence when he was struck by defendant's machine. The question of defendant's negligence depended entirely upon the rate of speed he was traveling at the time he struck the deceased. He claims that his machine was traveling at that time between 14 and 15 miles per hour. In proof of this fact he testified that he brought his machine to a full stop within 35 feet after he struck the deceased. If this were so, it appears to be conceded that he was not exceeding the lawful rate of speed along said street at the time of the collision. On the other hand, it is the theory of the plaintiff that if he did not bring his machine to a stop substantially within said distance he was guilty of negligence in exceeding the lawful speed limit, which was 15 miles per hour on said street at the point where the collision occurred. There is ample evidence in the record that defendant traveled from 54 to 65 feet after his machine had struck the deceased and before he had brought it to a full stop. One witness put the distance at 70 feet. There were found on the street immediately after the collision in one place a number of pieces of broken glass which, the evidence indicated, came from one of the front lights on defendant's machine, which was broken as a result of the collision. There was also found some distance from these pieces of glass a pool of blood in the street, which evidently came from the deceased's body, after it had been dragged by defendant's machine from the point of the collision to the point where defendant brought his machine to a stop. This distance between the broken pieces of glass and the pool of blood was roughly measured by a number of persons on the morning of the collision, with the result that, though their testimony differed as to the exact number of feet between the two points, none of them gave it at less than 54 feet, while others placed it at a greater number. The trial court evidently adopted their statements regarding this distance and accordingly found that defendant was negligently driving his automobile at the time it collided with the deceased. The evidence was undoubtedly sufficient to sustain this finding.

[2-7] The next contention made by appellant is that the evidence shows that the deceased was guilty of contributory negligence in attempting to cross Soquel avenue in front of defendant's moving machine. Contributory negligence is an affirmative defense, and it must be pleaded and proven by the defendant. Unless the evidence on the part of the plaintiff shows that the injured party was guilty of contributory negligence, the defendant must show by a preponderance of the evidence that said injured party was guilty of such negligence. The evidence shows that the deceased alighted from Lang's machine and started to cross Soquel avenue when he was struck by defendant's automobile. There is no evidence that he did not look in the direction of defendant's approaching machine before he attempted to cross the street. He may have done so, and, believing that he could cross the street before defendant's machine reached the point where he was to cross, attempted so to do. This may or may not have been negligence on his part. It cannot be said that a person is guilty of contributory negligence merely because he attempts to cross a street when an automobile is approaching. If that were so, he never could attempt to cross a street upon which automobiles are being operated, and consequently, where there is almost always an approaching machine. He has a right to expect that those operating automobiles upon a public street will operate them in the manner and at the speed customary at the particular place. Whether such a person is guilty of contributory negligence in attempting to cross a street in front of an approaching automobile would depend upon all the circumstances under which he acted. This question is one for the determination of the jury or the trial court, and their finding thereon is binding upon an appellate court. Scott v. San Bernardino Valley etc. Co., 152 Cal. 604, 93 P. 677; Clark v. Bennett, 123 Cal. 275, 277, 55 P. 908; Schneider v. Market Street Ry. Co., 134 Cal. 482, 488, 66 P. 734. While the above authorities all deal with the rights and duties of a pedestrian in crossing a city street in front of an approaching street car, we think the same rule should govern in the case of persons crossing in front of a moving automobile. As there is no proof that the deceased did not look in the direction of defendant's approaching machine before he attempted to cross the street, we must assume that he did so. If he did he must have seen defendant's machine approaching him. He may well have reasoned that defendant was traveling at a lawful rate of speed and therefore he could cross the street before defendant's automobile would reach the point in the street over which deceased would be required to pass in crossing the same. Had defendant been traveling at a lawful rate of speed, decedent might have crossed the street in safety. Under the circumstances, whether he acted negligently or not was for the trial court, and its findings as to his negligence will not be disturbed on appeal.

[8, 9] It was not error on the part of the trial court to admit in evidence testimony of witnesses that they observed skid marks on the street the morning of the collision. It is claimed by defendant that, as these witnesses were not at the scene of the collision until four or five hours after it happened, their testimony was not admissible against him. We think there is but little, if any, merit in this contention. While the street was one of the

business streets of said city, the evidence shows that there had been no great amount of travel thereon between the time of the collision and the time when these witnesses observed the skid marks on the street. The objection of defendant would go more to the weight of this evidence than to its materiality or competency. If it were error, however, to admit this testimony, such error did not prejudice the rights of the defendant. He testified that immediately on striking the deceased he applied both his foot and emergency brakes, that his brakes were in good order, and that he kept his brakes on until his car was brought to a full stop. From his evidence it is apparent that his car must have left skid marks on the street over which he traveled while his brakes were set. Then again, as we have already observed, the point where defendant's car struck the deceased was marked by a large number of broken pieces of glass and the point where the car evidently was brought to a full stop was indicated by a pool of blood. There was, therefore, ample evidence furnished by these objects on the street, aside from the skid marks, to furnish a basis of determining the distance the defendant's car traveled after striking the deceased. Proof that there were skid marks on the street was not in any way essential to the establishment of plaintiff's case.

The judgment is affirmed.

We concur: PRESTON, J.; SEAWELL, J.

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204 Cal. 231

HIGGINS v. EVA. (S. F. 11242.)

Supreme Court of California. May 25, 1928.

1. Appeal and error 🔑1176(1)—Direction by District Court of Appeal to reverse judgment for plaintiff and enter judgment for defendant held erroneous, where all trial court's findings were for plaintiff.

Where trial court found in favor of plaintiff on all issues arising out of pleadings in action, and District Court of Appeal in reversing judgment directed that judgment be entered for defendant, *held*, that such direction was error, since there were no findings in favor of defendant to support judgment.

2. Maritime liens 🔑60—Proceeding in rem against vessel in federal court held sole remedy of co-owners, voluntarily advancing money for salvaging and repairs of wrecked vessel.

Where part owners of wrecked vessel voluntarily provided funds for salvaging and repairs without any agreement by defendant co-owner to share such expenses, the remedy of such persons was solely in rem against the vessel, and hence within exclusive jurisdiction of the federal courts.

3. Shipping 🔑21—Managing owner, as such, cannot bind co-owners personally for repairs at home port.

A managing owner of a vessel, as such, cannot bind his co-owners, to a personal liability for repairs at a home port.

4. Limitation of actions 🔑28(1), 39(1)—Action by part owners of vessel, if treated as one, for money judgment for defendant's proportionate share of cost of repairs, held barred by limitations (Code Civ. Proc. § 343, and § 339, subd. 1).

Action, if treated as one, by part owners of vessel to recover money judgment against defendant co-owner for his proportionate share of cost of salvaging and repairs, *held* barred by two-year and four-year statute of limitations, Code Civ. Proc. § 343, and § 339, subd. 1.

5. Tenancy in common 🔑29(2)—Cotenant's interest is subject to lien for improvements authorized or assented to, though personal judgment for cost thereof cannot be had against cotenant, in absence of contract.

If a cotenant has assented to or authorized improvements to be made, he is answerable therefor, and a lien exists against his property for the amount thereof; but, in the absence of contract, one cotenant cannot recover a personal judgment against another for cost of improvements.

6. Tenancy in common 🔑32—Cotenant in possession may deduct from rents or profits cost of working, developing, or protecting property.

A cotenant in possession is entitled to deduct from rents or profits received the cost of all proper expenditures made in working the property and developing it or in protecting the common estate.

7. Shipping 🔑21—Tenancy in common 🔑1—Tenancy in common can exist in personalty, as well as realty, and, ordinarily, owners of merchant vessels or steamers so hold.

Though definitions of tenancy in common generally relate to tenancy in common in real property, such a tenancy can exist in personalty, as well as in realty, and, ordinarily, the owners of merchant vessels or steamers hold their interest therein as tenants in common.

8. Shipping 🔑21—In absence of contrary agreement, ship owners hold as tenants in common and not as partners.

Ships are chattels of which the owners, in the absence of an agreement to the contrary, are possessed as tenants in common and not as partners.

9. Shipping 🔑21—Part owners held not entitled to personal judgment against co-owner for cost of unauthorized alterations.

Plaintiffs, part owners of vessel, *held* not entitled to judgment against co-owner for his proportionate share of cost of alterations and repairs, in the absence of any contract authorizing such expenditures.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

10. Shipping ⟹21—Co-owner's silence, coupled with knowledge of salvaging and repairs of vessel, held not to warrant personal judgment for proportionate cost thereof in excess of profits.

Mere silence of co-owner of vessel, coupled with knowledge of expenditures for salvaging, reconstructing, and repairing vessel, will not warrant a personal judgment against such co-owner for his proportionate share of such expenditures in excess of profits earned, on theory that contract resulted.

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by C. H. Higgins, for himself and for and on behalf of his co-owners of record in the American steamship Fort Bragg, other than the defendant, against William J. Eva, for specific performance of alleged contract and for money judgment. From the judgment rendered, defendant appeals. Reversed.

For opinion of District Court of Appeal, see 259 P. 502.

Randolph V. Whiting, of San Francisco, for appellant.

Edwin T. McMurray, of San Francisco, for respondent.

CURTIS, J. [1] A hearing was granted by this court after decision by the District Court of Appeal in and for the First Appellate District, reversing the judgment and directing the trial court to enter judgment in favor of the defendant. Upon a further consideration of the questions involved in this appeal, we are of the opinion that the District Court of Appeal was correct in its opinion reversing said judgment. We are not, however, in accord with the order of the District Court of Appeal wherein the trial court was directed to enter judgment for the defendant, who is also the appellant herein. The trial court found in favor of the plaintiff upon all the issues arising out of the pleadings in said action. There are, therefore, no findings to support a judgment in favor of the defendant. Accordingly, a judgment could not be entered in his favor, except upon a retrial of said action and upon findings of fact favorable to him. The opinion of the District Court of Appeal, however, as written by Mr. Justice Campbell, pro tem., is hereby adopted as the opinion of this court, which said opinion is as follows (259 P. 502):

The steamer Fort Bragg was owned by appellant, respondent, and others as tenants in common. The steamer was wrecked in the Gulf of California; it was salvaged, repaired, and lengthened by respondent and other owners, not including appellant; appellant did not pay any portion of the cost of salvage, etc.; and this action involves the respective rights of the parties as the result of appellant's failure or refusal to pay his proportionate part of the cost of such salvage and moneys expended in repairing and lengthening the vessel.

According to the allegations of the complaint the steamer in question was wrecked; its owners are numerous, and it is impracticable to bring them all before the court; and that the questions involved are of common interest to all record owners, with the exception of defendant owner, Eva. Plaintiff was acting as managing owner. The vessel was determined to be a constructive total loss, and the underwriters paid the insurance carried by the several owners on their respective interests in full, thereby acquiring a 69 per cent. ownership in the wreck; that for approximately two months prior to January 17, 1916, the plaintiff, as managing owner and representative of the original owners of the steamer, undertook to sell the wreck and salvage the vessel for the account of those interested therein, but no substantial offer could be obtained therefor. On account thereof on or about January 17, 1916, plaintiff undertook to secure financial co-operation of the underwriters with the original owners in chartering, fitting out, and dispatching a steamer to the wreck in an attempt to float and tow it to an American port. Said underwriters declined to assume any portion of the financial hazard or obligation of such an undertaking, but, in order to induce said original owners to make an effort to float said steamer, agreed with plaintiff, as the representative of said owners, that, if they would assume the financial risk of such a venture, the underwriters would transfer their entire interest in said steamer to said owners without consideration, upon the condition, however, that, if said vessel were successfully floated, said owners would pay therefor on the basis of a valuation of $10,000 for the entire vessel, and upon the basis of a valuation of $15,000 for the entire vessel, if said owners succeeded in reaching an American port with said wreck. Immediately all of the owners, including the defendant, Eva, were advised and notified of said offer by said underwriters, and certain of the owners, including plaintiff, believed that an effort to float and repair said wreck should be made and agreed together with all other owners who should signify their willingness to pay pro rata to assume the expense thereof, upon the condition, however, that any or all of the other owners who did not desire to assume the risk and hazard and pay their portion of the expense would transfer their interest upon the same terms and conditions as the underwriters had agreed to do. There was no opposition or objection and all the owners who had declined to participate in the undertaking, excepting defendant, Eva, transferred their interests. A steamer was chartered, equipped, and dispatched to said wreck, and said vessel was floated and towed into the port of San Francisco at an expense of $17,264.77, and was reconstructed and repaired at a cost of $78,175.30, which amounts were paid by the original owners who had agreed to bear the same. The amount due defendant, Eva, under the agreement was tendered to him in due course and at various times up to and including July 20, 1920, and he at all times refused to transfer his interest, and his interest in said steamer still stands of record in his name in the United States custom house at San Francisco. At various times subsequent to the completion and repair of said vessel said owners offered to waive any right of transfer of said interest provided defendant, Eva, would be willing to assume the responsibility of an owner for the expense incurred aforesaid. Defendant at all times has consistently refused to admit any liability. Since the repair of said vessel it has been operated at a loss, and on March 1, 1921, an assessment of $348.26 was levied against each interest therein. All of said expense and losses chargeable against the interest of defendant, Eva, have been paid by plaintiff. The complaint further alleges that the registration in said custom house of the interest of William J. Eva is prejudicial to and a cloud upon the title of the owners therein who assumed the financial risk and hazard of operating said steamer. The prayer of the complaint is for judgment against defendant for the execution and delivery, by said defendant, Eva, of a good and sufficient bill of sale conveying said interest to plaintiff as the managing owner of said steamer upon payment to him by said owners of $150, or such other sum as the court may find to be just and equitable, or for such other and further relief as the court may deem fair and equitable in the premises.

Defendant demurred to the complaint on numerous grounds, among which being that the complaint does not state facts sufficient to constitute a cause of action; that the court has not jurisdiction of the subject of the action; and that the alleged cause of action is barred by sections 339 and 343 of the Code of Civil Procedure. The demurrer being overruled, defendant sets up in his answer, as further and separate defenses, the bar of the statute of limitations under the provisions of sections 339 and 343 of the Code referred to, and that the court has not jurisdiction of the subject-matter of the action, alleging that the action is a civil cause of admiralty and maritime jurisdiction within the exclusive jurisdiction of the United States District Court.

From an examination of the allegations of the complaint in the light of the specific prayer thereof, it appears the action was intended as one to compel appellant to transfer his interest in the steamer to respondent and the other owners. The complaint, however, does not allege, nor does the evidence show, any agreement whereby appellant agreed to transfer his interest, and our attention has not been called to any statutory authority for compelling him to do so. The relief prayed for being in rem against the vessel and not a common-law remedy giving the plaintiff a right to proceed in personam against the defendant, the power to grant such relief was vested exclusively in the United States District Court. Fischer v. Carey, 173 Cal. 185, 159 P. 577, L. R. A. 1917A, 1100. However, in so far as this appeal is concerned, this theory of the case may be dismissed, for even though respondent had pleaded an agreement by appellant to convey his interest and the evidence had been sufficient to justify such a finding, the trial court did not grant any such relief, but specifically found "that specific performance of defendant's agreement to transfer his $\frac{1}{100}$th interest in the steamer Fort Bragg should not be enforced."

[2] The allegations of the complaint, which the court found to be true, show that the several payments made by respondent and certain other owners for salvaging and repairs were voluntary payments and without any agreement by appellant to bear any part of the expense; therefore the only remedy of the former was in rem against the vessel. The Steamboat Mayflower v. The Steamboat Sabine, 101 U. S. 384, 25 L. Ed. 982.

While the court found that specific performance of defendant's agreement to transfer his interest in the steamer should not be enforced as prayed for by plaintiff, it did find "that defendant refused to pay the portion of said amount chargeable to his $\frac{1}{100}$th interest, to wit, $954.40; and on or about September 1, 1916, plaintiff, as managing owner of said vessel, was required to borrow, and did borrow, the said amount in order to meet the indebtedness so incurred," and also "that on or about December 28, 1920, the amount of $34,826 was expended by the owners of said steamer in making necessary alterations and repairs, and defendant refused to pay the portion thereof chargeable to his $\frac{1}{100}$th interest amounting to $348.26; and plaintiff was required to borrow, and did borrow, the said sum of $348.26 to pay for said repairs and alterations," and concludes from such facts that plaintiff is entitled to a money judgment against defendant. From what has been said it follows that in our opinion these amounts claimed to be due for salvaging the vessel and repairing it under the circumstances here disclosed, in the absence of any authorization by appellant, cannot be recovered in an action in personam, but must be maintained in rem in the federal court, which has exclusive jurisdiction.

[3] The evidence also shows that the repairs were made in San Francisco, the home port of the steamer Fort Bragg. A managing owner as such—and respondent was no more

than that—cannot bind his co-owners to a personal liability for repairs at a home port. Woodall v. Dempsey (D. C.) 100 F. 653; The William Thomas v. Ellis, 4 Har. (Del.) 309; Hill v. Crocker, 87 Me. 208, 32 A. 878, 47 Am. St. Rep. 321; Benson v. Thompson, 27 Me. 470, 46 Am. Dec. 617; Pentz v. Clarke, 41 Md. 327.

Respondent in his brief states that there is practically no conflict as to the facts; that "a controversy arose and existed at the time the action was brought between the several owners, not partners, in the steamer Fort Bragg arising out of the salvaging and repair of the vessel after being wrecked in the Gulf of California. On one side of the controversy is the appellant, owning a $1/100$ interest in the steamer, and on the other, the owners of the remaining $99/100$. The action was brought by respondent, the acting managing owner of $99/100$ interests, under section 964 of the Civil Code to determine this controversy." The section of the Code referred to provides:

> "If a ship belongs to several persons, not partners, and they differ as to its *use* or *repair*, the controversy may be determined by any court of competent jurisdiction."

We are unable to find any evidence in the record to support respondent's claim that the parties to the action differed either as to the *use* or as to the *repair* of the vessel, or that any controversy whatever arose over its *use* or *repair*. It appears that respondent, without any suggestion or interference on the part of appellant, repaired, reconstructed, and lengthened the vessel. The controversy seemed to be over the sale of the vessel. Respondent was seeking to compel appellant to sell his interest in the vessel for an amount that was not satisfactory to him, while appellant was claiming a right to inspect the books—to an accounting.

[4] If, however, the action be treated as one for a money judgment, it is clear that the claim for $954.40, which plaintiff as managing owner borrowed on September 1, 1916, and paid on the salvage indebtedness and the reconstruction expenditure to cover the proportionate share of defendant, arose in September, 1916, when the money was paid, and as the complaint was not filed until December 1, 1921, it is apparent such cause of action was barred by the statute of limitations, whether we apply the two-year limitation for implied oral contracts provided by subdivision 1 of section 339 of the Code of Civil Procedure or the four-year limitation prescribed by section 343 of the same Code for causes of action not coming within one of the other sections of the Code, as more than four years elapsed between the time the cause of action accrued and the action was commenced.

As to the $348.26, which the court found was chargeable to appellant's proportionate share, paid by respondent for repairs and alterations on or about December 28, 1920, and for which an assessment was levied on March 1, 1921, and concerning which there is no evidence to show that such repairs or alterations were authorized or agreed to by appellant or that he had any knowledge concerning the making of such repairs or alterations, it may be said:

> "Neither cotenant has any power to compel the other to unite with him in erecting buildings or in making any other improvements upon the common property." Freeman on Cotenancy (2d Ed.) par. 262.

[5, 6] If a cotenant has assented to or authorized the improvements to be made, he is answerable therefor, and a lien exists against his property for the amount thereof (Robinson v. Bledsoe, 23 Cal. App. 687, 139 P. 245; Arroyo Ditch & Water Co. v. Bequette, 149 Cal. 543, 87 P. 10, but we know of no authority, and none has been called to our attention, holding that one cotenant can recover a personal judgment against another cotenant in the absence of contract to that effect. A cotenant in possession, however, is entitled to deduct from the rents or profits received the cost of all proper expenditures made in working the property and developing it, and protecting the common estate (McCord v. Oakland Q. M. Co., 64 Cal. 134, 27 P. 863, 49 Am. Rep. 686; Raun v. Reynolds, 18 Cal. 275), which the evidence shows was done in this case; profits having been earned and payment of appellant's proportionate share withheld.

[7, 8] While definitions of tenancy in common generally relate to tenancy in common in real property, this tenancy can exist in personalty, as well as in realty (Haven v. Mehlgarten, 19 Ill. 91; Livingston v. Lynch, 4 Johns Ch. [N. Y.] 573), and authority generally holds that owners of merchant vessels or steamers holding their interests therein as tenants in common are governed by the rules of law applicable to that species of tenure. See authorities, 36 Cyc. 29, note 31. Ships are declared to be chattels, of which the owners, in the absence of agreement to the contrary, are possessed as tenants in common and not as partners. Thorndike v. De Wolf, 6 Pick. (Mass.) 120.

[9] While the court found in finding that all the allegations of the complaint are true that an assessment of $348.26 expended in making alterations and repairs in December, 1920, was levied in March, 1921, against appellant, respondent pleads no contract authorizing the levy of an assessment, nor did he prove any such contract; neither did he plead nor prove any corporate status or other relationship giving any right to levy or collect by personal action an assessment to cover a deficit in operating expenses.

As has been said, according to the complaint, this action was brought for the purpose of enforcing specific performance of a contract of sale, the basis of the action being an implied agreement or acquiescence in the terms of a contract contained in a circular letter mailed to all of the owners of the steamer Fort Bragg, advising them that effort would be made to salvage such vessel, and explaining to them that it was proposed to charter and equip a steamer for that purpose, and advising any owners not wanting to incur the financial risk involved to join in the proposal made by the underwriters; that before anything could be done it would be necessary for those electing to join in the attempt to salvage the steamer to make their election and obligate themselves to pay their portion of the expense in writing. It also provided that, if no objection was made to the plan of procedure within a reasonable time, which was definitely specified, the plan would be considered approved and the proposed action taken, and that any of the owners not expressly making an election under the plan within the time specified would be considered as approving the plan and electing to join in the offer made by the underwriters; that is, to accept as payment for their respective interests what their proportionate interest bears to a valuation of $15,000 for the steamer, the steamer being floated and towed to the port of San Francisco.

[10] The appellant claims that he never received a copy of the circular letter, and, while the court made no finding that he did in fact receive such letter, it did find that appellant "had full knowledge of the action of his coowners in the steamer Fort Bragg in reference to salvaging, repairing, and reconstructing said steamer, and ratified the same by his acquiescence." In other words, that mere silence on his part, coupled with knowledge of the fact of the salvaging, reconstruction, repair, and lengthening of the vessel, bound appellant to a contract upon which recovery could be had by way of personal judgment; that under such circumstances one tenant in common can enforce a personal judgment for money in excess of the profits earned. Respondent has not cited us to any authority sustaining such a position and what authority we have found is to the contrary. We do not deem it necessary to a decision of the case to discuss the points raised on demurrer, as the case can be disposed of on its merits.

From what has been said, it follows that we are of the opinion that if the action be one as indicated by the prayer of the complaint for the execution and delivery by defendant, Eva, of a bill of sale conveying his interest in the vessel to plaintiff, Higgins, as the managing owner of the steamer upon payment therefor, such action is one in rem and in the exclusive jurisdiction of the federal court; that if it be construed to be an action for the recovery by one tenant in common against another tenant in common for money paid in protecting, improving, and repairing the common property, no authorization existing therefor, no personal judgment may be had against the cotenant defendant, and, further, that the claim for money borrowed and paid by respondent, Higgins, to cover the proportionate share of appellant in salvaging, lengthening, and repairing the vessel in 1916 is barred by the statute; that the item of $348.26, which respondent borrowed and paid in December, 1920, as the proportionate share of appellant, as the court found, to cover the cost of repairs, and that an assessment was levied to cover this item, which occasioned a loss in operating expenses, no authorization by appellant being shown, cannot be recovered by way of personal judgment.

The judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; RICHARDS, J.; SHENK, J.

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204 Cal. 325

ALBERTI v. JUBB. (Sac. 4056.)

Supreme Court of California. May 31, 1928.

1. Pleading 🔑248(6)—Amendment to complaint for breach of warranty of title held properly allowed to rescind contract for misrepresentations as not stating new cause of action.

In action to rescind contract for purchase of electric violin piano for false and fraudulent misrepresentations as to playing condition of instrument, amendment alleging breach of implied warranty of title by seller did not state new cause of action, but was merely additional ground for rescission and was properly allowed.

2. Sales 🔑120—That purchaser's possession was not disturbed did not prevent rescission of contract for breach of implied warranty of title.

Finding that purchaser was entitled to rescind contract for purchase of musical instrument on ground of breach of implied warranty of title *held* not precluded by fact that possession of purchaser had not been disturbed.

3. Sales 🔑118, 126(1)—Purchaser must rescind promptly and may thus protect himself from being required to make monthly payments on discovering property belongs to person other than seller (Civ. Code, § 1691).

Under Civ. Code, § 1691, purchaser is required to rescind promptly and is entitled to thus protect himself from being forced to make monthly payments on notes given for property purchased which he has discovered belongs to another, and which is liable to claim and removal by such person at any time.

4. Sales 🔑120—Fraudulent intent is not necessary element of action to rescind contract for breach of warranty of title.

In action to rescind title for breach of warranty of title, fraudulent intent is not necessary element of action.

5. Sales 🔑118—Contract may be canceled for mistake of fact as to title of property sold without showing misrepresentation (Civ. Code, § 1689, subd. 1).

Mistake of fact as to title to musical instrument sold, though no misrepresentation is shown, would be valid ground on which equity could decree cancellation of contract, under Civ. Code, § 1689, subd. 1.

6. Sales 🔑283—Piano left on partnership premises by owner after dissolution of partnership and sold by remaining partner to plaintiff's seller held not abandoned property in suit to rescind for breach of warranty of title.

Where electric piano purchased under conditional sales' contract for music company was permitted to remain on partnership premises occupied by remaining partner after dissolution, though not considered partnership property, and was subsequently purchased by defendant from remaining partner and sold to plaintiff, piano could not be considered as abandoned property in action to rescind sale for breach of warranty of title.

7. Abandonment 🔑2, 5—"Abandonment" must be voluntary act of owner and clearly proved.

"Abandonment" must be voluntary act of owner and must be clearly proved.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Abandon—Abandonment.]

8. Sales 🔑130(3½)—Failure to find purchase-money notes were in purchaser's possession held immaterial in action to rescind for breach of warranty of title.

In action to rescind contract for fraudulent representations and breach of warranty of title in which seller produced and deposited notes for purchase money, failure of court to find that purchaser had notes in his possession was immaterial and did not constitute prejudicial error, where findings fully disposed of issues in case.

9. Sales 🔑130(4)—Judgment authorizing purchaser to retain piano until surrender of notes and cancellation of contract for breach of warranty of title held not erroneous for failure to order delivery to seller.

Where judgment in action to rescind purchase of piano for breach of warranty of title only authorized retention of piano by purchaser until surrender of notes and cancellation of contract, right of possession was good only as against claims of seller and terminated on seller's compliance with judgment after which purchaser could not resist seller's demand for possession nor guarantee delivery of piano to seller, since true owner might reclaim same, and hence judgment was not erroneous for failure to order delivery of piano to seller.

Department 1.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action for rescission of contract by G. Alberti against C. E. Jubb. Judgment for plaintiff, and defendant appeals. Affirmed.

Clark Clement, of Lemoore, for appellant.

John G. Covert, John F. Pryor, and George L. Reimbold, all of Hanford, for respondent.

PRESTON, J. This is an action in equity for the rescission of a written agreement entered into between the parties for the sale by defendant and purchase by plaintiff of an electric violin piano for the sum of $1,600 and to obtain cancellation and surrender of 40 promissory notes of $40 each, executed by plaintiff and delivered to defendant to provide payment in monthly installments for said instrument.

The complaint was based upon allegations of false and fraudulent misrepresentations made by defendant seller as to the playing condition of said instrument. Upon these grounds the trial court found in favor of defendant to the effect that the piano was at all times in the condition of an ordinary secondhand instrument and was bought by plaintiff as such.

During the trial, however, plaintiff for the first time learned of the condition of title to the instrument, and was permitted by the court to file an amendment to his complaint alleging breach of implied warranty of title by the seller, based upon facts substantially as follows, admitted in evidence over the objection of defendant: One Craine obtained possession of the instrument under a conditional sales contract between the Irvine Music Company and himself, but title never passed from the company to him. With $1,400 still due the music company upon the purchase price of $1,650, said Craine dissolved a partnership which he had entered into with one Bartlett and allowed the piano to remain upon the partnership premises, which Bartlett continued to occupy, although said instrument was never considered partnership property. Still later defendant purchased it from Bartlett for $100, which amount was characterized as being about right for storage. Bartlett, however, took no steps to foreclose a lien, if any he had, on said instrument for storage, and the rights of defendant were based solely upon his aforesaid purchase from Bartlett. Craine testified that until the trial of this action he was unaware that the piano had been sold to defendant and, as against every one except the music company, he claimed to be entitled to possession of it under the aforesaid conditional sales agreement.

Upon this issue the court found that defendant had falsely represented to plaintiff that he was the owner of and entitled to possession of said instrument, and if plaintiff had not believed said representations he would not have entered into said agreement with defendant. Judgment accordingly was entered canceling the agreement, declaring the notes void, and ordering them to be surrendered and delivered to plaintiff. Defendant has appealed.

[1] Appellant's first contention is that the amendment to the complaint was an attempt to state a new cause of action and therefore it was improperly allowed by the court. It is plain, however, that the amendment stated the same cause of action, with additional grounds of complaint, to wit, a cause for rescission of said agreement between the parties based upon new and further allegations of misrepresentation. No abuse of discretion by the trial court is shown, and we hold that said amendment was properly allowed.

Disregarding the undisputed fact that he contracted to sell for $1,600 an instrument which he had purchased for $100 and to which he had acquired no title and hence could pass none, appellant claims that the record does not show a fraudulent intent on his part nor had respondent a cause for rescission of the agreement so long as his possession of the piano remained undisturbed.

[2, 3] While the rule as to disturbance of possession laid down in the authorities cited by appellant (Courtney v. Gordon, 74 Mont. 408, 241 P. 233; Gross v. Kierski, 41 Cal. 111) might apply were the action one for damages, the conclusion that respondent is entitled to rescind the contract upon the ground of breach of implied warranty of title by appellant (36 A. L. R. note p. 482, 27 R. C. L. § 410; §§ 1765 and 1786, Civ. Code; Burks v. Davies, 85 Cal. 110, 24 P. 613, 20 Am. St. Rep. 213; Milton Realty Co. v. Butterfield, 54 Cal. App. Dec. 1411) is not precluded by the fact that the possession of respondent has so far remained undisturbed. The element of damages does not enter into the case. Respondent is required to rescind promptly (Civ. Code, § 1691; Garstang v. Skinner, 165 Cal. 721, 134 P. 329) and he is entitled to thus protect himself from being forced to make monthly payments on notes given for property which he has discovered belongs to another and is liable to claim and removal by such person at any time.

[4, 5] The same result may be reached upon other grounds. Fraudulent intent is not a necessary element of an action of this character. There can be no doubt that respondent entered into the agreement with appellant under a misapprehension of the true facts as to title to the instrument. Such mistake of fact, even were no misrepresentation shown, would be a valid ground upon which equity could decree cancellation of the contract. Civ. Code, § 1689, subd. 1; Hannah v. Steinman, 159 Cal. 142, 112 P. 1094; Robertson v. Robertson, 137 Va. 378, 119 S. E. 140, 36 A. L. R. 479, 482.

[6, 7] There is no merit in the contention that the piano was abandoned property. The doctrine of abandonment is well stated in 1 Cal. Jur. pp. 1–16. The abandonment must be the voluntary act of the owner and it must be clearly proved. Here the necessary elements are neither shown nor proved.

[8] The court found that just prior to commencement of this action appellant was endeavoring to transfer the notes in question to another for value; they were, however, produced and deposited under stipulation pending final determination of the cause. Appellant complains of failure of the court to find that he had the notes in his possession. The absence of such finding is immaterial and does not constitute prejudicial error, as the findings made fully dispose of the issues in the case. Hertel v. Emireck, 178 Cal. 534, 174 P. 30.

[9] Appellant complains of other minor matters, which have received our careful attention but which are not worthy of discussion. We find all his various contentions to be without merit, including his criticism relating to failure of the judgment to order delivery of the piano to him. The judgment only authorizes retention of the piano by respondent until surrender of the notes and cancellation of the contract, and this right of possession is, of course, good only as against the claims of appellant. The necessary interpretation of the judgment is to terminate, upon compliance by appellant therewith, respondent's claim to possession of the instrument. Respondent cannot in such event resist appellant's demand for possession; neither can he guarantee to deliver the instrument to appellant, as the true owner may reclaim in the meantime. The wording of the judgment is proper.

Judgment affirmed.

We concur: CURTIS, J.; SEAWELL, J.

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204 Cal. 334

WHITE v. JACOBS et al. (L. A. 8847.)

Supreme Court of California. June 11, 1928.

1. Pleading 🔑120(1)—Denials of first two counts of complaint, relating to transactions detailed in third count, held without greater effect than denials of indebtedness arising from such transactions.

Where it is conceded that three counts in complaint relate to same transaction, denial of first two counts must be held to refer to existence of indebtedness arising out of detailed transactions set forth in third count, and hence without other or greater effect than denials of indebtedness arising out of such transactions.

2. Vendor and purchaser ⚷39—That one suing for money paid for lots, sold by reference to map, knew that map was unrecorded, is no defense (St. 1907, p. 290).

That one seeking to recover money paid on account of illegal and void contract for sale of lots by reference to unrecorded map or plat, in violation of St. 1907, p. 290, knew that map referred to was unrecorded, is no defense.

3. Costs ⚷260(4)—Defendants' appeal from judgment on pleadings held frivolous, where sole defense was held without merit in prior court decision (St. 1907, p. 290).

Appeal from judgment for plaintiff on pleadings in action for money paid on account of contract for sale of lots by reference to unrecorded map or plat, in violation of St. 1907, p. 290, *held* frivolous, as without merit and taken for purposes of delay, where only defense set up was plaintiff's knowledge that map was unrecorded, which was held no defense by prior decision of Court of Appeals.

Department 2.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Jeanette P. White against Edward A. Jacobs and others. From a judgment against defendant Jacobs and certain other defendants, they appeal. Affirmed.

Oliver O. Clark, J. Sanford Wilson, Walker R. Flint, and Dan V. Noland, all of Los Angeles, for appellants.

Loewenthal, Lissner, Roth & Gunther, of Los Angeles, for respondent.

RICHARDS, J. This appeal is prosecuted by certain of the defendants herein from a judgment rendered against them upon the pleadings in an action wherein the plaintiff sought to recover certain sums of money, with interest, claimed to be due her on account of a certain agreement in writing which proved, for reasons hereinafter to be stated, to have been illegal and void. The plaintiff's complaint was in three counts, the first of which was in the form of a common count wherein the defendants, and each of them, were alleged to have become indebted to the plaintiff in the sum of $3,500 for money had and received by said defendants for the use and benefit of plaintiff, no part of which had been repaid. The second count was in the same form, alleging an indebtedness in the sum of $514.50, which remained due and unpaid. By the third count the plaintiff proceeded to set forth the details of a certain real estate transaction whereby the defendants undertook and agreed in writing to sell to the plaintiff certain parcels of real estate which were described therein by reference to a certain map which had never been recorded as required by the provisions of an act of the Legislature, adopted in 1907 (Stats. 1907, p. 290), requiring the recordation of maps of subdivisions of land for purposes of sale and prohibiting the selling or offering for sale of lands by reference to said maps unless the same were recorded. The plaintiff alleges that pursuant to said contract she paid to the defendants the sums of money which are referred to in the first two counts of her complaint, and which aggregate the sum of $4,014.50, and for the recovery of which she sues, basing her right thereto upon the claim that said transaction was illegal and void as in violation of the aforesaid statute.

[1] The defendants Edward A. Jacobs, Teckla S. Jacobs, B. W. Marks, and Otillie Schaus appeared separately, and, answering said complaint, denied any indebtedness under the first two counts thereof, but, as to the third count or cause of action, admitted making the said written agreement and the payments made by the plaintiff thereunder, and also admitted the fact of the lack of recordation of the map of the tract wherein the lots referred to in said writing were located. The defendants, however, denied any indebtedness to the plaintiff under the averments of the third count of her cause of action, basing their denial upon the averment in their answer that the plaintiff, prior to and at the time of entering into said agreement, knew that the map of the tract wherein said lots were situated had not been recorded. Upon the coming in of said answer the plaintiff moved the trial court for judgment upon the pleadings, as against the defendants above named, which motion was granted by the trial court. As to the other defendants in the action, the cause proceeded to trial with what result is not material to this appeal. The sole question which the above-named defendants present upon this appeal relates to the right of the plaintiff to a judgment on the pleadings in view of the foregoing denials and admissions in their answer. It is an obvious and conceded fact that the three counts in the plaintiff's complaint relate to the same transaction. Denials which said defendants presented to the first two counts of the complaint must be held, therefore, to have reference to the existence of an indebtedness arising out of the detailed transaction set forth in the third count of the complaint, and hence to have no other or greater effect than the said defendants' denials of any indebtedness arising out of the transactions therein detailed. This being so, and the sole defense of the said defendants to the third count or cause of action being the defense that the plaintiff knew at the time of entering into the agreement therein set forth that the map therein referred to was an unrecorded map, it follows that, if the defendants' averments in that regard constituted no defense, the trial court acted correctly in granting the mo-

tion of the plaintiff for a judgment against said defendants on the pleadings.

[2, 3] In the case of Smith v. Bach, 183 Cal. 259, 191 P. 14, it was held by this court that the sale or offer for sale of lots of land by reference to an unrecorded map or plat was expressly prohibited by the terms of the aforesaid statute and that contracts for such sales based thereon were illegal and void. In a later decision of the same case by the District Court of Appeal (Smith v. Bach, 54 Cal. App. 236, 201 P. 611) it was held that the fact that the plaintiff, who was seeking to recover the money paid on account of such illegal and void transaction, knew that the map referred to therein was unrecorded, constituted no defense to her right of recovery. We have no doubt as to the correctness of the foregoing decision by the appellate tribunal and expressly approve the same, and, in so doing, hold not only that the trial court in the instant case acted correctly in granting the plaintiff's motion for a judgment on the pleadings and in entering such judgment, but but that this appeal is frivolous and without merit and was taken for purposes of delay.

A penalty of $100 is hereby imposed upon the appellants herein for having taken and prosecuted a frivolous appeal.

The judgment is affirmed.

We concur: SHENK, J.; TYLER, Justice pro tem.

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92 Cal. App. 225

TOMASINI v. HYATT, State Engineer.★
(Civ. 3608.)

District Court of Appeal, Third District, California. May 26, 1928.

Rehearing Denied June 4, 1928. Hearing Denied by Supreme Court July 23, 1928.

1. Navigable waters ⟹20(7)—It is only in relation to navigable streams that state engineer must designate width of draw in proposed bridge (St. 1881, p. 76, as amended by St. 1927, p. 1542, especially § 4).

Under St. 1881, p. 76, as amended by St. 1927, p. 1542, especially section 4 of the amendatory act, it is only in relation to navigable streams that the state engineer is required to designate the width of the draw in a bridge proposed to be constructed.

2. Navigable waters ⟹1(6), 20(7)—"Navigable stream" does not include San Francisco Bay so as to require state engineer to designate width of draw in proposed bridge (St. 1881, p. 76, as amended by St. 1927, p. 1542, especially §§ 5, 7, 8, Act 1881, and § 4, of amendatory act).

Under St. 1881, p. 76, as amended by St. 1927, p. 1542, especially section 4, and in view of sections 5, 7, 8, of Act 1881, the words "navigable stream" do not include San Francisco Bay so as to make it the state engineer's duty to designate width of draw in bridge proposed to be constructed thereon; "navigable" stream, as used in said section 4 of amendatory act, meaning a navigable river flowing between well-defined channels in a continued course, and not including any of the other natural objects, conditions, or situations mentioned in title of act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Navigable.]

Application by T. A. Tomasini for writ of mandate, prayed to be directed to Edward Hyatt, as State Engineer, requiring him to designate length of spans and width of draw of a certain bridge. Writ denied.

Joseph E. Bien, Frederick Olds, Werner Olds, and Stanley Jackson, all of San Francisco, for petitioner.

PER CURIAM. This cause is before us upon the petition of the above-named T. A. Tomasini praying that an order be issued by this court directed to the said Edward Hyatt as state engineer of the state of California, commanding him to show cause why a writ of mandate should not be granted requiring him to designate the length of spans and width of draw necessary to permit the free flow of water through and under a certain bridge across a portion of San Francisco Bay for the construction of which the petitioner has made application for permission and for a franchise to maintain and operate as a tollbridge.

The line along which the bridge is proposed to be constructed is set forth in the petition, with the beginning point in the town of Sausalito and the point of termination in the town of Belvedere, in the county of Marin, and extends across a portion of the Bay of San Francisco, which portion is a part of the navigable waters of San Francisco Bay.

The petition herein is based upon the provisions of a certain act entitled, "An act to provide for bridges across navigable streams and across estuaries, ponds, swamps or arms of bays that may be outside of the line of navigable waters," approved March 14, 1881 (Stats. 1881, p. 76), as amended by the act of the Legislature approved May 26, 1927 (Stats. 1927, p. 1542).

[1, 2] This title limits jurisdiction to navigable streams and such portion of estuaries, fords, etc., that are not navigable, and the amendment approved in 1927 does not, in our opinion, extend the scope or power or jurisdiction, or require the state engineer to do anything not required of him by the act of March 14, 1881. Section 4 of the amended act refers only to a bridge across a navigable stream. This definition does not include bays, swamps, or estuaries. A stream of water is defined by Webster as "a current, of water flowing as a river, brook, etc., in a continued current or course." Ordinarily, it is understood to be a river having well-defined banks flowing in a continued course, the

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★Rehearing denied. Hearing denied by Supreme Court.

word "navigable" relating only to the uses that may be made of such stream. Thus, as used in section 4 of the amendatory act of May 26, 1927, it means a navigable river flowing between well-defined channels in a continued course, and does not include any of the other natural objects, conditions, or situations mentioned in the title of the act, and it is only in relation to a navigable stream that the state engineer is required to designate the width of the draw in a bridge proposed to be constructed. The second paragraph of section 4 of the amendatory act does not extend the engineer's duties beyond the scope of navigable streams. Section 5 of the act of 1881 only provides for what shall be done with the Engineer's plans, and the giving of certain notices therein specified. Sections 7 and 8 of the original act refer only to bridges built by one or more counties. The circumstances presented here are almost identical with those considered by the United States Circuit Court of Appeals in the case of Western Pacific R. R. Co. v. Southern Pacific Co., 151 F. 376, where it was held that the words "navigable stream" do not include San Francisco Bay.

Being of the opinion that the act approved March 14, 1881, as amended by the act of May, 26, 1927, does not apply to the bridge on the line proposed to be constructed by the petitioner, it follows that the application for an order to show cause should be and the same is hereby denied.

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92 Cal. App. 365

SPECK v. SPECK. (Civ. 6341.)

District Court of Appeal, First District, Division 2, California. June 2, 1928.

1. Divorce ⟹225—Allowance of attorney fees to wife in action for divorce held not abuse of discretion because wife had funds.

In wife's action for divorce, allowance to her of $200 for counsel fees *held* not abuse of discretion because it was shown that wife had some $1,400 of her own, in absence of showing that funds were immediately available for purpose.

2. Divorce ⟹249(4)—Interlocutory decree should award husband land purchased with separate funds.

In wife's action for divorce, where undisputed evidence showed that husband had purchased with separate funds two tracts of land, interlocutory decree awarding him one of tracts should be modified and both tracts be awarded him.

Appeal from Superior Court, Los Angeles County; C. W. Muller, Judge.

Action by Edith Catherine Speck against David Benjamin Speck. Cross-complaint by defendant. From an interlocutory decree in favor of the plaintiff, the defendant appeals. Modified and affirmed.

Todd, Pawson & Watkins, of Long Beach, for appellant.

Carl V. Hawkins and Ben W. McLendon, both of Long Beach, for respondent.

NOURSE, J. Plaintiff sued the defendant for a divorce on grounds of extreme cruelty. The defendant answered and filed a cross-complaint charging similar grounds. The cause was tried before the court and resulted in an interlocutory decree in favor of the plaintiff and against the defendant. The latter has appealed upon a bill of exceptions.

The appellant has advanced three grounds for a reversal: First, that the evidence is insufficient to justify the finding of extreme cruelty; second, that the decision is contrary to law in that it awards to the parties in equal shares certain real property which was acquired by the appellant as his separate estate; and, third, that the trial court abused its discretion in allowing the respondent attorney's fees.

After a fair and impartial hearing of all the witnesses called by both parties, the trial court found that the acts complained of constituted extreme cruelty on the part of the appellant. Nothing would be gained by reciting here the evidence on that issue. It is sufficient to say that our examination of the record satisfies us that there is evidence which supports a finding of this character.

[1] The sum of $200 was allowed the respondent for attorney's fees for the prosecution of the action pursuant to a motion made for that purpose prior to the trial. The appellant insists that the trial court abused its discretion in this respect because it was shown that the respondent had some $1,400 of her own separate estate. The allowance of attorney's fees in a case of this character is a matter which is left to the discretion of the trial court in view of the circumstances and necessities of the several parties (Turner v. Turner, 80 Cal. 141, 144, 22 P. 72), and it is only in a case of an abuse of this discretion that the finding of the trial court can be disturbed on appeal. The mere fact that the wife has some funds of her own without showing that they were immediately available for the purpose does not satisfy us that error has been committed.

[2] The undisputed evidence shows that the appellant purchased with his separate funds two pieces of property, described in the complaint and referred to throughout the proceedings as the lots in the McDonald home tract and the lot in tract No. 6521, in Virginia City, Los Angeles county, Cal. In entering the interlocutory decree, the trial court awarded the lots in the McDonald home tract to the appellant as his separate property, but failed to make a similar award as to the lot in the Virginia City tract. The interlocutory decree should therefore be modified to the

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

extent that this lot in Virginia City be awarded to the appellant as his separate property, but in all other respects it should be affirmed.

The interlocutory decree as modified herein is affirmed, with costs to the respondent.

We concur: KOFORD, P. J.; STURTEVANT, J.

92 Cal. App. 302

HANSEN v. HANSEN & JOHNSON, CONTRACTORS INC., et al. (Civ. 5624.)★

District Court of Appeal, First District, Division 1, California. May 31, 1928.

Hearing Denied by Supreme Court July 26, 1928.

Contracts 🔑193—Assignee of note, required to take over property securing it, held not liable under agreement to pay assignor sum collected over certain amount.

Under agreement whereby vendor transferred $11,000 note, received in part payment, to another, with provision that he was to receive nothing until the sum of $9,000, together with interest, had been collected, he was not entitled to recover the sum of $2,000, where assignee, being unable to collect note or interest thereon, in good faith accepted a conveyance of property from purchaser and subsequently sold it at a loss; there being no voluntary or express trust under which assignee held note and trust deed in trust for benefit of vendor to collect sum of $2,000.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Carsten Hansen against Hansen & Johnson, Contractors, Incorporated and others, wherein defendants filed a counterclaim. From the judgment, plaintiff appeals. Affirmed.

John F. Barnett, of San Francisco, for appellant.

Edward J. Lynch, of San Francisco, for respondents.

KNIGHT, J. Plaintiff appeals from a judgment rendered in favor of defendants, as executors of the last will of Peter H. Johnson, deceased, in an action to recover $2,000 claimed to be due as a result of a real estate transaction had between plaintiff and Johnson. Respondents urged as defenses a denial of liability and the statute of limitations, and they also set forth two counterclaims. The trial court found against appellant on the merits of his action, and held that the same was barred by the statute of limitations, and found against respondents on the merits of their counterclaims.

The controversy grew out of the following facts, which are without substantial dispute: Johnson, the deceased, and Hansen, were engaged in the contracting business under the corporate name of Hansen & Johnson, Contractors, Incorporated, and during their operations acquired considerable incumbered property. Hansen became indebted to Johnson on account of advances made by the latter from time to time in order to carry on the business, and the parties eventually decided to adjust their financial affairs and divide up the property. Accordingly, on February 25, 1915, pursuant to the terms of a written agreement which they entered into, a parcel of land on Filbert street, San Francisco, carrying a mortgage of $12,000 in favor of one Crim, and another parcel not here involved, were conveyed to appellant, and all of his corporate stock was transferred to Johnson, and in addition appellant and his wife executed a promissory note in favor of Johnson for the sum of $9,000, secured by a second mortgage on the Filbert street property. The note bore interest at 6 per cent., payable quarterly, and the principal matured in annual installments of $1,000 each. Said agreement also provided that appellant should assume and pay the indebtedness to Crim, including interest, and protect and save Johnson harmless from any loss or payment on account thereof. On July 24, 1916, in accordance with an arrangement made between appellant and Johnson, appellant sold the Filbert street property to one Smith, and as part payment of the purchase price Smith and his wife executed and delivered to Johnson their promissory note for the sum of $11,000, payable three years after date, with interest at 7 per cent., secured by a trust deed, which was made subject to the first mortgage of $12,000 to Crim, whereupon, and on the same day, July 24th, another and separate written agreement was entered into between appellant and Johnson, substituting the Smith note of $11,000 for appellant's note of $9,000, and in consideration of the delivery to Johnson of the Smith note Johnson promised and agreed "that, after there shall have been paid to him on account of the said principal the sum of $9,000, together with the interest on said $9,000, he will pay to the said Carsten Hansen all moneys received on account of the principal of said promissory note, and that, upon the payment to him of the interest accruing on the said $9,000 as the same becomes due, he will then pay to Carsten Hansen all interest received by him on account of the balance of $2,000 of said note belonging to Carsten Hansen," and Hansen agreed to accept payment of the $2,000 and interest as in said agreement provided.

Simultaneously with the execution of this latter agreement, a resolution was passed by said corporation, which had the effect of ratifying and confirming said agreement, and provided, accordingly, that the Smith note should be made payable to Johnson, and that the trust deed given as security therefor "be made to trustees designated by him (Johnson) for his benefit, and that the said promissory note and trust deed shall be delivered to said Peter H. Johnson to be owned and held by him." In conformity with said agreement

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★Hearing denied by Supreme Court.

and resolution, Hansen was released from liability on the $9,000 note to Johnson, and the Smiths' note for $11,000 was made out directly to Johnson, and the deed of trust securing the same was made out directly to trustees for Johnson, thus giving Johnson complete control over the collection of the $11,000.

The Smiths remained in possession of the property from July, 1916, to July, 1917, during which time they did not pay the taxes, the insurance premiums, the accrued interest on the first mortgage, or the interest on the second deed of trust. As a consequence Johnson's security was being constantly diminished, because the items mentioned constituted liens on the property which were prior to the lien created by Johnson's deed of trust, and under the circumstances he was entitled to cause a sale of the property under his deed of trust, but, instead of doing so, the Smiths, on July 14, 1917, conveyed the property to Johnson, in consideration of which Johnson canceled the Smiths' note for $11,000 and granted them an option to repurchase the property within one year for the sum of $21,000; but, up to April, 1918, they failed to exercise the option, at which time Johnson sold the property for $20,000 to one Kathrine Gallwey, subject to the outstanding Smith option.

The division of the interests of Johnson and Hansen under the corporate name did not end their business association, however, and for several years thereafter they engaged in other joint enterprises during which time they were in frequent personal touch with each other. Appellant claims, however, that he did not learn of the sale of the Filbert street property until the fall of 1921, more than four years after the conveyance thereof to Johnson by the Smiths. In this regard appellant testified that he had "heard it was sold," but how or exactly when he gained the information does not appear. In the fall of 1921, however, he called upon his present attorney, who had acted for both parties in the settlement of their affairs, for the purpose of ascertaining the circumstances of the sale, and was at that time told, so appellant claims, that the property had been sold, but that "he need not worry about the $2,000, because Mr. Johnson was a man who would pay him all right." During that same year appellant and Johnson continued to do business together, the evidence in this regard showing that as late as 1921 appellant talked with Johnson, and at that time delivered to him certain promissory notes for money he had borrowed, but at no time did he bring up the matter of the sale of the Filbert street property, or the alleged indebtedness from Johnson to him now sued upon. The year following, to wit, in May, 1922, Johnson died, and notice to creditors was published in July, 1922; but appellant did not present his claim against the estate until May 4, 1923, a few days prior to the expiration of the 10-months period allowed by law for the presentation of claims.

The theory upon which appellant seeks a judgment for $2,000 against Johnson's estate, as stated by appellant, is this: That the agreement of July 24, 1916, "created a voluntary or express trust under which Johnson held the [Smith] note and trust deed in trust for the benefit of Hansen and to collect for Hansen the $2,000 belonging to him," and that the "surrender and cancellation of the Smith note by Johnson, in consideration of the conveyance to him of the property which was security for the note, was a breach of trust, and made him liable to Hansen for money had and received for Hansen's benefit to the extent of $2,000, which belonged to Hansen, with interest thereon." In other words, appellant contends that the implication arising from the agreement is that it was Johnson's duty to sell the property at trustees' sale, if the Smiths defaulted in carrying out the terms of their note and deed of trust, and that the acceptance by Johnson of a deed from the Smiths, instead of selling the property at trustees' sale, was equivalent to collecting the full amount of the Smith note, and consequently, immediately upon the acceptance of the deed, Johnson became liable to appellant for the amount due appellant thereunder.

We find nothing in the agreement to justify such construction. Its terms, reasonably construed, were that appellant was to receive nothing until "after there shall have been paid to him [Johnson] on account of said principal the sum of $9,000, together with the interest," and it was shown without conflict that Johnson never did receive the full amount of his $9,000 (which represented the original indebtedness from Hansen to Johnson) out of the property. The evidence on this point discloses that, although the property eventually sold for a gross price of $20,000, the deduction of the $12,000 first mortgage, accrued interest, taxes, insurance premiums, and expenses of sale, reduced the net amount received by Johnson to a sum approximately $2,800 less than the $9,000 due him.

Appellant makes no claim of fraudulent conduct on Johnson's part, or that he was in any manner neglectful in selling the property or in trying to obtain the best price therefor. With respect thereto the evidence shows that Johnson made every reasonable effort, through real estate agencies and by granting the Smith option, to obtain the best price possible, but that $20,000 was all that could be secured, and furthermore the fact that the Smiths were unable to sell the property for $21,000 during the 18 months they were entitled to dispose of the same, and that during the time they held legal title thereto they could not pay the taxes, interest, or insurance thereon, clearly indicates that they overestimated the value of the property when they purchased the same for $23,000.

Nor is there anything in the agreement

which imposed a duty upon Johnson to resort to the expense and delay of foreclosure proceedings instead of accepting a deed from the Smiths, and the fact that the agreement provided that the Smith note should be made payable directly to Johnson, and that the obligation under the deed of trust should run directly to Johnson's trustees, shows that it was doubtless the intention of the parties to vest Johnson with complete title to and control over the promissory note and trust deed, and, consequently, in the absence of express provision in the agreement to the contrary, he was entitled to exercise his best judgment as to the most profitable method of realizing on the outstanding indebtedness. And the results would seem to show that his judgment was wisely exercised, because, aside from the matter of the expense and delay of a forced legal sale, the parties under such sale would not have received the benefit of the services of the real estate agencies employed by Johnson to make a private sale. But, in any event, in the absence of charges of fraud or neglect, we think that under the circumstances appellant is without legal ground for complaint.

Evidently, to warrant a judgment in favor of appellant for money had and received, it would have been necessary for the trial court to have found as a fact that Johnson had received $2,000 belonging to appellant, and, as shown, there is no evidence whatever to support such a conclusion; nor does the evidence show any breach of trust on Johnson's part. Therefore, in our opinion, the trial court properly entered judgment in favor of respondents.

The case of Wagner v. Wedell, 3 Cal. App. 274, 85 P. 126, upon which appellant seems to rely, is materially different in its facts from the one before us. In that case there were two mortgages; the amount of the first being $1,500 and the second $1,000. The second mortgagee assigned his mortgage to the first mortgagee under a power of attorney and an agreement whereby the first mortgagee agreed to foreclose both mortgages and bid in the property for enough to cover the total sum due. Instead of complying with the agreement to foreclose, he acquired title from the mortgagor, satisfied both mortgages of record, and then sold the property to others accepting in payment $1,000 cash and two notes secured by mortgages, one for $1,500 and the other for $1,350, and he refused to pay the second mortgagee the amount due on his mortgage. It was apparent, therefore, that there was not only a lack of good faith on the part of the first mortgagee, but a clear breach of an express trust. There are no such circumstances here.

In view of the conclusion we have reached upon the question of the merits of appellant's cause of action, a discussion and decision upon the issue of the statute of limitations, or upon the other points urged by respondent in support of the judgment, are deemed unnecessary.

The judgment is affirmed.

We concur: TYLER, P. J.; PARKER, Justice pro tem.

MEMORANDUM DECISIONS

92 Cal. App. 265 1

GLADIUM COMPANY, Inc. (a Corporation), Plaintiff and Appellant, v. F. M. THATCHER, Defendant and Respondent. (Civ. 3213.) District Court of Appeal, Third District, California. May 29, 1928. Appeal by plaintiff from a judgment of the Superior Court of Butte County, H. D. Gregory, Judge. Motion to affirm judgment denied. J. Oscar Goldstein, of Chico, for appellant. Guy R. Kennedy, of San Francisco, and George F. Jones, of Oroville, for respondent.

PER CURIAM. This is a motion to affirm the judgment of the trial court, on the ground that the appellant has failed to set forth in its opening brief, or in a supplement thereto, in accordance with the requirements of section 953c of the Code of Civil Procedure, "a sufficient part of the record to justify a reversal of the judgment." The brief contains a statement of the points on which the appellant relies and cites the pages of the transcript on which it is claimed the evidence sustains the contentions made. Brief excerpts, selected from other parts of the evidence, are set forth. While the brief is on the border line of insufficiency, it appears that the ends of justice will be best served by a decision on the merits, rather than on the technical ground urged by the respondent. The motion is denied.

92 Cal. App. 328 2

PEOPLE of the State of California, Plaintiff and Respondent, v. Robert ARTER, Defendant and Appellant. (Cr. 1465.) District Court of Appeal, First District, Division 2, California. May 31, 1928. Appeal by defendant from a judgment of the Superior Court, City and County of San Francisco, Harold Louderback, Judge, of conviction of grand theft and from an order denying motion for new trial. Affirmed. U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for respondent.

PER CURIAM. The defendant and Bert Palmer were jointly charged with the crime of grand theft. They were tried before a jury, and both convicted, but the trial court granted Palmer a new trial. The defendant has appealed from the judgment following his conviction and from the order denying him a new trial, but has not supported his appeal by either brief or oral argument. We have, nevertheless, examined the record, and are satisfied that he was fairly tried and convicted. Judgment and order affirmed.

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204 Cal. 351

FLORA et al. v. HANKINS et al.
(L. A. 9446.)

Supreme Court of California. June 12, 1928.

1. Partnership 🔑64—Partnership whose name contained names of both members held entitled to maintain suit without filing certificate required of partnerships having fictitious names (Civ. Code, §§ 2466, 2468).

Where name under which partnership was doing business contained names of both of members of partnership, partnership designation was not fictitious, so as to require compliance with Civ. Code, §§ 2466, 2468, requiring filing and publication of certificate of partnership as condition to maintaining suit.

2. Mechanics' liens 🔑78—Owner's personal oral notice that she would not be responsible held insufficient notice of nonliability in mechanic's lien foreclosure suit (Code Civ. Proc. § 1192).

Personal oral notice by owner of premises to the effect that she would not be responsible for any work done by contractors on building constructed under contract with lessee was insufficient, under Code Civ. Proc. § 1192, in contractors' suit for foreclosure of mechanic's lien.

3. Names 🔑16(2)—Designation of lessee in claim for mechanic's lien as "Robert Hankins" under contract giving name as "Robert Hankines" held sufficient (Code Civ. Proc. § 1187).

Variance between name of contracting lessee given in contract as "Robert Hankines" and as "Robert Hankins" in claim of mechanic's lien *held* not to render lien insufficient, under Code Civ. Proc. § 1187, in view of rule of idem sonans.

Department 2.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Floyd Flora and W. J. Mahedy, copartners doing business as Flora & Mahedy, against Robert Hankins and others. Judgment for plaintiffs, and defendant Sarah Holzberg appeals. Affirmed.

Shapiro & Shapiro, of Los Angeles, for appellant.

Glen Behymer, of Los Angeles, for respondents.

RICHARDS, J. [1] This action is one for the foreclosure of a mechanic's lien upon certain real property in the county of Los Angeles; the plaintiffs and lien claimants therein being copartners doing business under the firm name of Flora & Mahedy. In the month of December, 1923, the defendant and appellant, Sarah Holzberg, being the owner of said real estate, rented the same to her codefendant Robert Hankins upon a month to month tenancy. In February, 1924, Hankins, having entered into possession of the premises under such tenancy, made a contract with the plaintiffs for the erection thereon of a one-story brick building for use as a garage, and which, by the terms of said contract, was to be constructed and completed between said date and the 15th of March, 1924. The plaintiffs having performed said contract, and the defendant Hankins having paid only a portion of the contract price, the plaintiffs filed a contractor's lien for the balance thereof, and within the time required by law commenced this action for the foreclosure of said lien. The trial court gave its judgment in the plaintiffs' favor for the recovery of the sum of $1,140.75, with interest and costs, against the defendant Hankins and for foreclosure of said lien as against the property of the defendant and appellant, Holzberg. The latter appeals from the judgment and urges as her first point upon the appeal that the plaintiffs are not entitled to maintain the action, for the reason that being a copartnership and doing business as such under the name of Flora & Mahedy, which the appellant alleges to be a fictitious name, the plaintiffs not having been shown to have filed or published the certificate of partnership provided for under sections 2466 and 2468 of the Civil Code, they have no capacity to sue. The answer to this contention is that the plaintiffs are not doing business under a fictitious name, since it appears that the name under which they are doing business as copartners contains the names of both and all of the members of the partnership, and it has been long held by this court that such a partnership designation is not fictitious so as to require compliance with the aforesaid sections of the Civil Code. Pendleton v. Cline, 85 Cal. 142, 144, 24 P. 659; Carlock v. Cagnacci, 88 Cal. 600, 26 P. 597.

[2] The next contention of the appellant is that the evidence is insufficient to show that she, as the owner of the property to be subjected to said lien, had sufficient knowledge of the fact that said building was in the course of construction upon her said premises so as to have been required to give the notice of nonliability required by section

1192 of the Code of Civil Procedure. Upon this point the evidence is in substantial conflict, and the trial court resolved such conflict in the plaintiffs' favor. The only notice which the appellant claims to have given to the plaintiffs was that of personal oral notice to the effect that she would not be responsible for any work done by them upon the building in question. Such notice is clearly insufficient under the express terms of the aforesaid section of the Code of Civil Procedure. Pasqualetti v. Hilson, 43 Cal. App. 718, 185 P. 693; Pacific Sash & Door Co. v. Bumiller, 162 Cal. 664, 124 P. 230, 41 L. R. A. (N. S.) 296.

[3] The only other contention made by the appellant is that the claimed lien was not sufficiently specific in the matter of its compliance with section 1187 of the Code of Civil Procedure to entitle the plaintiffs to their claim of lien. The only basis for this contention seems to be that of a variance between the name of the contracting tenant as it appears in the builder's contract and as it is given in the plaintiffs' claim of lien. In the former the name of the tenant is given as "Robert Hankines," while in the latter it appears as "Robert Hankins." It requires no citation of authority, however, to uphold the view that the rule of idem sonans applies to such a case.

The judgment is affirmed.

We concur: SHENK, J.; TYLER, Justice pro tem.

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204 Cal. 337

COULTER v. HENSEN et al. (L. A. 9281.)

Supreme Court of California. June 11, 1928.

1. Appeal and error ⟹882(11)—Omission to introduce assignment after laying foundation did not prevent reversal of nonsuit, where assignment sued on was treated as in evidence.

In action to establish liens under assignment of claims for work and labor, under Code Civ. Proc. § 1183, omission of plaintiff to introduce the assignment in evidence, after objection and laying of foundation for their admission, *held* not to prevent reversal of judgment for defendant entered on nonsuit, where record showed that the assignment was treated as having been introduced in evidence and that no reference was made to its nonintroduction on motion for nonsuit.

2. Mines and minerals ⟹112(1)—Where it was not shown that assignors of labor claims on oil property were married, failure of wives to join did not render assignment invalid (Code Civ. Proc. § 1183).

Assignments of claims of labor liens on oil property, under Code Civ. Proc. § 1183, were not invalid, in suit by assignee, on ground of failure of wives of assignors to join, where it was not shown that any of the assignors were married.

3. Pleading ⟹376—Landowners sued by assignee of claims for labor performed on oil well obviated necessity of proof of lease by alleging its existence.

In suit by assignee of labor claims arising from construction and alteration of oil well to establish liens, under Code Civ. Proc. § 1183, owners of land, who in answer alleged existence of lease and referred to the record thereof, relieved plaintiff from necessity of proving the lease or the contents thereof.

4. Mines and minerals ⟹117—Assignee's right to lien on land for labor performed by assignors drilling oil well held for jury (Code Civ. Proc. § 1183).

In action against owners of property to establish claims for laborers' liens under Code Civ. Proc. § 1183, for labor performed in construction and alteration of oil well under agreement entered into by owners' lessee, evidence that plaintiff's assignors performed labor on the premises under company contracting with the lessee, together with evidence of rate of wages, made issue for jury on defendant's motion for nonsuit.

5. Mines and minerals ⟹117—Whether owners of oil land posted notice of nonresponsibility held for jury in action by assignee of labor claims to establish lien (Code Civ. Proc. §§ 1183, 1192).

In suit by assignee of labor claims to establish lien on oil lands, under Code Civ. Proc. § 1183, issue whether owners posted notice of nonresponsibility on the premises under requirements of section 1192 *held* for jury, in view of testimony of owner when examined as a hostile witness and as a party, under section 2055.

Department 2.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by J. C. Coulter against Theodore D. Hensen and others. From a judgment for the defendant named, plaintiff appeals. Reversed, with instruction.

Louis N. Whealton and Will H. Winston, both of Long Beach, for appellant.

R. M. Sherwood, of Long Beach, for respondent.

RICHARDS, J. This action was one commenced by the plaintiff, purporting to act as the assignee of a number of labor claimants who are alleged to have performed work and labor upon certain real property owned by the defendant Hensen, which consisted in and contributed to the construction, alteration, and repair of an oil well upon the defendant's property and for which the persons performing the same claimed they were entitled to laborers' liens thereon. The property in question had been leased by Hensen and his wife to a certain voluntary association known as Motion Picture Oil Syndicate No. 1, which had theretofore been authorized by the corporation commissioner of the state of California to transact business within this state, and which association, after procuring said lease, had entered into a contract with the Hogan Drilling Company, a corporation, to drill an oil well thereon, in the course of which the Hogan Drilling Company are alleged to have employed the laborers, some 16 in number, who assigned their labor claims to said plaintiff. The answer of the defendant Hensen herein contains specific denials of practically all of the allegations of the plaintiff's complaint, and in addition thereto contains certain specific defenses, among which is the defense that Hensen had within due time filed and recorded the notice of nonresponsibility provided for in section 1192 of the Code of Civil Procedure. The trial court at the close of the plaintiff's case granted a motion for nonsuit and having done so made and entered its judgment in favor of defendant Hensen thereon. It is from such judgment that this appeal has been taken.

[1] It is the contention of the appellant that the evidence sufficiently showed that the persons who were alleged in the complaint to be the assignors of the plaintiff performed the work and labor referred to in said complaint and upon which their respective claims of laborers' liens under the provisions of section 1183 of the Code of Civil Procedure are based, and that the evidence also sufficiently showed that these persons are the persons who executed the assignment of their aforesaid labor claims to the plaintiff, and that the evidence also sufficiently showed that Hensen had actual knowledge of the construction of said oil well upon his said property, and that no notice of nonresponsibility was given, posted, or recorded as required by law. In response to these several contentions the respondent urges as his first contention that the assignment of the labor claims upon which the plaintiff relies for his right to sue in this action was never introduced in evidence, and that hence upon the very threshhold thereof his action failed. It is true that the record in the case discloses that when the assignment was first offered in evidence several objections were urged to its admittance, the first and chief of which was that no proper foundation had been laid for its introduction by proof that the labor claimants named therein were the persons who had executed such assignment. The court in the first instance held this objection to be good and directed that the offered assignment be marked by the clerk for identification. Thereafter the plaintiff sufficiently proved by proof or offer of proof that said assignment had been executed by the individual assignors named therein; but it seems that having made such showing the subsequent offer of the assignment itself in evidence was not made by plaintiff, but was apparently overlooked by all concerned. The record, however, sufficiently discloses that throughout the later progress of the trial the assignment was considered as being in evidence in the case to the extent that the defendant in his motion for nonsuit did not refer to its nonintroduction as one of the grounds of his motion, and that the court in granting the motion did so entirely upon other grounds. This being so, we are inclined to the view that the respondent's contention in the foregoing regard, and which is for the first time made upon appeal, is without merit.

[2] The respondent makes the further contention that the aforesaid assignment was invalid for the reason that it was not signed or otherwise consented to in writing by the wives of the assignors; but this contention is without merit for the reason, among others, that there is nothing in the record tending to show that there were any wives of the assignors, or any of them.

[3, 4] The respondent makes several other contentions with regard to the state of the evidence which may be briefly disposed of. As to the proof of lease between the Hensens and the Motion Picture Oil Syndicate, the defendants Hensen in their answer alleged the existence of such a lease and referred to the record thereof, and by so doing obviated the necessity of proof thereof or of its contents on the plaintiff's part. As to the proof that the oil well in connection with which the plaintiff's assignors and each of them performed labor under employment by the Hogan Drilling Company, through its authorized agent, there is ample evidence going to show that the Hogan Drilling Company was engaged in the drilling of said well upon the defendants' premises under some sort of an arrangement with the Motion Picture Oil Syndicate, the defendants' lessee, giving it the right so to do, and the plaintiff's assignors were its employees in that undertaking, and that they and each of them performed labor for the period of time and at the rate of wages covered by their respective labor claims and liens, and that the wages which they were to receive for so doing were in accordance with the union scale of wages. This evidence, whether presented by the plaintiff, either in actual testimony or of offers of proof at the trial, was sufficient to satisfy the requirements of law upon a motion for nonsuit.

[5] The respondent makes several other assignments of insufficiency in the plaintiff's case, which, without specification, but upon an examination of the record, we hold to be unmeritorious. This leaves as the only remaining question in the case the question as to whether the plaintiff had sufficiently

shown an absence on the part of the defendant Hensen of compliance with the precise requirements of section 1192 of the Code of Civil Procedure. This section, among other things, requires the posting of a notice of nonresponsibility upon the premises by the owner or owners thereof. The plaintiff produced at the trial a considerable number of the persons whose names are represented in these assigned labor claims and who each positively testified that no such notice as the statute requires was ever posted upon the property during the time they were performing work thereon; and while it is true that the defendant Hensen, when examined as a hostile witness and as a party under the provisions of section 2055 of the Code of Civil Procedure, testified that he had posted such a notice upon the premises, he admitted that he did not record such notice until the work covered by these labor claims had been practically completed, and when for the first time he learned that these laborers were not being paid. The foregoing evidence was, we think, amply sufficient to show noncompliance on the part of the defendant Hensen with the aforesaid provisions of the Code, and was therefore, with the other evidence introduced or offered by the plaintiff, sufficient to make out a prima facie case and to require a denial of the said defendant's motion for a nonsuit. It follows that the trial court was in error in granting said motion and in the entry of its judgment thereon.

The judgment is reversed, with the instruction to the trial court to enter an order denying the motion for nonsuit, and, having done so, to proceed with the trial of the cause.

We concur: SHENK, J.; TYLER, Justice pro tem.

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204 Cal. 354

O'MEARA v. HAIDEN et al. (S. F. 11952.)★

Supreme Court of California. June 14, 1928.

Rehearing Denied July 12, 1928.

1. Release 🔑16—Release for injuries to boy, later dying, did not cover death, where injury causing death was not known at time (Civ. Code, § 1542).

Release from liability for injuries to plaintiff's minor son, later dying, could be avoided on ground of mutual mistake, where injury which was cause of boy's death was not known to either party at date of release, and release did not extend to plaintiff's claim for damages arising from death, under Civ. Code, § 1542, relating to releases.

2. Release 🔑24(2)—Where release covering injuries to boy, later dying, did not cover damages for death, it was unnecessary to restore consideration received before instituting action for death (Civ. Code, § 1542).

Where release from liability for injuries to plaintiff's son, later dying, was made at time when neither party knew of injury causing death, so that release did not cover damages for death, under Civ. Code, § 1542, relating to releases, it was not necessary for plaintiff to rescind release and restore consideration received therefor before instituting action for son's death.

3. Contracts 🔑266(1), 271—Plaintiff must rescind contract and tender consideration received before commencing action to cancel contract on ground of fraud, mistake, etc.

Where purpose of action is to cancel or set aside contract on ground of fraud, mistake, or other reason, plaintiff must rescind contract and tender back consideration received before commencing action, or he will be precluded from recovery.

4. Release 🔑24(1)—Where plaintiff sues for injury and defendant pleads release, plaintiff may show invalidity of release, if he makes timely offer to rescind and restore consideration after commencing action.

Where plaintiff seeks to recover unliquidated damages for injury and defendant relies on release as defense, plaintiff may show invalidity of release, if he has made timely offer to rescind same and restore consideration, even if offer is made after commencement of action.

5. Evidence 🔑18—Courts, in passing on excessiveness of verdict, must take judicial notice that value of dollar has materially changed.

Courts, in passing on question of excessiveness of verdict, must take judicial notice of fact that value of dollar has materially changed from what it was some 10 to 15 years ago.

6. Death 🔑99(3)—$10,000 for death of son aged 7 years held not excessive.

Verdict for $10,000 for death of plaintiff's son, 7 years of age, *held* not excessive.

7. Appeal and error 🔑1047(5)—In action for death of boy, permitting mother to identify photograph of her deceased son held harmless error.

In action for damages for death of 7 year old boy, admitting photograph of deceased, and permitting mother on witness stand to identify photograph, where mother wept as she identified her son's picture, *held* harmless error.

8. Appeal and error 🔑1066—In action for death of boy, in which defendant pleaded release, reference in instruction to procuring release by fraud, where case was tried on theory of mistake only, held harmless error.

In action for death of boy, in which defendant pleaded release, instruction that, if plaintiff's consent was given to release "by mistake or obtained through fraud," then it was legal right of plaintiff to rescind same, where there was no claim that release was procured by fraud, and case was tried on theory of mistake only, *held* harmless error.

★Rehearing denied.

Department 1.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action for damages for death of a minor son by Harry O'Meara against G. P. Haiden and another. From a judgment for plaintiff, defendant named appeals. Affirmed.

John Ralph Wilson, of San Francisco, for appellant.

Ford, Johnson & Bourquin, of San Francisco, and Philip M. Carey, of Oakland, for respondent.

CURTIS, J. Action for damages for death of plaintiff's son from injuries sustained by reason of the negligent operation of an automobile by appellant.

On the 14th of September, 1922, Herbert O'Meara, plaintiff's son, then of the age of 7 years, while running across East Twelfth street, in the city of Oakland, was struck by an automobile driven by defendant R. Henderson, the agent of the defendant, G. P. Haiden. As a result of his injuries he remained in bed two weeks. He returned to school in November and attended irregularly for some five months. On November 1, 1922, the plaintiff, in consideration of the sum of $250 paid to him by defendant Haiden, executed and delivered to said defendant the following release:

> "1847 SF—Auto—19580-B
> "G. P. Haiden.
> "Herbert O'Meara—age 7.
>
> "In consideration of the payment of two hundred fifty no/100 dollars to me in hand paid by G. P. Haiden I do hereby release and forever discharge said G. P. Haiden from any and all actions, causes of actions, claims and demands for, upon or by reason of any damage, loss or injury which heretofore have been or which hereafter may be sustained by me in consequence of an automobile accident, which occurred at Seventh avenue and East Twelfth street, Oakland, California, on or about the 14th day of September, 1922, in which my minor son, Herbert was injured.
>
> "It being further agreed and understood that the payment of the said two hundred fifty and no/100 dollars is not to be construed as an admission on the part of said G. P. Haiden of any liability whatever in consequence of said accident.
>
> "In further consideration of the amount above stated I do hereby bind myself, my heirs, executors and administrators to indemnify and hold harmless the said G. P. Haiden from any loss the said G. P. Haiden may be obliged to pay in the future in reference to the above mentioned accident.
>
> "In witness whereof, I have hereunto set my hand this 1st day of November, 1922.
> "H. O'Meara.
>
> "Signed and sealed in the presence of
> "Mrs. H. O. O'Meara.
> "J. A. Stewart."

Thereafter and on the 8th day of April, 1923, the boy was again taken sick. Dr. Nichols who attended him on this occasion, as well as at the time he was first injured, pronounced his recent ailment as measles. He died on the 13th day of the same month.

Upon the death of his son the plaintiff brought this action for damages under section 376 of the Code of Civil Procedure, the amended complaint therein having been filed July 23, 1923. On September 7, following, defendant Haiden filed his answer to the complaint, setting up the foregoing release. On October 15, 1923, plaintiff served upon defendant Haiden a notice of rescission of said release, and tendered to said defendant the sum of $250 paid by defendant to plaintiff at the time of the execution of said release, which tender was refused by defendant.

The action came on for trial on January 22d, following, and a verdict was rendered in favor of plaintiff for the sum of $10,250. From this judgment the defendant Haiden has appealed. It may be conceded that plaintiff's son received his injuries through the negligence of defendant and that said injuries were the proximate cause of his death. The court so found, and there was ample evidence to sustain this finding. The principal contentions of appellant on this appeal are, first, that the release was a complete defense to this action; that it was binding upon plaintiff and could not be rescinded; and, second, that, if the release could be rescinded, the action was prematurely brought, as it was instituted almost three months prior to any attempted rescission.

It is conceded that at the time of the payment of the sum of $250 to plaintiff and the execution of said release neither party thereto had in mind that the boy would die. The appellant testified that—

> "At the time this release was obtained I did not have in mind that the boy was likely to die. The fact that the boy might die from his injuries was not in contemplation at all at the time the release was executed."

The evidence shows that the cause of the boy's death was abscess of the spleen, and the physician testified that this abscess was, in his opinion, caused from a bruise over the abdomen, producing a possible hemorrhage in the spleen which was not visible to the naked eye. He further explained how death resulted from a complication of the bruised condition of the spleen and the infection of measles. Under these circumstances, are the parties bound by the release in this action brought to recover damages for the injury fatal in its nature and effect when, at the time of its execution, neither of them had knowledge of such an injury, and neither of them contracted with such an injury in mind?

[1] Section 1542 of the Civil Code provides that—

> "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the

release, which if known by him must have materially affected his settlement with the debtor."

This court, in considering the extent to which a general release is binding upon the parties thereto, has said in Meyer v. Haas, 126 Cal. 560, 563, 58 P. 1042, 1043:

> "That portion of the contract, therefore, purporting to release and satisfy the claim upon which the action is based is, on the findings of the jury, absolutely void for the reason that the mind of plaintiff never consented to any such a release. * * *"

In that action the plaintiff, who had suffered injuries due to the negligence of the defendant, claimed, and the jury found, that the release given by the plaintiff was only in satisfaction of his claim for loss of time, although it purported on its face to be a release in full of all damages sustained as a result of said injuries. It is true that it was alleged and proven that said release had been procured by the fraud of the defendant therein; but this court has further held that a mutual mistake of fact concurred in by the parties invalidates a release. Miller v. Brode, 186 Cal. 409, 199 P. 531. In the case of Richardson v. Chicago, etc., Ry. Co., 157 Minn. 474, 196 N. W. 643, cited by appellant, the correct rule appears to be stated. In that action the court said:

> "Where the consideration received for a release is intended as compensation for the injuries sustained, and it subsequently develops that a substantial injury existed which was not known to the parties when the settlement was made and consequently was not taken into account in making it, the release may be avoided on the ground of mutual mistake."

This language is peculiarly applicable to the facts in this case. The evidence shows that the injury was sustained on September 14, 1922, and that as a result thereof the boy was sent to the hospital, from which he returned about two weeks thereafter. The doctor who attended the injured boy testified:

> "My first call was made on September 14, 1922, upon an automobile accident; he had muscular bruises over his right leg and arm and bruises over his abdomen; if I recall correctly, I think there were small cuts which probably would be termed as bruises. I saw him on the 14th, and 16th, and 19th and the 30th of September, and on the 4th of October; about the 4th of October, so far as the bruises were concerned, he seemed to be recovered, and from the immediate accident, so far as I could determine."

The boy was in this condition on November 1, 1922, when the release was executed. It was not until the following March or April that his condition again became serious. Continuing, the doctor testified:

> "On the 29th day of November I examined him; there were no notes made relative to that; that was an office visit; the boy did not recuperate as rapidly as—to make a statement, I never saw the boy before the 14th of September, 1922. He didn't seem to be recuperating as rapidly as he might have done; he didn't seem to be up to par, to be normal at these dates; he was pale; he was anæmic; he was nervous. I saw him again on the 2d of March, I saw him again on the 8th day of April, 1923, at his home; I recall it was on a Sunday night along in the evening; he had the measles; I saw him on the following morning on the 9th; that was a call at home; I didn't see him any more until the 12th; upon that day his condition was critical."

As already stated, the boy died on April 13, 1923. From this testimony of the doctor who attended the boy, it appears that he did not visit or see the boy after the 4th of October, 1922, until the 29th day of November, 1922, and, as stated by him, "about the 4th day of October, so far as the bruises were concerned, he seemed to be recovered, and from the immediate accident, so far as I could determine." It was during this time when the boy "seemed to be recovered from the immediate accident" that the parties entered into negotiations which resulted in the execution and delivery of the release. The evidence, as before observed, shows that at the time of its execution neither party had in mind the possibility that the boy might die, or that he had sustained any more than superficial wounds or bruises by reason of the accident. It is quite evident that the settlement made by the defendant and the delivery and acceptation of the release was simply for the injuries sustained by the boy, and which were then known to the parties, and from which, from the testimony of the doctor, the boy had recovered.

A further distinction is made in the case of Richardson v. Chicago, etc., Ry. Co., supra, between the injury sustained and the effects or results from such injury. If the injury is known at the time of the settlement, the release is binding upon the parties, even if unknown or unexpected consequences result therefrom; but, if the injury is unknown, and the parties purport to settle for all injuries sustained, then the release will not be held to be binding upon the parties as to the injury which was unknown to the parties at the time of executing the release:

> "To avoid such a release, the rule requires clear and convincing proof that a substantial injury, which was not discovered until after the settlement, had in fact been sustained in the accident and existed at the time of the settlement. That unknown and unexpected consequences resulted from known injuries is not sufficient." Richardson v. Chicago Elec. Ry. Co., supra.

The testimony of Dr. Nichols is that the boy died from an injury to his spleen received at the time he was run over by the defendant's automobile, and that such injury was not visible to the naked eye. The only conclusion to be drawn from his testimony as recited in this opinion is that he did not know of the injury to the boy's spleen at the time he ceased his visits to the boy on October 4, 1922; that his first knowledge that the boy had sustained any such injury was after the boy had come down with the measles, which was the following April, and which was long after the execution of the release.

It is not contended, nor is there any showing, that the plaintiff had any knowledge of this injury except as he was informed thereof by the doctor. It appears, therefore, beyond question, that at the date of the release the injury which was the cause of the boy's death was not known to either party. It was not in the minds of the parties at the time of the settlement which resulted in the execution of this written release. Accordingly, although the release may purport upon its face to extend to the plaintiff's claim for damages arising from the death of his son, yet, in reality it does not do so. Section 1542, Civ. Code. It is unreasonable to suppose that plaintiff would have entered into said agreement of settlement whereby he released the defendant of all damage for the sum of $250 had he known that there was any possibility that the boy had received this fatal injury to his spleen. Such knowledge would have materially affected his settlement with defendant. To hold him to the terms of the release would not only be manifestly unfair and unjust, but it would be against the law of this state as we understand the same and as we have attempted to state it in the foregoing pages of this opinion.

[2] It is next contended by appellant that the action was prematurely brought for the reason that no rescission of said release was made or was attempted to be made by the plaintiff until some three months after the institution of this action. In Garcia v. California Truck Co., 183 Cal. 767, 192 P. 708, the plaintiff sought to recover damages for personal injuries sustained through the negligence of defendant. The defendant pleaded a release in full of all said damages. The plaintiff showed upon the trial that said release had been procured by fraud. He had not, however, prior to the trial, attempted to rescind his contract of release, nor had he restored the consideration received by him from the defendant. This court held that rescission and restoration of consideration were necessary before plaintiff could recover, and reversed a judgment in favor of the plaintiff. In Meyer v. Haas, 126 Cal. 560, 58 P. 1042, which was also an action to recover damages for personal injuries, the defendant relied upon a release and written discharge executed and delivered to him by the plaintiff. The plaintiff claimed that he understood that the release given by him was simply of his claim for loss of time and was not intended as a release in full of all damages sustained. No rescission was ever made by the plaintiff, nor did he restore the consideration received. In holding that plaintiff was not required to make such rescission or restore said consideration, this court said:

> "It will be seen from these special findings of the jury, considered in connection with their general verdict, that the jury were of the opinion that plaintiff executed the alleged release under a mistake as to its contents, that he believed he was receiving the $25 and giving the receipt in discharge of any claim he might have for loss of time merely, and that he was led into this error by the artifice and deception of Kurtz as to the contents of the instrument, Kurtz acting as the agent of defendants and being in their employ, and at the same time pretending to act for plaintiff. The case is not without evidence to support such conclusions. That portion of the contract, therefore, purporting to release and satisfy the claim upon which the action is based is, on the findings of the jury, absolutely void for the reason that the mind of plaintiff never consented to any such a release, and the plaintiff should be bound only to the release and satisfaction of his claim for loss of time. This view of the case makes it clearly distinguishable from most of the cases cited by appellant. In those cases generally the parties sought to avoid or rescind contracts, the nature and contents of which they understood correctly, but they had been led to execute them by fraud or deception as to something other than the contents of the contract; and in such a case the contract would not be void but only voidable, and the rule requiring a return of everything received on the faith of the contract before it could be rescinded or avoided would apply; but this rule as to a return of everything received does not apply where a party is tricked or deceived into signing a contract different in its terms and objects from the contract which he has made and which he understands that he is executing. The contract under such circumstances will be held to be what the maker of it intended it should be, and not what it was made to appear to be by the deception practiced. The $25 paid plaintiff may, therefore, properly be said to have been received in payment for the loss of time during his illness, and not in satisfaction of anything that his mind never consented that it should satisfy. The claim sued upon does not include this loss of time, and the court instructed the jury that they could find nothing against defendants for loss of time. No offer to return the money was necessary, for the reason that the plaintiff in this case 'is not attempting to avoid a contract which he has made, but is showing that he did not make the contract which he apparently made.' Mullen v. Old Colony R. R., 127 Mass. 86, 34 Am. Rep. 349; Chicago, etc., Ry. Co. v. Lewis, 109 Ill. 120; Senter v. Senter, 70 Cal. 619 [11 P. 782]; Wilson v. Moriarty, 77 Cal. 596 [20 P. 134]; 88 Cal. 207 [26 P. 85]; Sullivan v. Moorhead, 99 Cal. 157 [33 P. 796]."

The present action in principle is much like the case of Meyer v. Haas, except that no fraud is claimed or proven to have been practiced by the defendant in the procurement of the release involved herein. In this action, however, the uncontradicted evidence, as we have already seen, shows that neither party to the release at the time they made the settlement evidenced by the release had in mind the injury which resulted in the boy's death. As to the damages sustained by the father for the death of his son due to defendant's negligence, we have held that the release did not cover any damages sustained by reason of the boy's death. It only extended to damages for those injuries known to the parties at the time of executing it. The present action was by the instructions of the trial court limited to such damages as the father may have sustained by reason of his son's death. As plaintiff herein has not recovered any damages sustained by him for injuries, which were covered by the release, it was not necessary for him to rescind said release and restore the consideration received therefor before the institution of this action. Lumley v. Wabash R. Co. (C. C. A.) 76 F. 66; McGill v. Louisville & N. R. R. Co., 114 Ky. 358, 70 S. W. 1048; Bliss v. N. Y., etc., Railroad, 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504. This we understand to be the effect of the holding of this court in Meyer v. Haas, supra. In that action, however, the plaintiff did not either after or before the commencement thereof offer to rescind and restore the consideration received by him from the defendant Haas. In the present action, after the commencement thereof and before the trial, the plaintiff herein offered in writing to rescind and tendered the defendant the $250 received at the time of executing the release, which the defendant refused to accept. There is creditable authority to sustain plaintiff's contention that the rescission, assuming that a rescission was required, attempted to be made by plaintiff herein after suit began, was timely, and was sufficient to entitle plaintiff to litigate the validity of the general release at the trial of the action.

> "Undoubtedly no duty exists to return the consideration until the fraud or other invalidity is discovered. Beyond this the authorities are in conflict as to when the restoration of consideration or tender thereof must be made. Some cases, in many of which cancellation of the release is asked in the complaint or statement of claim, decide that such return or tender must be made before the releasor institutes suit on the cause of action released. Other decisions take the view that a credit on the verdict is sufficient, and hence no actual tender is apparently required at any time. Furthermore, authority is not lacking for the statement that restoration or tender at any time during the pendency of the suit is early enough. But the clearest and soundest rule is that no restoration or tender need be made until an attack is made on the release. Such attack generally occurs when the ground of invalidity, as fraud, is replied in avoidance to a plea of the release to the original right." 34 Cyc. 1072.

In Rockwell v. Capital Traction Co., 25 App. D. C. 98, 4 Ann. Cas. 648, the following rule is enunciated:

> "We see no good reason why one party more than the other should be required to anticipate a defense founded on the instrument [a release], and offer to return the consideration as the condition of bringing the action. We are of the opinion that it is time enough to make the tender in either case after the release shall have been pleaded in bar. Tender or offer to return then accomplishes all the purposes for which it is required. * * * Some of the cases to which our attention has been called, where the doctrine has been declared that tender or offer to return is a condition precedent to the institution of the suit, were either suits to rescind, or suits in courts of blended jurisdiction where cancellation was part of the remedy sought. [Citing cases.] * * * On the other hand, many cases, some of which are cited, expressly decide that the offer to return may be made after the institution of the suit and while it is pending. O'Brien v. Chicago, etc., R. Co., 89 Iowa, 644, 57 N. W. 425; Chicago, etc., R. Co. v. Lewis, 109 Ill. 120; Chicago, etc., R. Co. v. Doyle, 18 Kan. 58."

[3, 4] There are cases to the contrary and some of those cited by defendant in his brief belong to that class, but in most of those cases we find simply general language purporting to uphold defendant's contention. And upon examination of these cases we find that the real point that we are here considering was not involved in any of said actions. Among the cases cited by defendant in support of his contention that rescission and restoration of consideration must precede the institution of the action are the following: Reed v. John Gill & Sons Co., 201 Mo. App. 457, 212 S. W. 43; Reid v. St. Louis & S. F. R. Co. (Mo. Sup.) 187 S. W. 15; Althoff v. St. Louis Transit Co., 204 Mo. 166, 102 S. W. 642; McCoy v. James T. McMahon Const. Co. (Mo. Sup.) 216 S. W. 770; and Randall v. Port Huron, etc., Co. (Mich.) 184 N. W. 435. In none of these cases, however, did the plaintiff, as the plaintiff did in this case, tender back and offer to restore the consideration before the trial. In Garcia v. California Truck Co., 183 Cal. 767, 192 P. 708, relied upon by defendant, the plaintiff therein made no offer to rescind the release either before or after the institution of the action. The court held he could not recover for that reason and reversed the judgment in his favor.

We think the true rule is that, when the purpose of the action is to cancel or set aside a contract on the ground of fraud, mistake, or other reason, then it is necessary for the plaintiff therein to rescind said contract and tender back the consideration received prior to the commencement of the action, or else he will be precluded from recovery; but, where plaintiff seeks to recover unliquidated damages for an injury sustained and the defendant relies upon a release as a defense to said action, the plaintiff is not precluded from showing the invalidity of said release, if he has made a timely offer to rescind the same and restore the consideration, even if said offer is made after the commencement of the action.

In the present action, immediately upon the service of defendant's answer upon plaintiff, in which the defendant set up said release as a defense to plaintiff's action, the latter served upon defendant his written rescission of said release and a tender of said sum of $250, being the consideration received from defendant on execution and delivery of said release. It does not appear that plaintiff's attorneys knew of the execution of said release, prior to the time they were served with a copy of defendant's answer, nor does it appear that plaintiff himself had any real understanding of its legal effect before the matter had been brought to his attention by his attorneys after they had been served with said answer. The court found under these facts and circumstances that the plaintiff had acted with due promptness in rescinding the release and tendering back the consideration received thereunder. Under the authorities cited above we believe said finding was fully justified.

[5-7] While the mother of the boy was on the stand she was shown and asked to identify a photograph of her deceased son. This was objected to by the defendant, but the court overruled the objection. Upon her testimony that the photograph shown her was that of her son it was admitted in evidence. There was no dispute as to the identity of the boy injured. Just what the purpose of offering in evidence his photograph is not apparent from the record, unless it was to unduly prejudice the jury in favor of the plaintiff. The reporter's transcript shows that the mother wept as she identified her son's picture. The effect of such procedure cannot aid in the rendition of a just and fair verdict by the jury, which should be the purpose of all trials by jury. To permit the introduction of the dead boy's photograph under the circumstances shown in this action was undoubtedly error and in a closely contested case would result in serious prejudice to the cause of the defendant, and would therefore call for a reversal of the judgment. We are not prepared to say that it had that effect in this proceeding. There was little question but that the boy's death was due to the negligence of defendant's servant who was operating defendant's machine at the time of the boy's injury. The main questions involved in the case were of a legal character and have already been considered by us. The objectionable testimony just referred to had no bearing upon any of them.

There is, however, one phase of the case upon which such testimony might have had a material bearing, and that is embraced in the further contention of defendant that the verdict was excessive. The verdict was for $10,250, the $250 evidently being to cover the amount paid out by the plaintiff for the funeral expenses of his son. The complaint alleges that this amount was expended for that purpose. This leaves a verdict of $10,000 for general damages due to the death of the son. In the case of Wiezorek v. Ferris, 176 Cal. 353, 167 P. 234, this court reversed a judgment in that amount in favor of a parent for the death of his minor son, his only child, a boy 6½ years of age, solely upon the ground that the amount thereof was excessive. Were we to follow that case we would be compelled to grant a reversal of the judgment herein. That case was decided in October, 1917, almost 11 years ago. Since the decision thereof radical changes have taken place in social conditions, and particularly in conditions affecting the costs of living. Courts have recognized this fact in passing upon the size of verdicts and have almost invariably made allowances therefor. Martin v. Pac. Gas & Elec. Co. (Cal. App.) 255 P. 284; Bowes v. Public Service Ry. Co., 94 N. J. Law, 378, 110 A. 699; Quinn v. Chicago, M. & St. P. Ry. Co., 162 Minn. 87, 202 N. W. 275, 46 A. L. R. 1228. In the last one of these cases the Supreme Court of Minnesota said:

> "In recent years there has been a noticeable increase in the size of verdicts in personal injury cases. The courts approve of verdicts today which would have been unhesitatingly set aside as excessive 10 or 15 years ago. Measured in money, the earning capacity of most men has increased; measured by its purchasing power, the value of a dollar has decreased. No immediate change in the situation is in sight. It is only right that these well-known facts should be taken into consideration."

In the case of Bowes v. Public Service Ry. Co., supra, decided in 1920, the Supreme Court of New Jersey expressed similar views in which it further said:

> "At a period when the purchasing power of the dollar has in the language of the day been 'cut in half,' the value of the sum awarded here is not to be estimated in the numerical quantum of the recompense, but in its comparative ability to furnish the necessities of life."

In view of the changed conditions that now prevail from those existing some 10 years ago, we do not feel that we would be justified in following at this time the views expressed by this court in Wiezorek v. Ferris, supra, regarding the subject of excessive verdicts. Under the present conditions that case cannot be accepted as a final authority in determining whether the verdict in the present action is excessive or not. On the other hand, the present verdict must be considered under the conditions prevailing at the present time, or at least at the time it was rendered in January, 1925. We must, as courts in other jurisdictions have done in passing upon similar questions as that involved herein, take judicial notice of the fact that the value of the dollar has materially changed from what it was some 10 to 15 years ago. Whether it is "cut in half," as intimated by the excerpt from one of the above-mentioned authorities, or not, it is universally admitted that it has materially decreased in value from what it was a few years ago. There has been a corresponding increase in wages and salaries as well as in the cost of living in all walks of life. The sum of $10,000 when measured by its present purchasing power is far less than what it formerly was. A verdict, therefore, in this amount for personal injuries, may well be sustained by the courts of to-day, when formerly it would have been their duty to set it aside as excessive. Before the advent of the present day conditions verdicts for the death of a child amounting to $5,000 or more were frequently rendered by juries, and sustained by the courts. One of such cases was decided by the District Court of Appeal in 1910 and a petition to hear the same was denied by this court. The verdict was for $5,000, and, in sustaining the same, Mr. Justice Hart, speaking for the court, said:

> "The jury were authorized, as the court properly instructed them, to consider and take into account, as an element affecting the pecuniary value of the service of deceased to the plaintiff, the fact that plaintiff has, by his death, been deprived of the comfort, society and protection of her son. * * * And, obviously, this element of loss of society, comfort and protection of the son to be reckoned in determining the pecuniary value of the service of the deceased to his mother is difficult to measure in mere dollars and cents, and manifestly must, with the whole question of damages, be left to the good sense and sound discretion of the jury to be exercised in the light of all the circumstances of the case." Clark v. Tulare Lake Dredging Co., 14 Cal. App. 414, 434, 112 P. 564, 572.

If, then, this court looked with approval upon a verdict in an amount of $5,000, in an action for the recovery of damages for the death of a child under former conditions, we can have no reasonable or legal grounds now for withholding such approval of the verdict in the present action. Taking all things into consideration, we are of the opinion that this verdict is not excessive. The erroneous admission of the boy's photograph in the manner already described did not then, in our opinion, have the effect of influencing the jury to render an improper verdict against defendant, and the error in admitting it was not prejudicial to the defendant.

[8] In one of the instructions given by the court the jury were told that, if the consent of plaintiff was given to the release in question "by mistake or obtained through fraud," then it was the legal right of plaintiff to rescind the same. As we have said above, there was no claim that the release was procured by fraud and the case was tried upon the theory of mistake only. The only reference to fraud throughout the record is in this instruction. Just how the court happened to mention in said instruction "fraud" as one of the grounds of avoiding the release is in no way explained. It may have been inadvertently done. In any event, we are not convinced that defendant was seriously prejudiced by this one reference to fraud, when the record shows plainly that plaintiff made no claim that the release was fraudulently obtained, and the sole contention of plaintiff throughout the trial was that the release was of no binding effect upon him by reason of the fact that it was executed under a mutual mistake of the parties.

In our opinion the judgment should be affirmed, and it is so ordered.

I concur: PRESTON, J.

SEAWELL, J. I concur in the conclusion announced by the main opinion. I do not concur in the portion thereof which holds that the admission of a photograph taken of the minor two weeks before he received the fatal injuries was error. It would certainly have been proper to have shown the physical condition and mental precocity of the youth by oral testimony as matters pertinent for the consideration of the jury in determining the extent of damages sustained by the parents. A photograph, the integrity of which could not be doubted, would, in my opinion, have given the jury a truer conception of the youth's physical appearance than could have been conveyed to the jury by the descriptive power of speech. So, too, it would reflect something of the mental force of the subject. Emotional manifestations are not alone produced by the exhibition of photographs in cases of this class. Such manifestations are to be expected where mothers are called to the witness chair to speak upon any branch of the case. I am of the opinion that no error was committed by the admission of the photograph.

204 Cal. 370

PACIFIC STATES SAVINGS & LOAN CO. v. HARWELL et al.

ZANOLA v. SAME.

(Sac. 4061.)

Supreme Court of California. June 14, 1928.

1. Appeal and error 🔑148—Stranger to ejectment proceeding, by connecting himself with cause, has right of appeal from order denying motion to recall and annul writ of assistance.

Stranger to ejectment proceeding, without right to appeal from original order, by connecting himself with cause on motion to recall and annul writ of assistance, and by having been given status of mover by the court, has right to appeal from order denying such motion.

2. Ejectment 🔑122—Stranger to ejectment proceeding, entering premises without collusion, cannot be removed by writ of restitution after judgment.

One who, after ejectment proceedings have been commenced, enters the demanded premises, not under the defendant, nor by collusion with him, and is likewise not a party to the action, cannot be removed by writ of restitution issued after judgment.

3. Assistance, writ of 🔑2—Writ will not issue, so as to affect new and independent right to property.

Where a new and independent right to property has been acquired, or where a prima facie showing of acquirement of such right is made, writ of assistance should not issue, and cannot operate to affect such new and independent right, in that writ relates back to and operates on those rights only which have been determined by the judgment.

4. Mortgages 🔑544(3)—Court obtained jurisdiction to determine claim to possession of stranger voluntarily becoming party to foreclosure proceedings.

Where stranger to foreclosure proceeding voluntarily became a party thereto by filing a motion to dissolve writ of assistance theretofore issued, the court obtained jurisdiction to try and decide his claim to possession of property.

5. Mortgages 🔑544(3)—Naked trespasser held not entitled to annulment of writ of assistance theretofore issued.

Naked trespasser *held* not to have such reasonable claim to possession of property as required court to grant motion to recall and annul a writ of assistance theretofore issued.

Department 1.

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Action by the Pacific States Savings & Loan Company against S. B. Harwell and others, wherein C. Zanola filed a cross-complaint. From an order refusing a motion to recall and annul a writ of assistance theretofore issued, G. M. Harwell appeals. Affirmed.

Guy L. Louderback and C. L. Donohoe, both of Willows, for appellant.

Duard F. Geis and Carroll F. Byrd, both of Willows, for respondents.

PRESTON, J. This is an appeal in the above-entitled proceeding from an order refusing the motion of one G. M. Harwell to recall and annul a writ of assistance theretofore issued and still outstanding in said proceeding, the same being in foreclosure. Respondent received the sheriff's deed, and sought and secured the writ complained of, the command of which is as follows:

> "Therefore we command you that, immediately after receiving this writ, you go to, and enter upon, the said piece or parcel of land above described, and that you eject the said defendants S. B. Harwell and Nannie A. Harwell, and any and all persons claiming under them, or either of them, since the commencement of the above-entitled action, and all persons claiming to have acquired any interest or estate in the premises subsequent to the filing of the lis pendens in the above entitled action that may be in possession of said premises, and all and every other person or persons holding or detaining the said premises, and that you deliver to said C. Zanola, or his assigns, the possession of said premises without delay, and him, the said C. Zanola, or his assigns, from time to time, maintain, keep, and defend, or cause to be kept, maintained, and defended, according to the true intent of said decree."

This writ does not in terms mention appellant. Appellant asserts that as a tenant of respondent he is in possession of the premises, and for that reason asks that said writ be recalled and annulled. The trial court treated the motion of appellant as proper, heard it upon evidence, both oral and documentary, and later refused to grant the relief sought, holding in effect that appellant was not a tenant of respondent, but in reality a trespasser upon the premises.

[1] The facts of this case bring appellant within the exception to the general rule that one may not appeal from an order refusing to vacate and annul an appealable order. Appellant, being a stranger to the proceeding, could not have appealed from the original order, but by connecting himself with the cause and having been given the status of a mover by the court, he may appeal. People v. Grant, 45 Cal. 97; Green v. Hebbard, 95 Cal. 39, 30 P. 202; Pignaz v. Burnett, 119 Cal. 157, 51 P. 48; Credits Com. Co. v. Superior Court, 140 Cal. 82, 73 P. 1009; Elliott v. Superior Court, 144 Cal. 501, 509, 77 P. 1109, 103 Am. St. Rep. 102; Title Ins. & Trust Co. v. Calif., etc., Co., 159 Cal. 484, 488, 114 P. 838; Estate of Baker, 170 Cal. 578, 584, 150 P. 989.

[2] It is also true that one who, after ejectment proceedings have been commenced,

enters the demanded premises, not under the defendant, nor by collusion with him, and is likewise not a party to the action, cannot be removed by a writ of restitution issued after judgment. Mayo v. Sprout, 45 Cal. 99; Bull v. Coe, 77 Cal. 54, 18 P. 808, 11 Am. St. Rep. 235.

[3] We also reannounce the doctrine set forth in Kirsch v. Kirsch, 113 Cal. 56, 62, 63, 45 P. 164, 166, as follows:

> "Reserving for the moment, the consideration whether a writ of assistance may issue at all in an action such as this, we are well satisfied that, where a new and independent right to property has been acquired, or where a prima facie showing of the acquirement of such a right is made, the writ should not issue and cannot operate to affect such new and independent right. The writ relates back to and operates upon those rights only which have been determined by the judgment. The reason for the issuance of the writ is to give effect to rights awarded by the judgment. It should not and cannot operate to establish in the one party, or to destroy in the other, any rights to the property independent of those determined by the judgment. So it would follow if appellant in this case had made even a prima facie showing of a new title by adverse possession, the issuance of the writ which would have passed judgment upon that title would have been improvident and irregular. But, while appellant claims a new title by adverse possession, the bald assertion of an unsupported claim is not a sufficient warrant for asking the court to withhold its process. If appellant, six months after the entry of the decree, should resist the issuance of the writ, upon the claim that she had, since the entry of the decree, acquired title by adverse possession, the groundlessness of the contention would entitle it to no consideration. The claim, in short, must be reasonable, and supported by a reasonable showing."

[4, 5] But the court here finds that appellant is a naked trespasser; hence his claim is "unsupported," and the showing is not "reasonable" within the meaning of the above-quoted doctrine. Moreover, appellant having voluntarily become a party to the foreclosure proceedings, the court obtained jurisdiction to try and decide his claim to possession of the property. In Dobbins v. Economic Gas Co. (on rehearing) 182 Cal. 638, 189 P. 1073, the court met and considered a principle kindred to the one here involved, and disposed of it in harmony with the announcement above made.

We have been furnished with practically no authorities on the questions above discussed; hence we do not feel called upon to pursue legal questions further. Respondent cited no authorities on the merits of the appeal, and rested practically his whole defense upon the contention that the order must be affirmed, because of the failure of appellant to present a properly authenticated bill of exceptions or reporter's transcript. The certificates of clerk and judge are each defective, but a question arises as to the waiver of these defects in the record by stipulation made by counsel. A consideration of these questions would take more time than to examine the order appealed from on its merits, treating the record before us as complete. This we have done, and we find no showing whatever from which it can be said that the order of the trial court was without support.

The order is affirmed.

We concur: TYLER, Justice pro tem; CURTIS, J.

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204 Cal. 342

FERGUSON v. KOCH. (Sac. 4151.)

Supreme Court of California. June 12, 1928.

1. Sales 🔑41—Generally rule of caveat emptor applies, but not where seller makes false statements as of own knowledge; falsity being unknown to buyer.

General rule is that, where parties deal fairly or at arm's length, the rule of caveat emptor applies, but, where honest dealing is departed from by seller making false statements as of his own knowledge, falsity of which are not known to buyer, such buyer has undoubted right to rely implicitly upon such statements, and principle has no application.

2. Sales 🔑267—Buyer purchasing used truck under contract providing that chassis was sold "as is" could rely on representations concerning model of motor and capacity of truck.

Where contract for conditional sale of used truck prepared by seller contained assurance that motor was in very good condition, further reciting that chassis was sold "as is" for reason that certain parts were missing, and fraud charged was that seller made misrepresentations concerning model of truck and its capacity which were not apparent for examination, *held* that buyer, having no knowledge of subject, was entitled to rely on seller's statements.

3. Sales 🔑52(1, 7)—Independent investigation of truck did not show buyer relied on own judgment rather than upon seller's representations, nor give rise to such presumption.

In seller's action on conditional sale contract, mere circumstance that buyer had made independent investigation of truck did not necessarily show that he relied on own judgment rather than upon representations of seller, nor did it give rise to presumption of law to that effect.

4. Sales 🔑38(7)—Buyer may rely on seller's representations of facts not within knowledge, and seller cannot escape responsibility by showing buyer might have ascertained falsity.

Buyer has right to rely on representations of seller as to facts not within his knowledge, and the seller cannot escape responsibility by showing that buyer might have ascertained upon inquiry that representations were untrue.

5. Appeal and error 🔑1010(1)—On appeal, judgment in seller's action for breach of contract of conditional sale of used truck must stand where finding of seller's false representations was sustained by competent evidence.

In seller's action for breach of contract conditional sale of used truck, where trial court found that false representations were made by seller and there was ample competent evidence in record to support conclusion, *held* on appeal that judgment must stand.

6. Evidence 🔑397(2)—Where parties have reduced to writing complete and certain agreement, parol evidence will not be received, in absence of fraud.

Where parties have reduced to writing what appears to be complete and certain agreement, it will, in absence of fraud, be conclusively presumed that writing contains whole agreement between parties, and parol evidence of prior, contemporaneous, or subsequent conversations or representations or statements will not be received for purpose of adding to or varying written instrument.

7. Evidence 🔑434(11)—Writing may be impeached for fraud and parol warranty may then be relied upon rather than fraudulent written one.

Writing may be impeached for fraud, and parol warranty really made may then be relied upon rather than written one thus shown to be fraudulently imperfect or defective.

8. Evidence 🔑434(11)—Parol evidence is admissible to prove fraud; hence fact that sale of used truck was evidenced by written contract did not prevent buyer from proving fraud by parol.

Parol evidence is always admissible to prove fraud, and it was never intended that parol evidence rule should be used as a shield to prevent proof of fraud; hence fact that sale of used truck was evidenced by written contract did not prevent buyer from proving by parol evidence that sale was induced by fraud, and this is true even though contract recites that all conditions and representations are embodied therein.

9. Evidence 🔑434(8)—In actions for rescission for fraud, statutory provisions as to effect of written contract have no application (Code Civ. Proc. § 1856; Civ. Code, § 1625).

In action for rescission on ground of fraud, statutory provisions that, when terms of agreement have been reduced to writing, such writing is to be considered as containing all terms (Code Civ. Proc. § 1856), and that execution of contract supersedes all prior negotiations or stipulations (Civ. Code, § 1625), have no application and do not control.

10. Sales 🔑251—There is no distinction between fraudulent representations inducing contract and representations in nature of warranties.

There is no distinction between fraudulent representations going to induce making of contract and representations in nature of warranties.

11. Courts 🔑89—Case not passed upon by Supreme Court is not controlling in Supreme Court.

Case not passed upon by Supreme Court because no petition for transfer was applied for is not controlling in Supreme Court.

12. Trial 🔑395(6)—Finding of fact that all matters set forth in answer are true as alleged is sufficient.

Blanket finding of fact that all matters set forth in defendant's answer are true as therein alleged is sufficient.

In Bank.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by E. A. Ferguson against Fred Koch, upon a conditional sale agreement. From a judgment for the defendant, the plaintiff appeals. Affirmed.

Superseding opinion of District Court of Appeal. 261 P. 489.

W. E. Davies, of Marysville, for appellant.

A. G. Bailey, Hudson Grant, and Grant & Bailey, all of Woodland, for respondent.

TYLER, Justice pro tem. Action to recover the purchase price of a certain used autotruck sold under a written agreement. Defendant by his answer admitted the sale, but, by way of defense, alleged that he was induced to make the purchase by means of fraudulent representations. Judgment was rendered for defendant, and plaintiff appeals. The facts, briefly stated, are as follows: On the 14th day of December, 1925, plaintiff was the owner of a 1916 year model Reo automobile, which he had commenced to convert into a light delivery truck. Defendant, a contractor, after examining the same, entered into negotiations with plaintiff for its purchase. Terms of sale were agreed upon, and the machine was towed to defendant's place of business, where further examination was made by him of the truck. The parties thereupon entered into a written agreement of sale, the material portions of which are as follows:

"Robbins, Sutter Co., Dec. 14, 1925.

"This is to certify that E. A. Ferguson agrees to sell to Fred Koch the following described property: One Reo chassis, year model 1916, as is. E. A. Ferguson, the sole owner of said Reo for several years past, agrees to give a clear title to said Reo to Fred Koch, the buyer. The Reo chassis is sold as is due to the fact that certain parts belonging to chassis are not attached thereto. E. A. Ferguson, to the best of his knowledge, states that the motor of said Reo is in very good condition.

"[Signed] E. A. Ferguson.
"Fred Koch.

"Witness: J. P. Ponne."

Defendant having refused to make the payments provided for under the contract, for reasons hereinafter stated, this action was brought to recover the purchase price. In his answer, defendant alleged, in substance, that plaintiff, in order to induce him to purchase the automobile, represented that the truck was a Reo speed wagon, that it was a 2½-ton truck, such as defendant desired, and would carry the desired weight, and, further, that it had the same motor in it as the Reo Company installed in its new cars for the year 1925; that in truth and in fact the auto was not a Reo speed wagon; that the motor was not the one described, it being the type used by the company in the year 1917 for passenger automobiles, and not in speed wagons; that the truck had a carrying capacity of three-fourths of a ton only. It is then charged that plaintiff knew the representations to be false and fraudulent and were made for the sole purpose of inducing defendant to enter into the contract. Further allegations recite that immediately after the purchase defendant discovered the falsity of the representations and thereupon offered to redeliver the auto to plaintiff and demanded the cancellation of the obligation. At the trial, plaintiff offered the written contract in evidence, and denied having made any false representations. Defendant, over objection, then testified as to the misrepresentations contained in his answer, and judgment went in his favor. It is here claimed by plaintiff, appellant herein, that the doctrine of caveat emptor applies to the facts of the case; it being clearly shown by the testimony that defendant had full opportunity of examining the car, and that, having availed himself thereof, and entered into the written contract agreeing to take the automobile "as is" and pay for the same, he thereby became bound by his agreement. It is further claimed that the parol evidence received was inadmissible to change or vary the terms of the written instrument. We will discuss the points in the order stated.

[1] The general rule is well established that, where parties deal fairly or at arm's length, the rule of caveat emptor applies, but, where honest dealing is departed from by the vendor making false statements as of his own knowledge, the falsity of which is not known to the purchaser, such purchaser has the undoubted right to rely implicitly upon such statements, and the principle has no application. In other words, the vendor must stand mute, or at least refrain from making statements calculated to deceive.

[2-5] Here the contract, prepared and written by plaintiff, contained the assurance that the motor was in very good condition, and it further recited that the chassis was sold "as is" for the reason that certain parts were missing. These assurances have relation to the mechanical condition of the truck, as to which no fraud is alleged and of which no complaint is made. The fraud charged, and which it is claimed induced the purchase, consists in the misrepresentations concerning the model of the motor and the capacity of the truck. The capacity of the truck was not a matter that could be ascertained by the exercise of reasonable care in the examination thereof, that fact not being apparent from such examination, and the vendee, having no knowledge upon the subject, was therefore entitled to rely upon the vendor's statement, which the evidence shows he made, that he had used the car and it would carry the desired load. The same may be said with reference to the misrepresentations concerning the motor. The evidence shows that the vendee was not familiar with the different types of motors in use in Reo cars, but had merely heard that those used in the speed wagon type of auto were very good machines. The mere circumstance, therefore, that the vendee made an independent investigation of the truck does not necessarily show that he relied on his own judgment rather than upon the representations of the other party, nor does it give rise to the presumption of law to that effect. A purchaser has a right to rely on the representations of his vendor as to facts not within his knowledge, and the vendor cannot escape responsibility by showing that the purchaser might have ascertained upon inquiry that the representations were untrue. Sullivan v. Helbing, 66 Cal. App. 478, 226 P. 803; Whiting v. Squeglia, 70 Cal. App. 108, 232 P. 986. The trial court having found that the false representations were made, and there being ample evidence in the record to support the conclusion, the judgment must stand unless it can be said that the evidence concerning the false misrepresentations was improperly received.

[6] This brings us to the question whether or not parol evidence is proper to prove false representations where there is a written contract of sale. The rule is, of course, well settled that, where the parties have reduced to writing what appears to be a complete and certain agreement, it will, in the absence of fraud, be conclusively presumed that the writing contains the whole of the agreement between the parties, and that it is a complete memorial of the same, and parol evidence of prior, contemporaneous or subsequent conversations or representations or statements will not be received for the purpose of adding to or varying the written instrument. If, therefore, such a writing exists between the parties, and it contains no warranty at all, no warranty can be added by parol; if it contains a warranty of some kind or to some extent, parol evidence will not be admitted to extend, enlarge, or modify that which the writing specifies. United Iron Works v. Outer H., etc., Co., 168 Cal. 81, 141 P. 917; 2 Mechem on Sales, § 1254.

[7, 8] In such a case, what the seller may have said is not admissible to show that the contract was different from that expressed

in the writing, and the parties will be held to their agreement and to no other. It is equally well settled, however, that a writing may be impeached for fraud, and a parol warranty really made may then be relied upon rather than the written one thus shown to be fraudulently imperfect or defective. Id. § 1257; 9 Ency. of Ev., p. 492. Parol evidence is always admissible to prove fraud, and it was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud. Hence, the fact that the sale of an automobile is evidenced by a written contract will not prevent the purchaser from proving by parol evidence that the sale was induced by fraud. And this is true even though the contract recites that all conditions and representations are embodied therein. Mooney v. Cyriacks, 185 Cal. 70, 195 P. 922; Hunt v. Field (Cal. Sup.) 262 P. 730; Whiting v. Squeglia, 70 Cal. App. 108, 232 P. 986. There is no such sanctity surrounding a writing that parties may not be permitted to go back of it and show that there was such fraud practiced in the procurement of the same as to vitiate the writing. The law never countenanced a rule which would deny to one the right to prove that fraud had been practiced upon him. Avery v. Staples (Tex. Civ. App.) 183 S. W. 43; Berry on Automobiles (4th Ed.) § 1561; Huddy on Automobiles (7th Ed.) § 1116, and cases cited.

[9-11] In actions for rescission on the ground of fraud, the statutory provisions that, when the terms of an agreement have been reduced to writing, such writing is to be considered as containing all the terms (Code Civ. Proc. § 1856), and that the execution of a contract supersedes all prior negotiations or stipulations (Civ. Code § 1625), have no application, and do not control (Mooney v. Cypriacks, supra). Appellant has cited us to certain earlier cases in our reports which he claims make a distinction between fraudulent representations going to induce the making of a contract and representations in the nature of warranties. There is no reason why any such distinctions should exist, and, in fact, none does exist. See Hayes v. Gammon, 168 Ark. 1116, 272 S. W. 644; Martin v. Shoub, 62 Ind. App. 586, 113 N. E. 384; 26 Cyc. p. 1145. The Mooney and Hunt Cases above cited had to do with fraud concerning warranties, and what was said in those cases applies to fraud exercised in this connection. An examination of the cases relied upon by appellant shows that in most of them the question of fraud was not involved. For the most part they are cited and distinguished in the Mooney Case, and a further review of them would answer no useful purpose. The case of Yuba Mfg. Co. v. Stone, 39 Cal. App. 447, 179 P. 418, chiefly relied on by appellant, contains language that supports his contention. The case, however, is based upon decisions where fraud was not alleged. While recognizing the rule that a defrauded party cannot, by the "simple device of a written instrument," be deprived of the right to prove fraud, it concludes with the statement that parol evidence cannot be permitted to nullify the further rule in relation to the effect of written instruments by the claim that the vendee was deceived by certain oral representations. Such, as we have pointed out, is not the law. This case was not passed upon by this court; no petition for a transfer having been applied for. It is therefore not here controlling.

[12] And, finally, it is claimed that the findings of fact are not supported by the evidence and are defective in form. What we have said disposes of the first objection. The blanket finding is made that all matters set forth in defendant's answer are true as therein alleged. This form of finding has always been held sufficient. Fritz v. Mills, 170 Cal. 449-459, 150 P. 375.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; RICHARDS, J.

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204 Cal. 387

RITCHEY v. WATSON. (L. A. 9435.)★

Supreme Court of California. June 20, 1928.

Hearing Denied in Bank and Opinion Modified July 19, 1928.

1. Automobiles 🔑245(15, 81, 88)—Negligence of bus driver proceeding along highway at high speed and contributory negligence of plaintiff occupying car and of driver making left turn into private road held for jury.

Negligence of motorbus driver, claimed to have proceeded along road at a high rate of speed, and contributory negligence of plaintiff occupying truck and driver thereof in making left-hand turn from road into plaintiff's private driveway, *held* for jury, under Motor Vehicle Act (St. 1923, p. 517), in action for injuries resulting from collision, where evidence showed that driver of truck gave proper signal.

2. Appeal and error 🔑1002—Jury's findings cannot be disturbed on appeal because conflicting or because evidence permitted drawing different inferences.

Jury's findings of fact on issues properly submitted cannot be disturbed by reason of conflict of evidence or because of the fact that different inferences might reasonably be drawn from the evidence.

3. Automobiles 🔑243(7)—Admission of evidence of speed of bus on approaching scene of accident held within trial court's discretion in action for injuries.

In action for injuries resulting from collision between bus and truck making left turn

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★Hearing denied in bank.

across road, admission of evidence of speed of bus on approaching scene of the accident when a few hundred feet away was within trial court's discretion, especially in view of positive testimony as to speed of bus at time of the accident which removed objection of remoteness.

4. Trial 🔑139(1)—Jury determines weight of evidence objected to for remoteness.

Weight of evidence objected to for remoteness is question for jury.

5. Trial 🔑263(1)—Each party is entitled to have instructions given based on his theory of case, if supported by any evidence.

Each party is entitled to have instructions given, based on his theory of the case, provided instructions requested are supported by evidence.

6. Trial 🔑260(1)—Instructions requested need not be given, where subject is fully covered by other instructions.

Instructions requested are properly refused, where other instructions upon the same subject fully present the law applicable.

7. Trial 🔑228(1)—Order of trial court's instructions was of no consequence in determining whether court committed error.

Order of giving instructions *held* not ground for reversal, notwithstanding claim that instructions so given were misleading.

8. Trial 🔑228(1)—Instructions should be simply and plainly framed.

Instructions should be framed as simply and plainly as possible at the same time covering the issues involved.

Department 2.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by Blanche Ritchey against A. B. Watson, doing business under the fictitious firm name and style of the Crown Stage Line. Judgment for plaintiff, and defendant appeals. Affirmed.

Clyde Bishop, of Santa Ana, and B. P. Gibbs, of Los Angeles, for appellant.

S. M. Davis, of Santa Ana, for respondent.

TYLER, Justice pro tem. Action for damages for personal injuries. The complaint alleges, in substance, that on July 13, 1925, plaintiff was riding with her husband in an automobile truck which was being driven in a careful and prudent manner in a northwesterly direction along and upon a public highway in the county of Orange; that, when the truck had reached a point directly opposite to the home of plaintiff, her husband made a left-hand turn in order to enter his private road, at which time defendant, operating an automobile bus going in the same direction, carelessly, recklessly, and negligently, and in utter disregard to the rights and safety of other drivers, collided with the truck, striking the left wheel thereof with such force and violence as to overturn it, pinning plaintiff and her husband underneath thereof, and causing the injuries complained of. Judgment was prayed for in the sum of $10,087.25. The answer denied negligence in the operation of the motorbus, and alleged that the driver of the truck turned the same from the right-hand side of the road toward the left-hand side thereof in a negligent manner and without the exercise of ordinary care, and the damage suffered by plaintiff was due to and caused by the fault of the driver of the truck by reason of his failure to exercise such requisite care. After trial before a jury, plaintiff recovered a verdict in the sum of $3,000. From this judgment defendant prosecutes this appeal.

[1, 2] It is here claimed that the verdict is contrary to the evidence and is contrary to the law in this: (1) That the proof discloses no negligence on the part of defendant; (2) that plaintiff and her husband were guilty of contributory negligence as a matter of law for the violation of the provisions of the Motor Vehicle Act (St. 1923, p. 517), and, in particular, for failing to look to the rear before turning to the left, such violation and negligence being the proximate cause of plaintiff's injuries. It is further claimed that the trial court erred in permitting testimony relating to the speed of the bus at a point distant from the scene of the accident as being too remote, and that the court likewise erred in the giving and refusing to give certain instructions to the jury. With reference to the question of negligence, there is evidence to show that plaintiff and her husband were traveling on the public highway in a light Ford truck and which was turned across to the left for the purpose of entering their private driveway. Prior to making this turn, and when some 50 or 60 feet therefrom, the husband slowed down, looked back, and also looked in his rear view mirror to ascertain if any vehicles were approaching, at the same time extending his hand to indicate his intention to make the turn and continuing to do so until he had accomplished his purpose. Before his rear wheels had cleared the road, his truck was struck by defendant's bus, overturned, and plaintiff and her husband were pinned beneath the same. There was also testimony to show that immediately prior to the accident, and when the bus was about 500 feet from the point in the road where the accident occurred, it was traveling at a high rate of speed, estimated at from 35 to 40 miles an hour, and had been traveling at a speed of nearer 50 miles just prior thereto. It further appeared that immediately prior to the impact, and when some 250 feet away from

the scene of the accident, the driver of the bus began to swing his vehicle from the right-hand side of the road toward the left-hand side in an attempt to pass the truck in which plaintiff and her husband were riding. It is manifest that under these facts defendant was guilty of negligence and that plaintiff was not guilty of contributory negligence, as claimed. It is true that there was conflict in the evidence, but with that we are not concerned. The question of negligence or contributory negligence is one of fact for the jury to determine, and its finding cannot here be disturbed by reason of a conflict, nor can it be disturbed because of the fact that different inferences might reasonably be drawn from the evidence. The evidence is ample to support the judgment.

[3, 4] Nor is there any merit in the claim that the trial court committed error in admitting evidence of the speed of the bus in approaching the scene of the accident when a few hundred feet away therefrom. The question as to whether or not this evidence was objectionable as being too remote was a matter of discretion of the trial court. No hard and fast rule can be laid down upon this subject. Traynor v. McGilvray, 54 Cal. App. 31, 200 P. 1056; 1 Wigmore on Ev. 574 et seq. Even assuming that, standing alone, the evidence might be considered too remote, still the positive testimony as to the speed of the bus at the time of the accident makes it legally relevant as affording an inference with respect thereto. Davies v. Barnes, 201 Ala. 120, 77 So. 612; Sterler v. Busch, 197 Iowa, 231, 195 N. W. 369. The weight of such evidence is a question for the jury.

[5-8] Equally without merit is the claim that the court erred in giving certain instructions requested by the plaintiff, for the reason that they were misleading on account of the order in which they were given. The issues were plain and simple. Each party was entitled to have instructions given, based on his theory of the case, if there was any evidence to support it. Both parties fully availed themselves of this privilege, for the instructions are voluminous. Some of the instructions asked for by the defendant were refused, and rightfully so, for the reason that other instructions upon the subject presented the law fully to the jury. The order in which the trial court read the instructions to the jury is of no consequence. Whether the first or the last made the greater impression upon the minds of the jury, or which were the most lasting, presents a question upon which minds might differ, but in any event the objection "borders on the realm of psychology, wherein the law seems loath to enter." Grillich v. Weinshenk, 64 Cal. App. 474, 222 P. 160. We have read the instructions, and fail to find objection to any of them, either in form or substance. As above stated, the issues were plain and simple. The instructions fully and fairly covered the questions involved and properly presented all issues to the jury. The only objection we see to them is that they are too voluminous. The more simply and plainly instructions can be framed and cover the issues, the better the jury will understand them, and the less likely will they run counter to some rule of law. Estate of Keithley, 134 Cal. 9-13, 66 P. 5. The appeal is devoid of merit.

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.

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204 Cal. 286

PEOPLE v. VENTURA REFINING CO.

(S. F. 11939.)

Supreme Court of California. May 31, 1928.

1. Statutes 🔑181(2)—General terms of statute will be limited to avoid interpretation leading to injustice, oppression, or absurd consequences.

Where asserted interpretation of statute will lead to injustice, oppression, or to absurd consequences, the general terms used in statute will be limited in their scope so as to avoid such a result.

2. Licenses 🔑16(9)—Exemption provision of Gasoline Tax Act held inapplicable to executory contracts of sale permitting distributor to add tax to fuel sold (Gasoline Tax Act, § 10).

Provision of Gasoline Tax Act (St. 1923, p. 571) § 10, exempting from tax any motor vehicle fuel delivered under contract entered into prior to May 14, 1923, *held* inapplicable to executory contracts of sale entered into prior to such date, which in terms or in effect permits the distributor to protect himself against operation of the tax by securing a price for the fuel sold which may have as an added constituent factor thereof a sum equivalent to tax fixed by the statute.

3. Constitutional law 🔑205(2)—Licenses 🔑7(3)—Statutes 🔑74(1), 95(2)—Construction of exemption provision of Gasoline Tax Act so as to apply to executory contracts permitting distributor to add tax to selling price would render act unconstitutional (Gasoline Tax Act, § 10; Const. art. 1, §§ 11, 21; art. 4, § 25, subd. 19).

Construction of exemption provision of Gasoline Tax Act (St. 1923, p. 571) § 10, so as to apply it to executory contracts wherein distributor may add tax to selling price, would render statute in violation of Const. art. 1, §§ 11, 21, and article 4, § 25, subd. 19, in that it would create an unwarranted and baseless discrimination in the operation of statute by conferring a benefit on certain persons and corporations which is denied to others under same circumstances.

4. Constitutional law 🔑154(1)—Imposition of tax on future sale does not interfere with obligation of contract, where seller may add tax to selling price.

It is in no sense an interference with obligation of a contract to impose a tax on a future sale to be made thereunder, where seller is given free rein to add to selling price in such commodity tax imposed by law.

5. Constitutional law 🔑43(1)—Estoppel 🔑52—Party may waive special benefits conferred by statute or Constitution.

A party may waive the benefits specially conferred on him by statute or Constitution.

6. Constitutional law 🔑43(1)—Estoppel 🔑58—Party waiving right to special benefits conferred by statute or Constitution is estopped to rely on exemption where inequitable or unjust to permit it.

When a party waives benefits specially conferred upon him by statute or Constitution, estoppel to rely on exemption will arise in any case, where it is inequitable or unjust to permit it.

7. Licenses 🔑19(3)—Distributor by adding tax to selling price held estopped to deny waiver of right to rely on exemption provision of Gasoline Tax Act (St. 1923, p. 571, § 10; Civ. Code, § 3513).

Exemption provisions of Gasoline Tax Act (St. 1923, p. 571) § 10, being enacted solely for benefit of distributor, *held* that, under Civ. Code, § 3513, distributor by adding tax to selling price of gasoline is estopped to deny waiver of right to rely on exemption or to claim benefit of it.

Langdon, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by the People against the Ventura Refining Company to recover gasoline tax. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for the People.

Charles W. Slack and Edgar T. Zook, both of San Francisco, for respondent.

PRESTON, J. This is an action by the people against the defendant to recover the two-cent per gallon license or excise tax provided by the Gasoline Tax Act (Stats. 1923, c. 267, p. 571) upon 2,041,922 gallons of motor vehicle fuel sold by defendant to five different concerns under five different executory contracts of sale made prior to May 14, 1923, the completed sales being made during the first quarter of the year 1924. Defendant had judgment, and plaintiff people have appealed on a stipulation of facts, a provision of which is that, should plaintiff finally prevail, it shall have judgment against defendant for the sum of $40,822.86, together with interest and costs as prayed for in the complaint.

Each of the five executory contracts above referred to contains a price-fixing provision substantially as follows:

> "The price fixed for gasoline deliverable hereunder contemplates that the jobber shall be entitled to a spread, or margin, of one and one-half (1½) cents per gallon of delivery hereunder, to compensate him fully for his outlay and services in receiving, storing and distributing gasoline delivered hereunder to the trade in tank-wagon lots and should any federal, state, municipal, or district tax, or taxes, be imposed on gasoline deliverable hereunder, not to the extent thereof reflected in the prevailing price at which standard grades of gasoline, conforming to United States Navy specifications, then in effect may be sold in tank-wagon lots at * * * California, at time of such delivery, the basis for arriving at the price of gasoline to the jobber then remaining deliverable hereunder shall be so altered as to insure to the jobber such spread, or margin, of one and one-half (1½) cents per gallon of delivery hereunder, to compensate him fully for his outlay and services in receiving, storing and distributing gasoline, then remaining deliverable hereunder."

These contracts were interpreted in practical operation as follows:

> "That each and all of the said sales and deliveries of gasoline embraced in the said sales of the said aggregate amount of 2,041,144 gallons were made to the purchaser thereof at a price one and one-half (1½) cents less than the prevailing price at which standard grades of gasoline, conforming to the United States Navy specifications, then in effect, was being sold in tank-wagon lots at the several places of delivery provided in the said respective contracts; that the said prevailing price was determined by the price at which Standard Oil Company, Shell Oil Company, Union Oil Company, and Associated Oil Company were then selling gasoline in the territories mentioned in the said several contracts; and that, at the time that the license tax provided in the statute hereinabove referred to went into effect, the prevailing price of such gasoline was increased by the action of the said last-mentioned corporations two (2) cents per gallon over the price at which such gasoline had been selling prior thereto."

The statute referred to is the so-called Gasoline Tax Act hereinbefore cited, which is entitled:

> "An act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels. * * *"

Section 1 defines certain terms used in the act. Section 2 provides for the registration of distributors of motor vehicle fuel. Sections 3 and 4 fix the amount of the tax at two cents per gallon of fuel distributed and the time for payment thereof. Sections 5 to 9 make certain provisions for records to be kept by the distributor and the manner of computation of the tax. Then follows section 10, a portion of which, constituting the basis of controversy here, reads as follows:

> "The provisions of this act requiring the payment of license fees shall not be held or construed to apply to * * * any motor vehicle fuel delivered under contracts entered into prior to the fourteenth day of May, 1923. * * *"

The question presented for our consideration under these facts is: May the respondent in this action rely upon the exemption last above quoted and refuse to comply with the demand of the state for the payment of said tax so levied?

It is the contention of respondent that the language of the statute proclaiming the exemption contains no uncertainty or ambiguity, but in plain words applies to any contract executed prior to May 14, 1923, the terms of which require the distributor to deliver motor vehicle fuel pursuant thereto.

The contention of the people, on the other hand, is that the exemption in said provision cannot be thus broadly interpreted, but must be limited to that class of contracts which contain as an integral part thereof a provision which compels the distributor to sell and deliver motor vehicle fuel at a fixed price and prevents him from adding the two-cent tax thereto. In other words, the contention of the people is that the tax in reality is not paid by the distributor, but is collected from the consumer, and that any contract which allows the distributor to reimburse himself for the tax levied is not within the terms of said exemption. The contention is further made that under the plain terms of the contracts here in suit, coupled with the further facts found, the price was not fixed, but, on the contrary, the distributor not only had the right to add the tax to the selling price, but in effect it was added and actually passed on to the consumer.

It is further urged by the people that, if the broad interpretation contended for by defendant is indulged, the effect will be to render the whole tax exemption unconstitutional and void because when thus interpreted it is discriminatory in character, inasmuch as there is no reasonable basis for declaring that a sale made at a price to be thereafter determined under an executory contract made prior to May 14, 1923, differs from a sale made under a similar contract of subsequent date.

[1] Where the interpretation claimed leads to injustice, oppression, or to absurd consequences, the general terms used in a statute will be limited in their scope so as to avoid such a result. In Ex parte Lorenzen, 128 Cal. 431, 438, 439, 61 P. 68 (50 L. R. A. 55, 79 Am. St. Rep. 47), the court had before it a city penal ordinance regulating the issuance and delivery of street car transfers and prohibiting the giving of them by passengers to others for their use in continuing the journey over a connecting road. The ordinance, if literally enforced, would have made it a penal offense for a passenger, after paying the fare of himself and his family or guests and securing transfers, to deliver such transfers to the other members of his party. The court, restricting the literal language of the ordinance and holding that the legislation did not apply to an innocent use of a transfer, said:

> "But for the more substantial objection that the ordinance by its terms would oppress and lead to the conviction of persons guilty of no fraudulent act, it is to be remembered that the letter of a penal statute is not of controlling force, and that the courts, in construing such statutes, from very ancient times have sought for the essence and spirit of the law and decided in accordance with them, even against express language; and in so doing they have not found it necessary to overthrow the law, but have made it applicable to the class of persons or the kind of acts clearly contemplated within its scope."

The above language is cited with approval in People v. Earl, 19 Cal. App. 69, 71, 72, 124 P. 887. In that case the defendant was indicted under a section of the Penal Code prohibiting the disclosure by any person of a telegraphic or telephonic message addressed to another, without permission of the addressee. Limiting application of the statute to offenses committed by persons having a duty to perform with respect to the dispatch, transmission, or delivery of such messages, in accordance with the obvious legislative intent, the court said:

> "The function of the courts in construing statutes is not constricted to a view which shall give literal effect to every word and phrase appearing by the letter of the law. In that analysis reason must have its just proportion, and the intent of the lawmakers is to be ascertained by taking into account several considerations, as: The history of the legislation upon the subject treated of, and concurrent legislation affecting the same or closely kindred subjects. The fact that the enforcement of a statute according to its literal import will have the effect of prohibiting otherwise necessary and useful acts may also furnish an entirely sufficient reason for concluding that the intent of its framers was not that it should so operate. Our Supreme Court, in Ex parte Lorenzen, 128 Cal. 431, 79 Am. St. Rep. 47, 50 L. R. A. 55, 61 P. 68, has declared the rule thus: [Citing from said case the language hereinabove quoted.] * * * As an illustration, the old Bologna law, which provided in literal terms for the punishment of a person who should let blood in the streets and which was held not to apply to a barber performing the office of a surgeon, is given, among others. The expression of Mr. Justice Field, used in United States v. Kirby, 7 Wall. 482, 19 L. Ed. 278, is also quoted: 'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice or oppression or an absurd

consequence. It will always be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.' "

The rule is followed in Re Haines, 195 Cal. 605, 612, 613, 234 P. 883, 885, where the court extended the application of the provisions of a penal statute to both classes of prisoners, misdemeanor and felony, although the precise language thereof included only, "Every prisoner charged with or convicted of a felony." It is there said:

> "Matter of Zany, 20 Cal. App. 360, 129 P. 295, is cited by respondent to the effect that a statute should always be so construed as to give a sensible and intelligent meaning to every part, to avoid absurd consequences, and, if possible, so as to make every provision thereof valid and effective. General terms should be so limited in their application as not to lead to an absurd consequence. People v. Earl, 19 Cal. App. 69, 124 P. 887. To arrive at the legislative intent in the interpretation of statutes the original purpose and object of the legislation must be considered. Mackey v. Mott, 25 Cal. App. 110, 142 P. 1082. Statutes must be read and considered in conjunction with the legislative intent and then be liberally construed with the object in view of giving effect to such intent. Odell v. Rihn, 19 Cal. App. 713, 127 P. 802. A construction or conclusion plainly not contemplated by the Legislature should not be given to a statute if it can be avoided. When a statute is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity and the other consisting of sound sense and wise policy, the former should be rejected and the latter adopted. San Joaquin & K. R. C. & I. Co. v. Stevinson, 164 Cal. 221, 128 P. 924.
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> "Absurd or unjust results will never be ascribed to the Legislature and it will not be presumed to have used inconsistent provisions as to the same subject in the immediate context. The courts will be astute to avoid such results. Wells Fargo & Co. v. Mayor, etc., of Jersey City [D. C.] 207 F. 871. In the interpretation of statutes courts are not bound by grammatical rules, and may ascertain the meaning of words by the context. Cavender v. Hewitt, 145 Tenn. 471, 22 A. L. R. 755, 239 S. W. 767.
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> " 'The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the Legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. "While the intention of the Legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of the law should not be sacrificed to a literal interpretation of such words." Words or clauses may be enlarged or restricted to effectuate the intention or to harmonize them with other expressed provisions. Where general language construed in a broad sense would lead to absurdity it may be restrained. The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense they were intended to be used as they are found in the act.' Lewis' Sutherland on Statutory Construction (2d Ed.) § 376, p. 721."

In the case of People v. Kaufman, 49 Cal. App. 572, 193 P. 953, defendant was charged with violation of a section of the Motor Vehicle Act (St. 1915, p. 409, § 21) requiring the driver of a motorcar which had collided with another to take any one who was riding in the other car to a surgeon upon the request of such person. Holding that the statute should not be so strictly construed against one accused of felony as to make it applicable to the facts of the case, the court said:

> "In the present case the complaining witness was driving alone. With the appellant, in the car he was driving, were four other persons. If none of them was hurt or required medical or surgical treatment, any one of the five in the appellant's car might first have asked the complaining witness for transportation to a surgeon, and he might have been accused of felony if he had said 'there is no reason why I should provide transportation for you.' Upon no reasonable hypothesis can the criminality of either of two actors be made to depend entirely upon which of the two shall first make a request of the other. Every statute must receive reasonable construction, and this is particularly true of statutes defining crimes. 'It is to be remembered that the letter of a penal statute is not of controlling force, and that the courts in construing such statutes, from very ancient times have sought for the essence and spirit of the law and decided in accordance with them, even against express language; and in so doing they have not found it necessary to overthrow the law, but have made it applicable to the class of persons or the kind of acts clearly contemplated within its scope.' Ex parte Lorenzen, 128 Cal. 431, 79 Am. St. Rep. 47, 50 L. R. A. 55, 61 P. 68. 'General terms should be so limited in their application as not to lead to injustice or oppression or an absurd consequence.' People v. Earl, 19 Cal. App. 69–72, 124 P. 887, 888; United States v. Kirby, 7 Wall. [U. S.] 482, 19 L. Ed. 278. See, also, Rose's U. S. Notes."

[2] Applying these principles to the provisions of the statute before us, we do not hesitate to declare the legislative intent to be that contracts of the type here considered should not be exempted from consideration in measuring the amount of the tax imposed. The clear intent of the law was to levy an excise or occupation tax upon distributors of motor vehicle fuel, giving such distributors, however, ample opportunity to fully indemnify themselves by adding the amount of the tax to the selling price of the fuel and thus in effect collect the tax from the consumer. The exemption, in other words, was to be a shield for their protection, but not a sword to be used for gaining a profit from the public. It is admitted in this case that in practical effect the two-cent tax was added to the selling price by respondent and presumably indirectly paid by the consumer.

There is, therefore, no equity in the contention of respondent. We hold the exemption to be inapplicable to any executory contract of sale entered into prior to May 14, 1923, which in terms or in effect permits the distributor to protect himself against operation of the tax by securing a price for the fuel sold which may have as an added constituent factor thereof a sum equivalent to the tax fixed by said statute.

[3] The same result is also reached by holding as we do that to broadly apply the exemption to contracts such as are here in suit would be to create an unwarranted and baseless discrimination in the operation of said statute in that it would confer a benefit upon certain persons and corporations which is denied to others under the same circumstances in violation of article 1, § 11, article 1, § 21, and article 4, § 25, subd. 19, of the Constitution. The statute is prospective in its operation and the tax imposed is measured by completed sales made after its enactment and during its operation. It is a tax measured by completed and not executory sales. All deliveries made under executory contracts which do not fix a selling price are in the same class regardless of the date of execution of such contracts.

[4] It is in no sense an interference with the obligation of a contract to impose a tax upon a future sale to be made thereunder where the seller is given free rein to add to the selling price of such commodity the tax imposed by law. Whether the executory contract of sale in such case be made on one date or another is entirely immaterial. Under the exemption here considered and applied to the contracts before us a sale made thereunder on January 1, 1924, will be exempt, whereas a sale under a contract dated May 15, 1923, identical in all other respects, made at the same time and at the same price will be taxed. The provision of the statute here under consideration could not validly operate, therefore, to effect the object contended for by respondent.

[5, 6] Again, we see no answer to the contention that the exemption set forth was enacted solely for the benefit of the distributor and under the facts here shown respondent by adding the two cents to the selling price of its product estopped itself to claim the benefit of said exemption. Section 3513 of the Civil Code provides:

> "Any one may waive the advantage of a law intended solely for his benefit. * * *"

It has been held many times in this state and the rule is universal that a party may waive the benefits specially conferred upon him by statute or Constitution. 6 Cal. Jur. § 78, p. 120; 5 Cal. Jur. § 55, p. 626; Wells, Fargo & Co. v. Enright, 127 Cal. 669, 60 P. 439, 49 L. R. A. 647; State Loan, etc., Co. v. Cochran, 130 Cal. 245, 62 P. 466, 600; Knarston v. Manhattan L. Ins. Co., 140 Cal. 57, 63, 73 P. 740. When this waiver is made, estoppel to rely on the exemption will arise in any case where it is inequitable or unjust to permit it.

In Maine a statute in the nature of imprisonment for debt exempts a married woman from arrest for tort in an action for damages against her, but it does not exempt a single woman in a like case. In holding that defendant by posing as a feme sole when in fact she was a feme covert waived the exemption, the court in the case of Kalloch v. Elward, 118 Me. 346, 348, 108 A. 256, 258, 8 A. L. R. 750, 752, said:

> "In the case at bar the exemption is created by statute, but there is no reason why the doctrines of waiver and estoppel should not apply and work their legitimate effects the same as if the exemption were created at common law or under the Constitution. A statute cannot stand in the way of waiver or equitable estoppel when the facts demand their application in the interest of justice and right."

Also in Hallowell Nat. Bank v. Marston, 85 Me. 488, 27 A. 529, it is said:

> "A statutory, or even a constitutional, provision, made for one's benefit, is not so sacred that he may not waive it, and, having once waived it, he is estopped from thereafter claiming it."

[7] It seems clear to us, for reasons based upon public policy, if upon no other ground, that respondent may not deny that it has waived the right to rely on the exemption by collecting the equivalent of the tax indirectly from the public. And this must follow, even though by its terms said exemption would otherwise shield and protect it. If it be said that in no event is the state entitled to the tax, the ready answer is that respondent was able to secure this advantage by reason of the statute, and public policy forbids it to deny the full operation of said section 3 of the act under which it is entitled in the absence of an exemption to the tax here claimed.

The judgment of the court below is reversed, and the cause remanded, with directions to enter judgment for plaintiff and against defendant for the sum of $40,822.86, with interest and costs as prayed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.

LANGDON, J. I dissent. There is no uncertainty or ambiguity in the language of the statute under consideration, and consequently, no occasion for judicial construction. Such statute provides that—

> It "shall not be held or *construed* to apply to * * * (c) any motor vehicle fuel delivered under contracts entered into prior to the fourteenth day of May, 1923. * * *"

The Legislature may have had in mind, as contended by the Attorney General, only contracts providing a fixed price for fuel, but it has not so restricted the term and to amend the statute by judicial construction seems to me an usurpation of legislative power which is unjustified even in the interests of public policy.

204 Cal. 297

PEOPLE v. GENERAL PETROLEUM CORPORATION. (S. F. 11940.)

Supreme Court of California. May 31, 1928.

1. Licenses 🔑16(9)—Exemption provision of gasoline tax act held inapplicable to executory contracts of sale permitting distributor to add tax to fuel sold (Gasoline Tax Act 1923, § 10).

Provision of Gasoline Tax Act 1923 (St. 1923, p. 571) § 10, exempting from tax any motor vehicle fuel delivered under contract entered into prior to May 14, 1923, *held* inapplicable to executory contracts of sale entered into prior to such date, which in terms or in effect permits the distributor to protect himself against operation of the tax by securing a price for the fuel sold which may have as an added constituent factor thereof a sum equivalent to tax fixed by the statute.

2. Statutes 🔑121(1)—Title of Gasoline Tax Act held not defective, in that subject-matter is not suggested (Gasoline Tax Act 1923).

Title of Gasoline Tax Act 1923 (St. 1923, p. 571) in part reading "An act to regulate and license the business * * *" *held* not defective, in that the subject-matter thereof is not suggested therein nor thereby.

3. Constitutional law 🔑43(1)—State held not estopped from asserting that construction of exemption provision of Gasoline Tax Act to apply to executory contract permitting distributor to add tax to selling price would be unconstitutional (Gasoline Tax Act 1923, § 10).

The tax imposed by Gasoline Tax Act 1923 (St. 1923, p. 571) being of a flat one measured by volume of sale, and if state does not get its quota of revenue, there being no way to recoup loss by such method of taxation, state is not estopped to assert that construction of exemption provisions of section 10 so as to apply to executory contracts permitting distributor to add tax to selling price would violate certain provisions of Constitution.

Langdon, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the People against the General Petroleum Corporation to recover gasoline tax. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for the People.

A. L. Weil, of San Francisco, and Salisbury & McNeil and Verne E. Robinson, all of Los Angeles, for respondent.

PRESTON, J. [1] The state in this action sues defendant for the two-cent tax levied under the provisions of the Gasoline Tax Act of 1923 (Stats. 1923, c. 267, p. 571), and measures the amount of the claim by the sale during the second quarter of the year 1924 by defendant of 6,945,356 gallons of motor vehicle fuel, the sum demanded being $10,749.10, together with interest and costs. The record is presented upon an agreed statement of facts. The sole question is the applicability of the exemption provision found in section 10 of said act, which reads as follows:

> "The provisions of this act requiring the payment of license fees shall not be held or construed to apply to * * * any motor vehicle fuel delivered under contracts entered into prior to the fourteenth day of May, 1923. * * *"

The executory contracts under which the sales here involved were made contained the following provision:

> "* * * Any internal revenue tax, impost, custom duties, or other charge or tax of any kind created or increased during the life of this contract and levied by governmental authority on any matter connected with this contract, or on the performance thereof, or on the product sold thereby, shall be added to the purchase price and shall be paid by the second party while same is in effect."

This case is ruled by the case of People v. Ventura Refining Co., 268 P. 347, this day determined. It is true that respondent urges that the tax is upon executory sales and not upon executed sales and that the word "sold" in section 3 of the act should be so construed; and from this it is argued that the tax period begins with contracts made on and after September 30, 1923, thus excluding the contracts in question. But we have held otherwise in said cause above cited and see no reason to place such construction upon the act, which, considered as a whole, compels the contrary conclusion.

The further contention that in other cases existing contracts made prior to the passage of the act have been made a legal basis for a classification between such contracts and contracts made subsequent to the act argues nothing of a conclusive character here. The holding here made is that the nature of the contracts before us does not furnish a sufficient reason for a separate classification. Other contracts could well be drawn which would furnish a reason for such a classification, but the contracts before us are not of that type.

[2] The contention that the title of the act is defective, in that the subject-matter thereof is not suggested therein or thereby, we deem unnecessary to discuss, as the title "An

act to regulate and license the business * * *" answers this contention amply and should satisfy even the most hypercritical mind.

[3] The same remarks must be applied to the contention that the state is estopped to assert that the construction of the exemption in the manner claimed by respondent would violate certain well-understood safeguards found in the Constitution. The tax is a fat one, measured by the volume of sales, and, if the state does not get its quota of revenue, there is no way to recoup the loss by this method of taxation upon this industry. If the state may not have the standing granted to other litigants in like circumstances, it might be severely hampered in its operation of the various departments thereof. The case of San Francisco v. McGovern, 28 Cal. App. 491, 152 P. 980, is not in point.

The judgment is reversed, and the cause remanded, with directions to enter a judgment for plaintiff against the defendant for the sum of $10,749.10, together with interest and costs of suit as set forth in the stipulation of facts.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.

LANGDON, J. I dissent. There is no uncertainty or ambiguity in the language of the statute under consideration, and, consequently, no occasion for judicial construction. Such statute provides that—

> It "shall not be held or *construed* to apply to * * * (c) any motor vehicle fuel delivered under contracts entered into prior to the fourteenth day of May, 1923. * * *"

The Legislature may have had in mind, as contended by the Attorney General, only contracts providing a fixed price for fuel, but it has not so restricted the term, and to amend the statute by judicial construction seems to me an usurpation of legislative power which is unjustified even in the interests of public policy.

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204 Cal. 301

PEOPLE v. RICHFIELD OIL CO.
(L. A. 8982.)

Supreme Court of California. May 31, 1928.

On Petition for Rehearing June 29, 1928.

1. Licenses 🔑16(9)—Exemption provision of Gasoline Tax Act held inapplicable to executory contracts of sale permitting distributor to add tax to fuel sold (Gasoline Tax Act, § 10).

Provision of Gasoline Tax Act (St. 1923, p. 571) § 10, exempting from tax any motor vehicle fuel delivered under contract entered into prior to May 14, 1923, *held* inapplicable to executory contracts of sale entered into prior to such date, which in terms or in effect permit the distributor to protect himself against operation of the tax by securing a price for the fuel sold which may have as an added constituent factor thereof a sum equivalent to tax fixed by the statute.

2. Constitutional law 🔑208(1)—Statutes 🔑74(1), 95(2)—Constitutional provisions prohibiting unjust discrimination between persons of same class apply to statute imposing excise tax (Const. art. 1, §§ 11, 21; art. 4, § 25, subd. 19).

Const. art. 1, §§ 11, 21 and article 4, § 25, subd. 19, prohibiting unjust discrimination between persons of same class, apply as well to a statute imposing excise tax as to any other.

Langdon, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by the People against the Richfield Oil Company to recover gasoline tax. Judgment for plaintiff, and defendant appeals. Affirmed.

Page, Nolan, Rohe & Hurt, Arthur F. Coe, and Ralph E. Lewis, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn and Frank L. Guerena, Deputy Attys. Gen., for the People.

PRESTON, J. On the authority of People v. Ventura Refining Co., 268 P. 347, this day decided, the judgment in this cause must be affirmed.

The contracts here involved are summarized by appellant as follows:

> "Class A agreements, where the purchaser agrees to purchase and the Richfield Oil Company agrees to sell the entire requirements of the purchaser in his business for a period of one or more years, and daily thereafter until the agreement is canceled by either party upon a 90 days' written notice of cancellation to the other. The price of the motor vehicle fuel sold thereunder was to be cash paid on delivery, 3 cents per United States gallon under the retail market price as maintained by the Standard Oil Company of California in the city of Los Angeles at the time of delivery.
>
> "Class B agreements are in general in the same form as those of class A, except that the agreement of this type has no fixed term or period, but remains in effect from the date of execution thereof until the same is canceled by either party upon a 90 days' written notice of cancellation to the other. Price provisions are the same.
>
> "Class C agreements, where the buyer purchases from the Richfield Oil Company certain property and equipment used in the ordinary gasoline station, such as pumps, tanks, piping, etc. The purchaser under this agreement agrees to pay for such property or equipment in installments running over a period of 10

months or more, the purchaser agreeing, during which period and until the property is paid for, to use said property and equipment exclusively for the purpose of storing, distributing, and vending petroleum products which may be sold or furnished to him by the Richfield Oil Company, and also agrees, during all of said time, to regularly handle and sell or offer for sale through and by means of said property and equipment such petroleum products sold and furnished to him by said Richfield Oil Company. In this type of agreement there is no provision regarding the purchase price of the motor vehicle fuel to be sold and delivered thereunder."

[1] These contracts are even more flexible as to price than those considered in the case above noted. In fact, one set of the contracts has no price feature of any kind. The market price controls in all of them and this price, of course, reflects the two-cent tax. This is conceded by appellant; hence there is no basis for a different holding.

[2] In answer to the claim of the state that to allow the broad construction contended for by appellant would be to allow an unjust discrimination between persons of the same class, appellant replies that, this being an excise and not a property tax, certain constitutional provisions are inapplicable here. But the constitutional provisions invoked (article 1, § 11; article 1, § 21; and article 4, § 25, subd. 19) apply as well to a statute imposing an excise tax as to any other. In re Richardson, 170 Cal. 68, 73, 148 P. 213.

Judgment affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.

LANGDON, J. I dissent. There is no uncertainty or ambiguity in the language of the statute under consideration, and, consequently, no occasion for judicial construction. Such statute provides that—

It "shall not be held or *construed* to apply to * * * (c) any motor vehicle fuel delivered under contracts entered into prior to the fourteenth day of May, 1923. * * *" St. 1923, p. 571, § 10.

The Legislature may have had in mind, as contended by the Attorney General, only contracts providing a fixed price for fuel, but it has not so restricted the term, and to amend the statute by judicial construction seems to me an usurpation of legislative power which is unjustified even in the interests of public policy.

On Petition for Rehearing.

PER CURIAM. On petition for rehearing herein it is urged that this court has erroneously "assumed that there were two types of contracts in existence, i. e., contracts having (a) a fixed sales price, and (b) a flexible sales price"; whereas, it is insisted, "it is apparent from the record, either directly or by necessary inference, that the so-called fixed price contracts do not exist." It is therefore contended that a conclusion cannot be drawn that the Legislature had in mind two types of contracts and by its action intended to provide only for a fixed price contract.

Assuming that the record is susceptible to the construction placed upon it by counsel, namely, that only flexible sales contracts were in existence at the effective date of the act, the correctness of the conclusion that the contractors thereunder would be in no different situation so far as the license tax was concerned than those having no contracts outstanding is further emphasized. The opportunity of those in each class to protect themselves against the burden of the license tax was the same. The operation of the law with the exemption in it would therefore confer upon those attempted to be exempted a special privilege or immunity not accorded to others similarly situated. The exemption, then, would effect an unlawful discrimination as between those in the same class and would be void under section 21 of article 1 of the Constitution. See Bacon Service Corporation v. Huss, 199 Cal. 21, 248 P. 235. The fact that the unlawful exemption was stricken from the statute by later enactment of the Legislature could not affect the petitioner's obligations under the act with the void exemption in it.

The petition for a rehearing is denied.

204 Cal. 699

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RICHFIELD OIL COMPANY, a Corporation, Defendant and Appellant. (L. A. 8980.)

Supreme Court of California. May 31, 1928.

On Petition for Rehearing, June 29, 1928.

In Bank.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Page, Nolan, Rohe & Freston, Page, Nolan, Rohe & Hurt, Ralph E. Lewis, and Arthur F. Coe, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn and Frank L. Guerena, Deputy Attys. Gen., for the People.

PRESTON, J. Upon the authority of People v. Ventura Refining Co., 268 P. 347, and People v. Richfield Oil Co. (L. A. No. 8982) 268 P. 353, both decided this day, judgment in this cause must be affirmed.

The contracts here are identical with the contracts considered in the case last above cited. The only reason for separate appeals in the two cases was that in one of them the question arose as to when the appellant should have claimed the exemption; but, in view of our conclusions announced in these cases, this question becomes immaterial.

Judgment affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.

LANGDON, J. I dissent. There is no uncertainty or ambiguity in the language of the statute under consideration, and, consequently, no occasion for judicial construction. Such statute provides that it "shall not be held or *construed* to apply to * * * any motor vehicle fuel delivered under contracts entered into prior to the fourteenth day of May, 1923. * * *" St. 1923, p. 571, § 10. The Legislature may have had in mind, as contended by the Attorney General, only contracts providing a fixed price for fuel, but it has not so restricted the term and to amend the statute by judicial construction seems to me an usurpation of legislative power which is unjustified even in the interests of public policy.

On Application for Rehearing.

PER CURIAM. On petition for rehearing herein it is urged that this court has erroneously "assumed that there were two types of contracts in existence, i. e., contracts having (a) a fixed sales price, and (b) a flexible sales price"; whereas, it is insisted, "it is apparent from the record either directly or by necessary inference that the so-called fixed price contracts do not exist." It is therefore contended that a conclusion cannot be drawn that the Legislature had in mind two types of contracts and by its action intended to provide only for a fixed price contract.

Assuming that the record is susceptible to the construction placed upon it by counsel, namely, that only flexible sales contracts were in existence at the effective date of the act, the correctness of the conclusion that the contractors thereunder would be in no different situation, so far as the license tax was concerned, than those having no contracts outstanding is further emphasized. The opportunity of those in each class to protect themselves against the burden of the license tax was the same. The operation of the law with the exemption in it would therefore confer upon those attempted to be exempted a special privilege or immunity not accorded to others similarly situated. The exemption, then, would effect an unlawful discrimination as between those in the same class and would be void under section 21 of article 1 of the Constitution. See Bacon Service Corporation v. Huss, 199 Cal. 21, 248 P. 235. The fact that the unlawful exemption was stricken from the statute by later enactment of the Legislature could not affect the petitioner's obligations under the act with the void exemption in it.

The petition for a rehearing is denied.

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204 Cal. 305

GOLDEN GATE FERRY CO. v. RAILROAD COMMISSION OF CALIFORNIA. (S. F. 12388.)

Supreme Court of California. May 31, 1928.

1. Ferries 🔑15—Railroad abandoning carrying vehicles on ferry for over 32 years held not obligated to render such service as regards necessity of securing certificate of convenience and necessity (Public Utilities Act, § 50 (d), as amended by St. 1923, p. 836).

Where railroad company had abandoned ferry on which it carried vehicles for period in excess of 32 years, though it operated boats for transportation of passengers carried on its trains, *held*, that there was no obligation on part of company to render service for vehicles, and no right in public to insist on receiving it as regards necessity of company to secure certificate of convenience and necessity, under Public Utilities Act (St. Ex. Sess. 1911, p. 18, as amended) § 50 (d), as amended St. 1923, p. 836, to operate vehicular ferry.

2. Statutes 🔑184—Court must construe ambiguous act with reference to purposes sought to be served.

Where it is apparent that act under consideration is not clear and definite, it becomes duty of court to construe same with reference to purposes sought to be served and public policy underlying the legislation.

3. Ferries 🔑15—Railroad operating passenger ferry on effective date of act could not operate vehicular ferry over different route without certificate of public convenience and necessity; "operating vessels in good faith" (Public Utilities Act, § 50 (d), as amended by St. 1923, p. 836).

Under Public Utilities Act (St. Ex. Sess. 1911, p. 18, as amended) § 50 (d), as amended by St. 1923, p. 836, providing no corporation shall operate vessels between points exclusively on inland waters of state without first having obtained from Railroad Commission certificate declaring public convenience and necessity, unless corporation is actually operating vessels in good faith at time act became effective, "operating vessels in good faith" means operating them in essential and inherent features of service sought to be continued after effective date of act, hence railroad company operating ferry for passengers transported over its railroad on effective date of act was not entitled to operate vehicular ferry over a different route and to render a different class of service without certificate of public convenience and necessity.

4. Ferries ⟹15—Ferry passenger carrier must secure certificate of convenience and necessity to operate vehicular ferry, though filing tariff therefor; "addition of commodity to passenger traffic" (Public Utilities Act, § 50 (d), as amended St. 1923, p. 836).

Where railroad company was engaged in operating ferry for transportation only of passengers transported over its railroad, and it had no tariff on file for transportation of freight of any kind, filing of tariff for operation of vehicular ferry having no connection with operation of railroad service *held* not addition of commodity to passenger tariff, precluding necessity of securing certificate of convenience and necessity to operate vehicular ferry, under Public Utilities Act (St. Ex. Sess. 1911, p. 18, as amended) § 50 (d), as amended by St. 1923, p. 836.

In Bank.

Application by the Golden Gate Ferry Company for certiorari to review an order of the Railroad Commission declaring that the Southern Pacific Company was not required to secure a certificate of public convenience and necessity for adding additional facilities to its existing ferry service. Order annulled.

Superseding former opinion in 259 P. 745.

Dudley D. Sales and Devlin & Brookman, all of San Francisco (Warren Olney, Jr., of San Francisco, of counsel), for petitioner.

Carl I. Wheat, of San Francisco, Arthur T. George, of Los Angeles, and Reginald L. Vaughan, of San Francisco, for respondent.

Brobeck, Phleger & Harrison, of San Francisco, amici curiæ.

Guy V. Shoup, Evan J. Foulds, and Henly C. Booth, all of San Francisco, for Southern Pac. Co.

LANGDON, J. This is an application for a writ of review. The petitioner, the Golden Gate Ferry Company, alleges that it was and now is engaged in the business of operating a public ferry for which tolls are charged for the transportation of passengers and self-propelled and other vehicles on, over, and across the waters of the San Francisco Bay; that it is the owner and in the possession of a franchise granted by the board of supervisors of the city and county of San Francisco authorizing the establishment, operation, and maintenance of a public ferry between points in the said city and county of San Francisco and the city of Alameda, county of Alameda; that on the 26th day of March, 1926, petitioner filed its application with the Railroad Commission of the state of California, pursuant to the provisions of section 50d of the Public Utilities Act (Stats. [Ex. Sess.] 1911, p. 18, and amendments thereto), requesting said commission to issue and grant to petitioner a certificate of public convenience and necessity to operate vessels between the city of San Francisco and the city of Alameda; that a hearing was had thereon by said commission, but no decision or order has as yet been made or rendered therein; that on or about September 3, 1926, the Southern Pacific Company, a railroad corporation, commenced the operation of a public vehicular ferry between a point within the city of San Francisco and a point within the city of Alameda; that in commencing said vehicular ferry service between said points, the Southern Pacific Company for the first time put into operation between said cities an entirely new, different, and distinct type of vessel, namely, that type of vessel which is designated as a vehicular ferry; that vessels of such construction and type had never theretofore been operated by said Southern Pacific Company between any points in San Francisco and Alameda; that on July 15, 1926, and prior to its operation of said vehicular ferry between San Francisco and Alameda, the Southern Pacific Company filed with the respondent commission an amendment to its tariff schedules, naming rates for vehicular ferry service between, among other points, San Francisco and the Alameda pier; that said amendment was the first filing by the Southern Pacific Company of any rate for vehicular ferry service between any point in San Francisco and any point in Alameda; that prior to said amendment the Southern Pacific Company had no rate on file with the respondent commission or any tariff applicable to the transportation of vehicles between any point in San Francisco and said Alameda pier, or any other point in Alameda; that said Southern Pacific Company has never received or petitioned for or in any manner sought from the respondent commission a certificate of public convenience and necessity to operate vessels in vehicular ferry service between San Francisco and the Alameda pier or any vehicular ferry service between the city of San Francisco and the city of Alameda; that there has never issued to the Southern Pacific Company nor to any of its lessees or subsidiaries any such certificate of public convenience and necessity as required by the provisions of section 50d of the Public Utilities Act, and said Southern Pacific Company is without lawful right, authority, or privilege to operate said or any vessels for automobiles or other vehicular ferry service between the city of San Francisco and the said city of Alameda; that the Southern Pacific Company had not for a period of 32 years prior to September 3, 1926, engaged in the transportation of vehicles between any point in the city of San Francisco and the city of Alameda; that the respondent commission, of its own motion, instituted a proceeding having for its purpose an investigation into the construction of facilities and the rendering of a vehicular ferry service by the Southern Pacific Company between said two points without first having obtained a certificate of public convenience and necessity; that the respondent commission permitted the petitioners herein to intervene in said proceeding as an interested party; that petitioner has been and now is an interested party in said proceeding and in the action, determination, and decision therein; that the respondent commission on the 17th day of December, 1926, made, rendered, and filed its opinion and order, concurred in by a majority of its members, declaring, in effect, that the Southern Pacific Company was and is not required to secure a certificate of public convenience and necessity under the provisions of section 50d of the Public Utilities Act, authorizing it to inaugurate a vehicular ferry service between the city of San Francisco and the Alameda pier; that thereafter and within 20 days from the making of said order and decision the petitioner herein filed with the respondent commission its petition for rehearing, which said petition was denied on January 6, 1927; that the majority opinion and order of the respondent commission, declaring that the Southern Pacific Company was and is not required to secure a certificate of public convenience and necessity under section 50d of the Public Utilities Act for the operation of a vehicular ferry service between the city of San Francisco and the city of Alameda, is illegal, void, and in excess of the jurisdiction of the respondent commission. Wherefore the petitioner prays that this court enter its decree and judgment annulling and setting aside the majority opinion and order of the respondent commission referred to above.

The sole question presented in this proceeding for a review of said order revolves about the interpretation to be given to section 50d of the Public Utilities Act, as amended in 1923 (Stats. 1923, pp. 834, 836). The section reads:

> "No corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, shall hereafter operate or cause to be operated, any vessel between points exclusively on the inland waters of this state, without first having obtained from the railroad commission a certificate declaring that present or future public convenience and necessity require or will require, such operation, but no such certificate shall be required of any corporation or person which is actually operating vessels in good faith, at the time this act becomes effective, between points exclusively on the inland waters of this state under tariffs and schedules of such corporations or persons, lawfully on file with the Railroad Commission."

It is contended by the Southern Pacific Company that its operation is and has been such as to bring it within the exemption contained in section 50d; that is to say, it is urged by said company that on August 16, 1923, the effective date of section 50d of the Public Utilities Act, it was operating vessels in good faith between points exclusively on the inland waters of this state and more particularly between the city and county of San Francisco and the Alameda pier, under tariffs and schedules lawfully on file with the respondent commission. In view of the existence of these facts, it is urged by the Southern Pacific Company that it may properly operate and maintain, by virtue of the exemption provision found in section 50d a public vehicular ferry service between said points without first acquiring from the respondent commission a certificate of public convenience and necessity.

Petitioner contends, on the other hand, that the operation of a vehicular ferry service by the Southern Pacific Company between San Francisco and the Alameda pier does not fall within the exemption provided for in said section 50d, for "that section exempted any existing operator from the necessity of obtaining a certificate of public convenience and necessity for any operations being conducted in good faith on that date, or for the exercise of any rights being exercised on that date, but did not exempt any operator from securing a certificate of public convenience and necessity for the commencement of any new operations not theretofore being conducted or for the exercise of any rights not theretofore being exercised."

[1] It is undisputed that for a period in excess of 32 years preceding September 3, 1926, Southern Pacific Company operated no vessels between any point in Alameda and any point in the city and county of San Francisco, except for the transportation of passengers carried on its trains. Prior to 1894 said company operated vessels which were used to transport vehicles between its Alameda pier and a point in San Francisco. In December, 1894, however, the plank road along the Alameda pier was torn up and since that time and until a new road was built in 1926 no service was offered to the public by Southern Pacific Company for the transportation of vehicles between any point in Alameda and any point in San Francisco. It is apparent, therefore, that whatever service the Southern Pacific Company or its predecessors may heretofore have offered to the public in the way of vehicular transportation between Ala-

meda and San Francisco was abandoned. It would seem to follow that, after such service was abandoned, the obligation to render it ceased and the right of the public to insist upon it was terminated. A similar situation was presented in the case of Atchison, Topeka & Santa Fé Railway Co. v. Railroad Commission, 173 Cal. 577, 160 P. 828. There railroad service between two points had been discontinued for about 20 years. A complaint was filed with the Railroad Commission to require the re-establishment of that service. The commission made an order requiring the railroad company to re-establish the service. Upon appeal, it was held that the commission acted beyond its jurisdiction, the following language being used:

> "Nor is the fact that a railroad line had once existed between Fallbrook and Temecula a factor of any moment in the present inquiry. No question is made of the authority of the Railroad Commission to compel a railroad company or other public utility to restore a service which it has been furnishing. Here, however, the line between Fallbrook and Temecula had been destroyed for about 20 years before the action of the commission was invoked, and, indeed, before the enactment of the law upon which the commission relies for its authority to act. It is expressly found that 'that portion of the line was left abandoned and service discontinued. It has remained abandoned ever since.' In view of this fact, it cannot be doubted that any obligation of the predecessor of the Santa Fé Company to maintain and operate the line from Fallbrook to Temecula had long since ceased (Public Service Com. v. Philadelphia, etc., Ry. Co., 122 Md. 438 [89 A. 726]), and that no such obligation ever rested upon the Santa Fé Company itself. The duty to maintain the line was dependent upon the right to maintain it, and this right was lost by abandonment (Home Real Estate Co. v. Los Angeles Pac. Co., 163 Cal. 710 [126 P. 972]), without regard to the question whether it had been forfeited under the provisions of section 468 of the Civil Code. The case must therefore stand precisely as it would if there had never been any connection between these two points."

Likewise, in the instant case, it would appear that vehicular service between the points in question having been abandoned by Southern Pacific Company and its predecessors, there was no obligation upon the part of the company to render it and no right in the public to insist upon receiving it.

[2, 3] Nor can it be said that a certificate of public convenience and necessity was unnecessary to inaugurate this service because the Southern Pacific Company was "actually operating vessels in good faith under tariffs and schedules lawfully on file with the Railroad Commission," within the meaning of the Public Utilities Act. The briefs on file herein present three possible interpretations of the language just quoted: One, a legislative purpose to exempt a corporation operating vessels in any type of service on the inland waters of this state from securing a certificate; two, a legislative purpose to exempt a corporation that is operating a similar service to the one sought to be inaugurated from securing such a certificate; and, three, a legislative purpose to exempt a corporation that is operating, at the time the act becomes effective, a service which is later to be continued, from securing such certificate.

We are of the opinion that the third alternative is the one which was intended by the Legislature, i. e., that a corporation is exempted from obtaining the certificate if it was, at the effective date of the act, actually operating a service in all respects substantially the same as the service to be rendered after the act became effective. Since it is apparent that the section of the act under consideration is not clear and definite in expressing any of the above-suggested alternatives, it becomes the duty of this court to construe the same with reference to the purposes sought to be served and the public policy underlying the legislation. An examination of the entire act under consideration evinces a determined purpose to give to the Railroad Commission power to regulate transportation on the inland waters of the state by granting or refusing certificates of public convenience and necessity, and a construction of the act, such as contended for by respondents, so as to exempt any person or corporation from applying for such a certificate if he or it has been operating any type of vessel in any type of service before the act became operative, would leave with the Railroad Commission but a semblance of power, and to construe the act so as to exempt a corporation from securing a certificate to carry freight if it had previously carried freight over a different route, but one comparable in some of its features to the new route sought, would be to give an elasticity to the language and the action to be taken under it which would result in confusion and litigation and impotency on the part of the commission. The safe, definite rule, and the one supported by the reason and purpose of the Public Utilities Act, would seem to us to be to construe the language "operating vessels in good faith" to mean operating them in good faith in the essential and inherent features of the service sought to be continued after the effective date of the act. It seems apparent from the admitted facts that the Southern Pacific Company was not operating such a service at the date mentioned. A different type of vessel is to be used by the Southern Pacific Company from that used at the date of the act; a different route is to be taken, and a different class of service rendered.

The Legislature, in 1917, enacted a statute regulating transportation by automobile stage (Stats. 1917, p. 330, as amended in 1919 [Stats. 1919, p. 457]), and therein relieved from the necessity of obtaining a certificate of public convenience and necessity companies actually operating in good faith at that time. The exemption portion of the statute was construed by this court in the case of Motor Transit Co. v. Railroad Commission, 189 Cal. 573, 209 P. 586, the court saying:

> "The purpose in so exempting such companies was to refrain from interfering with the operations as then carried on—in other words, to confirm in these operators the rights they were at that time exercising. But such exemption was, obviously, only to the extent of the operations then conducted. To hold that by the operation of a through line on that date petitioners were given a franchise to operate to any extent that they, in their judgment, might see fit, limited solely by the restriction that the operations must be between the same termini and over the same route, would be to materially decrease the power of the commission over these lines and thus overlook the primary purpose of the enactment which was to give to the commission, in the interest of the public, the fullest power possible to regulate the operation of auto stage companies."

[4] We see no essential legal distinction between the portion of the statute considered in the last-cited case and the portion of the statute under consideration here. Nor can we agree with respondents that the filing of a tariff amendment to the creek route vehicular tariff is the addition of a commodity to the Alameda passenger tariff. The tariff which was amended covered no service whatever between any point in the city of San Francisco and any point in the city of Alameda. At the time of the tariff amendment the Southern Pacific Company was engaged in the operation of vessels between Alameda pier and the Ferry building in San Francisco for the transportation only of passengers transported over its railroad. It had no tariff on file for the transportation of any freight of any kind whatever. The operation of a vehicular ferry has no connection with the operation of a railroad service. It is in no way an adjunct of the railroad operation. A vehicular service could just as well be rendered by a corporation which had no rights whatever to operate a railroad. The Southern Pacific Company, in another action, successfully maintained this contention before this court. Southern Pac. Co. v. Richardson, 181 Cal. 280, 184 P. 3.

The order of the respondent Railroad Commission filed herein is annulled.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; SHENK, J.

PRESTON, J. I concur in the judgment, but prefer to base my conclusion upon the following grounds: This proceeding requires the court to declare the legislative mind when enacting on the 15th day of June, 1923 (Stats. 1923, p. 834), subdivision (d) of section 50 of the Public Utilities Act (Deering's Gen. Laws, pt. 2, p. 2683, tit. 464), which reads in part:

> "No corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, shall hereafter operate or cause to be operated, any vessel between points exclusively on the inland waters of this state, without first having obtained from the Railroad Commission a certificate declaring that present or future public convenience and necessity require or will require, such operation. * * *"

—together with the following exception, or proviso:

> "* * * But no such certificate shall be required of any corporation or person which is actually operating vessels in good faith, at the time this act becomes effective, between points exclusively on the inland waters of this state under tariffs and schedules of such corporations or persons lawfully on file with the Railroad Commission."

The effective date of this amendment was August 16, 1923. Our particular task lies in declaring the scope and meaning of said proviso as applied to the following undisputed facts: The Southern Pacific Company, a Kentucky corporation, on the effective date of said amendment, was operating across San Francisco Bay, inland waters of the state of California, a motor vehicular ferry service between San Francisco and a point at the foot of Broadway in Oakland, Cal., situated upon the north bank of a stream commonly called San Antonio estuary, being navigable waters leading into San Francisco Bay. This ferry was known as the Oakland creek route ferry. It was also operating at the same time a line of vessels between a point on the San Francisco shore of said bay and a point on the opposite shore known as Alameda mole, said mole forming in fact the southern bank of said San Antonio estuary, the center line of which said estuary marks the dividing line between the municipalities of Oakland and Alameda. This Alameda line of vessels, however, was not used as a general ferry, but was used exclusively as an extension of the suburban railway system of said corporation. Said Southern Pacific Company on said date had a set of one-way and commutation passenger tariffs on file with the Railroad Commission of the state, but it had no commodity tariffs on file for service between said points. It carried no passengers who were not to use or who had not used its railway lines. Its service at that point connected with no highways, nor was there any highway at all leading from the Alameda mole to the mainland. It possessed no local ferry franchises either from the city and county of San Francisco or from the county of Alameda nor from any municipality for such operation. The public who had vehicles or animals or baggage to transport across said bay neither had the right to demand ferriage nor to have access to said vessels. As above stated, said company carried passengers for its interurban service only. It bases no claim to operate upon any franchise conferred by statute, but bases its claim to operate solely upon its charter rights as a railway corporation and such rights as it may have from usage or prescription.

On July 15, 1926, said Southern Pacific Company proceeded to file an amendment to its commodity tariffs theretofore applicable only to the said Oakland creek ferry so as to include vehicular service to Alameda mole and thereafter and on or about August 15, 1926, prepared to operate a motor vehicular ferry line from San Francisco across said bay to Alameda mole. Such action on its part was stayed by injunction proceedings until on or about September 3, 1926, when it began to operate said ferry service and presumably now continues to operate it. Immediately thereafter the Railroad Commission of the state of California on its own initiative began an investigation pursuant to said section 50 of the Public Utilities Act, supra. Petitioner, the Golden Gate Ferry Company, a corporation, was allowed to intervene in said action. The basis of the investigation was the failure of the Southern Pacific Company to seek or to obtain from the Railroad Commission of the state of California a certificate declaring that present or future public convenience required such vehicular service to be inaugurated and this failure furnishes the immediate grounds for the controversy before us.

The Railroad Commission, however, after investigation, decided that the action of the Southern Pacific Company in establishing this service between San Francisco and Alameda mole was legal and regular and within the said exemption and gave and made its order dispensing with the requirement that such company should obtain said certificate by dismissing the proceeding. The intervener, having secured a franchise from the city and county of San Francisco for a similar service, instituted this proceeding by a petition for certiorari and thereby attacks the validity of said order of the Railroad Commission and seeks to have the said order annulled as being in excess of the jurisdiction of the commission, and to that end to have this court declare that under the undisputed facts shown by the record the Southern Pacific Company is required by law to obtain such certificate before it can validly exercise the right to conduct such vehicular ferry service.

The task is not free from difficulty. The proviso in question is far from being clear and definite because of the general terms employed. At the outset it must be observed that no good reason appears for concluding that the Legislature intended to unduly expand the scope of said exemption. The evident purpose was to place within the jurisdiction of the Railroad Commission complete supervision over this type of public utility without disturbing privileges in the nature of vested rights theretofore held by others.

This court in Motor Transit Co. v. Railroad Commission, 189 Cal. 573, 580 and 585, 209 P. 586, 589, had before it the construction of legislation enacted in 1917 (Stats. 1917, p. 330), as amended in 1919 (Stats. 1919, p. 457), regulating transportation by automobile or auto stage and, in speaking of the purpose of it, said:

> "It is in the interest of the public that the service rendered by public utilities be adequate and of good quality and the rates as low as possible commensurate with good service and a reasonable return to the owner. The certificate of public convenience and necessity is the means whereby protection is given to the utility rendering adequate service at a reasonable rate against ruinous competition. The person or corporation obtaining a certificate must operate at the times and in the manner prescribed by such certificate, thus furnishing uniform and efficient service to the public. If any one else would be at liberty to operate without such a certificate he might operate at his own pleasure and only under favorable conditions, thus making it impossible for the holder of a certificate to successfully carry on his business. It is the public interest in efficient service which is being safeguarded by the requirement of a certificate. Oro Electric Corp. v. Railroad Commission, 169 Cal. 466, 475, 147 P. 118; Public Utilities v. Garviloch, 54 Utah, 406, 181 P. 272, P. U. R. 1919E, p. 182. Such requirement is part of the regulation of transportation companies in the interest of the public. * * *
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> "The primary purpose of the Legislature in enacting this statute was not to confer a franchise upon the operating companies but to give into the power of the commission for regulation and control in the interest of the public the operation of auto stages for transportation. It did this by requiring every auto transportation company to secure from the commission a certificate of public convenience and necessity. It relieved from the necessity of obtaining such certificate the companies actually operating in good faith at that time. The purpose in so exempting such companies was to refrain from interfering with the operations as then carried on—in other words, to confirm in these operators the rights they were at that time exercising. But such exemption was, obviously, only to the extent of the operations then conducted. To hold that by the operation of a through line on that date petitioners were given a franchise to operate to any extent that they, in their judgment, might see fit, limited solely by the restriction that the operations must be between the same termini and over the same route, would be to materially decrease the power of the commission over these lines and thus overlook the primary purpose of the enactment which was to give to the commission, in the interest of the public, the fullest power possible to regulate the operation of auto stage companies."

Passing now to a consideration of the language of the exemption before us, it is to be noted that the legislation concerning automobile transportation exemption above noted was provided by language as follows, to wit:

> "* * * But no such certificate shall be required of any transportation company as to the fixed termini between which or the route over which it is actually operating in good faith at the time this act becomes effective." Stats. 1919, p. 457.

In the year 1927 (Stats. 1927, p. 240) the entire section (section 50) here under consideration was amended, subdivision (d) thereof being changed to read in part as follows:

> "No corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, shall hereafter begin to operate or cause to be operated any vessel for the transportation of persons or property, for compensation, between points exclusively on the inland waters of this state, without first having obtained from the Railroad Commission a certificate declaring that public convenience and necessity require such operation, *but no such certificate shall be required as to termini between which any such corporation or person is actually operating vessels in good faith at the time this act becomes effective, under tariffs and schedules of such corporations or persons, lawfully on file with the Railroad Commission.* * * *" (Italics ours.)

A careful consideration of these three enactments of the Legislature convinces us that in principle they are the same. Indeed, we are unable to discover any difference whatever in meaning between the provision of section 50 as enacted in 1923 and the paragraph as re-enacted in 1927. To our mind both said provisions should receive a construction analogous to that received by the automobile transportation section construed in Motor Transit Co. v. Railroad Commission, supra, for it is evident from the context of the proviso that the exemption granted is not personal.

It is equally clear that the word "vessel" confers no special right on any particular craft as such, but that said word is to receive the same construction found in the introductory provision of the Public Utilities Act which is as follows (Deering's Gen. Laws, pt. 2, p. 2688, subd. (y) of section 2, Act 6386):

> "The term 'vessel,' when used in this act, includes every species of water craft, by whatsoever power operated, which is owned, controlled, operated or managed for public use in the transportation of persons or property. * * *"

The manifest meaning, then, of said proviso, as compelled by the context of the enactment, is that the Legislature intended to exempt from the requirement of said certificate the service or operation evidenced by water craft engaged in the independent public use of transporting persons or property; in other words, commerce upon the inland waters as an independent enterprise. The words "between points exclusively on the inland waters of this state" mean definite fixed points at which vessels in service actually call.

Petitioner contends, as we understand it, that the word "vessel" used in said proviso is equivalent to the use of the word "ferry." We think the word has a broader significance, and although it includes a ferry, it also includes water craft service not properly covered by the word "ferry." For taxation purposes a ferryboat has been defined as follows:

> "A ferryboat is a vessel traversing across any of the waters of the state, between two constant points, regularly employed for the transfer of passengers and freight, authorized by law so to do. * * *" Pol. Code, § 3643.

It has been held in other jurisdictions, however, that intermediate points may be visited by the vessel and it will still retain its characteristics as a ferryboat. Mayor of N. Y. v. N. J., etc., Co., 106 N. Y. 28, 31, 12 N. E. 435.

In Vallejo Ferry Co. v. Solano Aquatic Club, 165 Cal. 255, 271, 131 P. 864, Ann. Cas. 1914C, 1917, a ferry has been defined and, citing said definition, the characteristics are again set forth as follows in Menzel Estate Co. v. City of Redding, 178 Cal. 475, 479, 174 P. 48, 49:

> "Undoubtedly a ferry franchise has been so called, as for example, in the opinion of this court, prepared by Mr. Justice Henshaw, in Vallejo Ferry Co. v. Solano Aquatic Club, 165 Cal. 255, where, at page 271 (Ann. Cas. 1914C, 1197, 131 P. 864 [871]), the following language is used: 'A ferry franchise emanating from the supreme power of the state or its authorized mandatories, is a grant to a named person empowering him to continue an interrupted land highway over the interrupting waters.' In 19 Cyc. 493, cited by appellants, a ferry is called 'a public highway,' but with an important limitation. The definition there given (beginning on page 492), so far as of value to this discussion, is as follows: 'A ferry is a liberty to have a boat upon a river for the transportation of men, horses, and carriages with their contents, for a reasonable toll. The term is also used to designate the place where such liberty is exercised. In the latter sense a ferry is a public highway, being a continuation of the highway with which it connects.'" See 25 C. J. 1048.

An early definition of ferriage was given in People v. S. F. & A. R. R. Co., 35 Cal. 606, 619, as follows:

> "A ferry, in its ordinary sense, is but a substitute for a bridge where a bridge is impracticable, and its end and use is the same. Like a tollbridge, it is a franchise created for the use and convenience of the traveling public, as a link in the highway system of the country, and by no means includes the transportation of goods, wares, and merchandise by themselves, or, in other words, the carrying trade of modern commerce."

From these definitions of the words "ferry," "ferryboat," and "ferriage," it is evident that the word "vessel" covers a much broader field and should be held to include commerce on the inland waters of the state.

We are also convinced that the intention of this proviso was to exempt commerce upon the inland waters of the state which was being carried on between fixed points and which commerce was such as could be made the subject of franchises granted by a county or municipality within the state. In granting franchises, for example (Pol. Code, § 2892), the applicant is required to show "the landings of the proposed ferry," and "if the applicant is not the owner of the land, that notice of the application has been served on the owner thereof at least ten days prior to the application." Indeed, other provisions of said section 50 indicate this fact by the use of the following words of subdivision (e):

> "The Legislature hereby declares that the provisions of this section are being enacted under the state's reserved power over public utilities or corporations, or both, as the case may be, for the purpose of acting on the right of the grantee of a public utility franchise granted by a county, city and county or incorporated city or town, to exercise rights thereunder, and not for the purpose of acting on the right of any city and county or incorporated city or town to grant any such franchise. The Legislature hereby declares that the provisions of this section shall be and remain in full force and effect concurrently with the right of any city and county or incorporated city or town to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law."

That fixed points are contemplated is also evidenced by use of these words in subdivision (d):

> "Every applicant for such a certificate shall file in the office of the commission, application and evidence in such form as shall be required by the commission, and the commission shall have power, after hearing, to issue said certificate as prayed for, or to refuse to issue the same, * * * or to issue it for operation between certain points only."

Of course, this does not mean that minor changes may not take place in the location of the termini.

These deductions make it evident that the Southern Pacific Company may not by filing an amendment to its Oakland creek route tariffs be authorized to conduct a vehicular ferry to Alameda mole. Especially is this true as the company does not propose to discontinue the Oakland creek service. The manifest intention of the Legislature was to keep the control in the Railroad Commission over this class of public service and to allow such a use as is here proposed without a certificate of public convenience and necessity would be to materially impair the very object of the legislation.

The above observation also answers the contention that prior to the year 1894 the Southern Pacific Company did in fact operate a vehicular ferry between San Francisco and Alameda mole and for that reason it should now be allowed to resume such operation without a certificate. In that year the company abandoned the road leading to said mole and from that date until this controversy arose no means existed whereby vehicles could reach or leave said mole.

> "The idea of a ferry presupposes a road traveled by the public which is bisected by the water course, the ferry serving in a different way the same purpose that is served by a bridge. As the bridge is made for the road, not the road for the bridge, so is the ferry made for the road, not the road for the ferry; the ferry is the incident, the road is the principal." State ex rel. v. Wiethaupt, 231 Mo. 449, 465, 133 S. W. 329, 333.

Thirty-two years of disuse under these facts must be held to be an abandonment of any such prior right. Atchison, T. & Santa Fé v. Railroad Commission, 173 Cal. 577, 160 P. 828.

For the same reason the claim of the Southern Pacific Company is untenable that, by consolidation during the period between 1885 and 1887 of three groups of railroad companies operating in the east bay region it gained the right to segregate and co-ordinate its passenger, vehicular, freight, and other service by transferring the one from one ferry point to another ad libitum. To hold that the taking from the Alameda mole in 1894 of the vehicular service then existing and handling it through the creek route ferry was merely an act of efficiency and that such service may at any time be restored when in the judgment of the company it would be expedient to do so would be in a great measure to consent to a monopoly of San Francisco Bay. Bearing in mind that the Southern Pacific Company claims only to be acting under railroad franchises and such other rights as may belong to it by reason of usage or prescription, it is evident that it may not change a local ferry service at will, for such service is a proper subject for regulation and control and such a concession to the Southern Pacific Company would be in a large measure to abdicate in its favor the franchise granting power as well as the right of the Railroad Commission to exercise control over utilities of this type.

This leaves to be answered but one other query: May the Southern Pacific Company ingraft upon the Alameda local passenger train service this vehicular ferry operation? The question is far deeper than the mere right to add a commodity to an existing tariff. For the purposes of this case, this right as a general rule may be conceded. In fairness to the Southern Pacific Company it has but faintly asserted this claim, but respondent Railroad Commission places great stress upon it. The Southern Pacific Company did not attempt to amend the Alameda mole passenger tariffs. It attempted to amend the creek route vehicular tariff and attempted to split the vehicular service between the creek route and the Alameda mole route. It even contends that it owes no duty to submit to the jurisdiction of the Railroad Commission as to the pre-existing Alameda boat service, claiming to do so would be the impairment of a contract evidenced by its railroad charter rights and cites in support of this contention the recent case of Postal Tel., etc., Co. v.

Railroad Commission, 200 Cal. 463, 254 P. 258.

The company also has in mind, no doubt, the holding of this court in the case of Lake Tahoe, etc., Co. v. Roberts, 168 Cal. 551, 143 P. 786, Ann. Cas. 1916E, 1196, that a steamboat in partial use of a railroad company for railroad purposes is not "any part thereof" for taxation purposes. In other words, if vehicular service should be confined in the same vessel with the Alameda passenger service, the boat might lose its status as a part of the operative property of the railroad company. This furnishes a reason for the act of the company in putting in a new line of boats to Alameda mole and not mixing its railroad and vehicular services.

If it be borne in mind that the Southern Pacific Company is seeking to ingraft upon its railroad service, controlled by a foreign charter and over which the Railroad Commission has but limited control, a service that can be lawfully exercised only under local franchise grants, the intention of the Legislature is easily discerned. The general terms employed in the statute must give way for the operation of the legislative intent. People v. Ventura Refining Co. (Cal. Sup.) 268 P. 347. A local ferry operation is in no proper sense a railway operation as it may and usually does exist independent of it. The carriage by water to bridge the gap between the interrupted termini is but an incident to the railway transportation, a projection of its road over intervening waters. Such ferriage is merged into the railway transportation and is in no proper sense an entity or process resting upon its own independent foundation as is the case in commerce upon the inland waters, whether by ferry or other craft. This was the holding of this court in the case of S. P. v. Richardson, 181 Cal. 280, 184 P. 3, respecting the creek route ferry itself.

Indeed, in Wheeler v. S. F. & A. R. Co., 31 Cal. 46, 64, 89 Am. Dec. 147, speaking of this identical subject, Justice Sawyer said:

> "It is one thing to build and own a line of steamers to some foreign country, or some distant port, carrying on a wholly distinct and independent business entirely foreign to the objects of a railroad corporation, which might just as well, and a great deal better, be transacted by some other company organized for the purpose, and quite another to own and control a steamboat for crossing rivers and bays which lay in the line of the road, and the use of which is convenient, proper, and necessary to a successful accomplishment of the objects for which the road is built and operated."

This statement would be equally true if it had inserted therein the words "port" or "or between local ports or points." See, also, People v. S. F. & A. R. Co., supra. This distinction between these two classes of service has been recognized many times in other jurisdictions. The Maverick, 16 Fed. Cas. No. 9,316, 1186, 1 Sp. 23; Fitch v. New Haven, etc., R. R. Co., 30 Conn. 38; St. Clair Co. v. Interstate Transfer Co., 192 U. S. 454, 467, 24 S. Ct. 300, 48 L. Ed. 518.

It should be noted in passing that the Legislature in 1917 (Stats. 1917, p. 429) struck from section 3643 of the Political Code the following words: "* * * And also any boat employed as a part of the system of a railroad for the transfer of passengers and freight, plying at regular and stated periods between two points" (Stats. 1885, p. 93)—thus showing that for purposes of taxation at least the statute has made the very distinction suggested in the cause before us.

We are thus irresistibly led to the conclusion that the boat service existing between San Francisco and Alameda in the year 1923 was not a service by "vessels" operating between points exclusively on the inland waters of this state within the meaning of said proviso.

This conclusion, of course, does not impair the authority of the Railroad Commission over railways and boats that are a part of them derived from other sources. The said amendment of 1923 is simply inapplicable to railway service and thereby inapplicable to boats or vessels used exclusively therein. We are thus resting our conclusion upon uncontestable grounds and are not required to declare a distinction between passenger and commodity transportation when admittedly carried by vessels subject to the act.

The order of the Railroad Commission dismissing the proceeding instituted to determine the status of said operation is in excess of the jurisdiction of said commission and should be annulled.

204 Cal. 258

BLOOMQUIST et ux. v. HALEY et ux.

(L. A. 9585.)

Supreme Court of California. May 28, 1928.

1. Appeal and error 🔑1176(2)—District Court of Appeals, after reversing order vacating order for new trial, had no authority to direct entry of judgment (Const. art. 6, § 4¾; Code Civ. Proc. § 956a).

District Court of Appeals, on reversing order vacating order for new trial and directing entry of judgment, was without authority under Const. art. 6, § 4¾ (Code Civ. Proc. § 956a), to direct judgment in favor of either party, since on granting of motion for new trial the action stood in exact condition in which it was before any trial thereof, except an appeal from such order might have been taken, and any action thereafter without formality of trial constituted proceeding without due or any process of law.

2. Chattel mortgages 🔑162—Mortgagees held to have right to possession of mortgaged chattels on default in payments, under express term of mortgage.

Chattel mortgagees *held* to have right to take possession of mortgaged chattels on failure of mortgagors to make stipulated payments, by the express terms of the mortgage.

3. Pleading 🔑129(1)—Answer admitted allegation of complaint by failing to deny it.

Answer admitted truth of allegation of complaint that lease was assigned to both of certain persons by failing to deny truth of allegation.

4. Pleading 🔑129(1)—Assertion in complaint, undenied in answer, and hence admitted, held sufficient to warrant finding of fact asserted.

Where complaint alleged that lease was assigned to both of certain persons and answer failed to deny it, and hence admitted allegation, there was sufficient basis for finding that lease was so assigned.

5. New trial 🔑165—Order attempting to vacate order granting new trial in general terms held void.

Where order granting new trial was general in terms, it exhausted court's jurisdiction, and subsequent order attempting to vacate order granting new trial was void.

In Bank.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action in claim and delivery brought by A. Bloomquist and wife against I. M. Haley and wife. From a judgment in favor of plaintiffs, defendants appeal. Reversed and remanded for a new trial.

For opinion of the District Court of Appeals, see 260 P. 572.

Morris Abraham and Charles I. Rosin, both of Los Angeles, for appellants.

D. K. Gault and Schweitzer & Hutton, all of Los Angeles, for respondents.

CURTIS, J. [1] A hearing was granted by this court after decision by the District Court of Appeal in and for the Second Appellate District, Second Division, reversing the judgment in favor of respondents, and directing the entry of the following order:

> "It is directed that the order of the trial court granting a new trial be vacated, that said court enter a new judgment for the plaintiffs that they have possession of all of the furniture, fixtures, and furnishings described in the complaint, and in the event that said property cannot be restored to plaintiffs upon the return of the writ of the sheriff so stating, then that plaintiffs have judgment against the defendants in the sum of $8,999.80, with interest from September 20, 1926, at the rate of 7 per cent. per annum, the amount due and unpaid upon the note and chattel mortgage covering said property, and interest, and for their costs."

We are in accord with the action of the District Court of Appeal in reversing said judgment, but are of the opinion that said appellate court was without the power or authority to make the order directing a judgment in favor of respondents as set forth above. The following portion of the opinion of said District Court of Appeal, written by Mr. Justice Craig, correctly expresses our views upon the questions therein considered, and we adopt the same as the opinion of this court:

[2] This appeal is from a judgment against the appellants giving the respondents possession of certain personal property, which is the subject of the suit, and damages for the value of said property. The action is one in claim and delivery in the usual form. It is a companion case to Haley v. Bloomquist (No. 5519) 260 P. 569, and Bloomquist et al. v. Haley (No. 5518) 260 P. 571. The opinion in the first of the two companion cases just named relates the principal facts referred to in the instant appeal.

It appears that by the terms of the chattel mortgage mentioned in that opinion, on the 1st day of May, 1926, there became due the sum of $500. The defendants and appellants as assignees of the personal property were obligated to make this payment, but refused to do so. The chattel mortgage expressly provides that, if the mortgagor shall fail to make any payment agreed to be made, the mortgagees have the right to take possession of the mortgaged property. Therefore appellants' default gave the respondents the right to claim possession.

Since the auction sale was void as against public policy (Haley v. Bloomquist, supra) we need not consider appellants' contentions in reliance upon that transaction.

[3, 4] As in Bloomquist v. Haley, supra, the failure of the answer to deny the allegations of the complaint that the lease was assigned to T. E. Haley, as well as I. M. Haley, was

an admission of the truth of that statement. With the pleadings in this condition, the finding that Zeller assigned to both appellants was warranted.

[5] At the close of the trial judgment was rendered for plaintiffs and respondents for $25,000, in the event that the property covered by the chattel mortgage should not be restorable to them. There was no justification or basis for a judgment naming this sum. Later, on September 17, 1926, the court granted appellants' motion herein for a new trial; then on September 20, 1926, the respondents having consented to a judgment for $8,999.80, the order granting a new trial was vacated and set aside and the judgment modified in accordance with the stipulation. Respondents insist that the order made on September 17th was based upon an understanding that it should not take effect in the event that respondents consented to a modification of the amount of the judgment. The order is general in its terms and the record contains nothing in support of this assertion. Without doubt, the trial court exhausted its jurisdiction by granting the new trial, and the order made in attempting to vacate that order was void. Holtum v. Greif, 144 Cal. 521, 524, 78 P. 11, and cases there cited; Dorland v. Cunningham, 66 Cal. 484, 6 P. 135. No attempt was made to set the order aside upon a proper showing that it had been entered prematurely, or by inadvertence, as was done in Odd Fellows' Savings Bank v. Deuprey, 66 Cal. 168, 4 P. 1173, or to correct it, as in Garoutte v. Haley, 104 Cal. 497, 38 P. 194.

The trial court having exhausted its jurisdiction by granting a new trial, its subsequent order in vacating its order granting a new trial and in modifying the judgment previously rendered was without authority and was for that reason void. Nor has an appellate court under section 4¾ of article 6 of the Constitution, nor under section 956a of the Code of Civil Procedure, any power or authority either to enter a judgment, or to direct the trial court to enter a judgment, in favor of either party to said action under the circumstances shown above. Upon the granting of the motion for a new trial the action stood in the exact condition in which it was before any trial thereof had been had, except that an appeal from said order might have been taken by the plaintiffs. For either the trial court or the appellate court thereafter and without the formality of a trial to enter a judgment therein would be to proceed without due or any process of law. There is nothing in the section of the Constitution or the section of the Code of Civil Procedure above referred to which purports to give to an appellate court any such power or authority. While the purpose of section 956a of the Code of Civil Procedure is to enable the appellate courts to act so that "wherever possible causes may be finally disposed of by a single appeal and without further proceedings in the trial court," we are unable to construe this language as a grant of power to appellate courts either to enter or to direct the entry by a trial court of a judgment before the trial of the issues therein has been had or to deprive a party to an action of his right to a trial thereof before a judgment is entered against him. As the record stands in this case, all orders of the trial court made after the granting of the new trial are void, and the same, together with the judgment herein as modified, are hereby reversed, and the action is remanded for a new trial.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; RICHARDS, J.; SHENK, J.

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204 Cal. 253

HALEY et ux. v. BLOOMQUIST et ux.

(L. A. 9584.)

Supreme Court of California. May 28, 1928.

1. Auctions and auctioneers 🔑7—Party to faked auction sale on sham bid will be given no relief.

Public policy forbids making of faked auction sale on sham bid, and the courts will give no relief to a party to such a sale.

2. Auctions and auctioneers 🔑7—Finding that chattel mortgagors were parties to agreement that auction sale to mortgagee should be faked held sustained by evidence.

In action for amount of bid made by mortgagee of chattels at auction sale thereof, evidence *held* to sustain finding that mortgagors were parties to agreement suggested by auctioneer that mortgagee make a sham bid and become party to a faked sale.

3. Auctions and auctioneers 🔑7—Finding that bid of chattel mortgagee at auction sale was sham held sustained by evidence.

In action for amount of bid made by chattel mortgagee at auction sale of mortgaged chattels, evidence *held* to sustain finding that bid was sham and made solely for the purpose of protecting the interest of the mortgagors and to prevent sale at inadequate price.

4. Auctions and auctioneers 🔑7—Finding that pretended purchase by chattel mortgagee at auction of chattels was without consideration held sustained by evidence.

In action for amount of bid made by chattel mortgagee at auction sale of chattels, evidence *held* to sustain finding that sales agreement was signed by mortgagee without consideration.

5. Auctions and auctioneers 🔑7—Buyer at sham auction sale held not estopped to assert fraud.

In action to recover amount of sham bid at faked auction sale bidder might not be held to pretended sale on the ground that he was estopped to assert the fraud, on the ground that the written sales agreement could not be varied by parol, or on the ground that pretended sellers had not relied on fraudulent character of sale, but only buyer, and that he could not profit by his turpitude, since courts will not enforce a contract contrary to public policy.

In Bank.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action for money by I. M. Haley and wife against A. Bloomquist and wife. From judgments in favor of defendants, plaintiffs appeal. Affirmed.

For opinion of District Court of Appeal, see 260 P. 569.

See, also, 260 P. 571, 260 P. 572.

Morris Abraham and Charles I. Rosin, both of Los Angeles, for appellants.

D. K. Gault and Schweitzer & Hutton, all of Los Angeles, for respondents.

PER CURIAM. As stated by us in the memorandum of opinion in action L. A. No. 10253, Bloomquist v. Haley, 268 P. 367, this day filed, we are in full accord with the opinion of the District Court of Appeal in and for the Second Appellate District, Second Division, written by Mr. Justice Craig, in this action, and we adopt the same as the opinion of this court, which said opinion reads as follows:

Pursuant to stipulation three appeals in suits between the same parties and involving interrelated matters have been herein briefed together. The one which will be the subject of this decision is designated in the complaint as an action for money, in which I. M. Haley and T. E. Haley, husband and wife, are plaintiffs, and A. Bloomquist and his wife, Hattie Bloomquist, are defendants.

The following statement of facts is intended to suffice in that regard for the decision of all three appeals: On January 31, 1923, A. Bloomquist and Hattie Bloomquist owned a certain hotel in the city of Los Angeles, known as the St. George. On that day they leased it to Jack Zeller for the period of 10 years, at a rental of $1,150 per month. As a part of the transaction Zeller executed his promissory note for a total rental amounting to $138,000, and as security therefor gave a chattel mortgage on the furniture and lease; he also purchased from the Bloomquists the furniture and furnishings of the hotel and gave his promissory note for $24,500, payable in installments of $500 per month. This note was also secured by a chattel mortgage on the furniture and furnishings. Later, Zeller assigned both his interest in the furniture and in the lease to I. M. Haley, the appellant in these cases, who assumed the obligations of his assignor to make the payments above mentioned. Haley paid installments on the furniture only until January, and the rent until May, 1926. On February 11, 1926, appellant held a public auction to sell the furniture and furnishings and lease of the hotel.

At this point the parties disagree as to what took place. Appellants' contention is that Bloomquist bid $19,000 at the sale and became the purchaser. Respondent A. Bloomquist insists that he permitted the auctioneer to announce him as bidder and purchaser merely to prevent the property being sold too cheaply, and that it was understood between the parties that he was not required to take the property, and was not in fact to be regarded as buying it, and claims that he had no intention of doing so. There is evidence that respondent A. Bloomquist first authorized a bid of $17,000; some one else bid $18,000; the auctioneer then importuned Bloomquist to bid $19,000, which he refused to do; after that the auctioneer announced that Bloomquist had offered $19,000, at the same time stating privately that he need not take the property. However, Bloomquist signed the customary certificate of sale. Thereafter, on a number of occasions, Haley demanded of Bloomquist and of Hattie Bloomquist the payment of the $19,000, after deducting therefrom the amounts then due on the furniture. The Bloomquists at all these times refused to comply with the demands. After May, 1926, Haley refused to pay further rent, but continued to occupy the premises. As before stated, the Bloomquists did not pay as demanded, nor did they take possession of the hotel. Haley then instituted suit for $19,000, with interest thereon from February 11, 1925, less $8,500, the amount still due on the $24,500 note. This is the purpose of action Civil No. 5519. A judgment of nonsuit was entered as to Hattie Bloomquist, and at the end of the trial judgment was rendered for the defendant A. Bloomquist.

[1, 2] If the respondents' version of the conversation at the auction is taken to be true, there can be no doubt that fraud was perpetrated in the purported sale to Bloomquist. According to the testimony of several witnesses, the auctioneer, Byrens, induced Bloomquist to make a sham bid and to become a party to a fake sale. Such a transaction is against public policy, and courts will refuse to give relief to any party thereto. Dealey v. East San Mateo Land Co., 21 Cal. App. 39, 130 P. 1066. But respondents insist that they were not parties to whatever may have been said and agreed between Byrens and Bloomquist. Upon this question there is a direct conflict of the evidence. Certain witnesses stated that neither T. E. Haley nor I. M. Haley was present when the matter of Bloomquist's bidding was discussed, but Bloomquist testified that at the time "two feet away was standing Mr. Haley." In answer to a question by the court, Mrs. Bloomquist testified that Haley was present when the conversation in question took place. Another witness, Mrs. Margaret Hutton, also corroborated the

Bloomquists both as to the arrangement between Byrens and Bloomquist and the fact that T. E. Haley was present. Appellants point out that no witness testified that Haley took part in the conversation, and that certain of these witnesses gave other evidence contradictory to that to which reference has been made. These are considerations which might affect the credibility of witnesses and the weight to be given their testimony, but which, of course, the trial court alone had a right to take into account.

[3, 4] It is next contended that there is no evidence to support the finding that Bloomquist had no intention of buying the property; no evidence to support the finding that Bloomquist bid solely for the purpose of protecting the interest of Haley and preventing a sale at an adequate price; and no evidence to uphold the finding that the agreement was signed by Bloomquist without consideration. Bloomquist himself testified that he had no intention of purchasing the property. The testimony of witnesses that Byrens, in the presence of Haley, urged Bloomquist to bid because Haley "is your tenant; you ought to help him out," to which Bloomquist replied, "All right," and that later Byrens stated that Bloomquist did not "have to take it; just bid it"; following which Byrens announced that Bloomquist had bid $19,000, and the latter finally signed the certificate of sale. This evidence, and more of a similar character, is amply sufficient to justify the second finding to which reference is above made. The same evidence warrants the finding that the agreement was signed by Bloomquist without consideration, since the evidence permits the conclusion that the entire transaction was fraudulent.

[5] It is said by appellants that respondents (1) were estopped to assert facts constituting the fraud in this case; (2) that the oral agreement was superseded by the writing which cannot be varied by parol; (3) that appellants have not alleged the fraudulent part of the agreement, and it is only respondents who have sought to rely upon it, and, therefore, that the latter will not be permitted to profit by their own turpitude. Each of these considerations is a false quantity in a case of this character. We are here concerned with a fraud, not against any individual, but against the public. The rule is well stated in Dealey v. East San Mateo Land Co., supra: "It makes no difference how or when the fact was brought to the attention of the court that the contract sued upon is against public policy. Neither does it matter whether or not one of the parties raises the question of its illegality upon that account, but courts of law and of equity, as the true character of such a contract is disclosed, refuse to permit themselves to be used in settling a controversy arising out of such a contract."

This decision cites many authorities to the effect that the court must sua sponte refuse relief to either party to an agreement which contemplates a fraud upon the public, or which is void as against public policy.

Certain rulings of the trial court upon the introduction of evidence are mentioned by appellants, but no attempt is made to point out any prejudice which may have resulted therefrom. The rulings in question under this head, if considered to be error, become unimportant in view of our decision upon the principal legal issue presented. We find no other points requiring decision, and no error of a substantial character.

The judgment is affirmed.

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204 Cal. 251

BLOOMQUIST et ux. v. HALEY et ux.

(L. A. 10253.)

Supreme Court of California. May 28, 1928.

1. Pleading 🔑129(2)—Answer admitted allegation of complaint as to assignment of lease by failing to deny it.

Answer admitted truth of allegation of complaint that lease was assigned to both of certain persons by failing to deny truth of allegation.

2. Pleading 🔑129(1)—Assertion in complaint, undenied in answer, and hence admitted, held sufficient to warrant finding of fact asserted.

Where complaint alleged that lease was assigned to both of certain persons and answer failed to deny it, and hence admitted allegation, there was sufficient basis for finding that the lease was so assigned.

3. Appeal and error 🔑1047(3)—Striking out testimony respecting auction sale, if error, held harmless, where sale was void.

Court's order striking out testimony concerning an auction sale of mortgaged chattels to the mortgagee, if error, *held* harmless, where the auction sale was void as sham.

4. Landlord and tenant 🔑291(17)—Judgment in unlawful detainer, based on failure to pay rent under unexpired lease, need not provide that execution shall not issue for 5 days (Code Civ. Proc. § 1174).

Judgment for plaintiffs in action of unlawful detainer, based on failure to pay rent under unexpired lease, *held* not erroneous because it contained no provision that execution should not issue for 5 days after entry of judgment, since Code Civ. Proc. § 1174, providing that execution shall not issue for 5 days in such a case, merely regulates time of issuance of execution and not contents of judgment.

In Bank.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action for unlawful detainer brought by A. Bloomquist and wife against I. M. Haley and wife. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

For opinion of District Court of Appeal, see 260 P. 571. See, also, 260 P. 569, 260 P. 572.

Morris Abraham and Charles I. Rosin, both of Los Angeles, for appellants.

D. K. Gault and Schweitzer & Hutton, all of Los Angeles, for respondents.

CURTIS, J. Hearings in this action and the two companion actions of Haley v. Bloomquist, L. A. No. 9584, 268 Pac. 365, and Bloomquist v. Haley, L. A. No. 9585, 268 P. 364, were granted by this court after decision thereof by the District Court of Appeal, in and for the Second Appellate District, Second Division. The hearings were granted mainly for the reason that we were in doubt as to the correctness of the opinion of the District Court of Appeal in said action of Haley v. Bloomquist, L. A. No. 9584. But, desiring to have all three related cases before us upon our final consideration of the action of Bloomquist v. Haley, L. A. No. 9585, we granted hearings in all of them. After considering the opinions rendered by said District Court of Appeal in this action and in that of Haley v. Bloomquist, L. A. 9584, we are satisfied with the correctness of said opinions, and we hereby adopt the same as the opinions of this court. The opinion in this action, as written by Mr. Justice Craig, is as follows:

This action is one of unlawful detainer. It concerns the property and one phase of the transaction mentioned in Haley v. Bloomquist (Civil No. 5519) reported in 260 P. 569. The opinion in that case states the principal facts involved in this appeal. The appellants make no denial of respondents' assertion that in the instant case the former failed to make certain payment required by the lease. The principal defense on the merits is that Bloomquist purchased the lease, furniture, and furnishings of the hotel in question, and that not having paid Haley the purchase price the latter had a lien, under section 3046 of the Civil Code, for the sale price and had a right to hold the property until the purchase price was paid. In view of our decision in Haley v. Bloomquist, supra, this defense is not available.

[1, 2] It is contended that there is no evidence to support the finding that Zeller assigned the lease to the appellants, and that they promised to carry out its terms. The point in this connection is that the written transfer between Zeller and Haley shows that the assignment was made to I. M. Haley, and that T. E. Haley does not appear as a party to it. An inspection of the instrument shows this to be true. However, the complaint contains the allegation that the assignment was made to I. M. Haley and T. E. Haley. The answer fails to deny this assertion, and therefore admits it to be true. This is sufficient basis for the finding that the transfer was so made. 24 Cal. Jur. 952. Any finding otherwise would be outside the issues and erroneous. Welch v. Alcott, 185 Cal. 731, 198 P. 626.

[3] Certain testimony concerning the auction sale was admitted and later was ordered stricken out. The making of this order is assigned as error, but in view of the holding in Haley v. Bloomquist, supra, that the sale was void and against public policy, the ruling becomes immaterial.

[4] It appears that the judgment contained no provision that execution should not issue until 5 days after the entry thereof. It is contended that the failure of the court to include such a provision in the judgment was prejudicial error. In that behalf reliance is placed upon section 1174 of the Code of Civil Procedure, under the subdivision entitled "Execution." This provision does not affect the contents of the judgment. It merely regulates the time of issuance of execution after judgment, and the Code provision is sufficient to protect the appellants' rights, regardless of the judgment.

We find no other points requiring our consideration.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; RICHARDS, J.; SHENK, J.

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204 Cal. 349

RENWICK v. PHILLIPS et al. (L. A. 9389.)

Supreme Court of California. June 12, 1928.

1. Physicians and surgeons 🔑11(3)—Evidence held insufficient to sustain board of medical examiners' order revoking petitioner's medical license for unprofessional conduct (Medical Practice Act, § 14, subd. 7a).

Evidence *held* insufficient to sustain order of board of medical examiners revoking license to practice medicine and surgery under Medical Practice Act, § 14, subd. 7a (St. 1925, p. 281), for alleged unprofessional conduct in aiding and abetting another in practicing system of treatment without a license.

2. Physicians and surgeons 🔑11(3)—In absence of evidence to sustain orders on part of medical examiners revoking licenses, there exists lack of jurisdiction justifying annulment of orders on review.

In absence of proper and sufficient evidence to sustain orders on part of board of medical examiners revoking licenses, there exists such lack of jurisdiction as justifies annulment of such orders upon writ of review.

Department 2.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Petition by Robert W. Renwick against P. T. Phillips and others, members of the Board of Medical Examiners of the State of California, to annul an order of the board revoking petitioner's license to practice medicine and surgery. From a judgment annulling the order, defendants appeal. Affirmed.

A. B. Bianchi, of San Francisco, for appellants.

Wilbert C. Hamilton, of Los Angeles, for respondent.

RICHARDS, J. This appeal is from a judgment of the superior court in and for the county of Los Angeles, setting aside and annulling an order of the board of medical examiners of the state of California revoking the license of one Robert W. Renwick, the petitioner and respondent herein, which license entitled him to practice medicine and surgery in this state. The order of said board was made after a hearing before it, conducted under the provisions of section 14 of the Medical Practice Act, the specific charge made against the petitioner and respondent being that of having been guilty of unprofessional conduct as the same is defined under the terms and provisions of subdivision 7(a) of section 14 of said act (St. 1925, p. 281) and which alleged unprofessional conduct consisted in the aiding and abetting of one Roy Finney in practicing a system and mode of treatment of the sick and afflicted, said Finney being then and there without and not having a valid unrevoked certificate of license from the state board of medical examiners which would have permitted him to do the act or acts in the doing of which the petitioner and respondent herein was charged with having aided and abetted him.

[1, 2] The petitioner was a licensed chiropodist. The said Roy Finney conducted a chiropodist parlor, equipped with a variety of foot remedies and appliances which he prepared and sold there. He employed the petitioner and respondent herein to act as a chiropodist in connection with his said establishment and to give such treatment and perform such operations as only could be done by the holder of a regular chiropodist's license so to do. In so far there was nothing illegal or unprofessional in the relations or conduct of Dr. Renwick in his connection with said Finney at the latter's place of business; nor was there any evidence presented before the medical board, with the exception of the single episode upon which the charge against the petitioner and respondent herein was founded, which showed or sufficiently tended to show that Finney had ever, previous to said occurrence, performed or attempted to perform any act or operation which could only be performed by a licensed chiropodist. The single episode testified to before the board of medical examiners occurred, admittedly, during the absence of Dr. Renwick and without any knowledge, concurrence, or consent on his part. Upon the hearing before the trial court the evidence was fully presented and carefully considered and reviewed by Judge Hartley Shaw, who, after such consideration and review, reached the conclusion that the evidence was wholly insufficient to justify or sustain the order of the board of medical examiners revoking the petitioner's license, and he accordingly annulled said order. Without again essaying a review herein of such evidence, we deem it sufficient to say that after a full consideration thereof we are in accord with the views expressed in the judgment of the trial court.

It has been uniformly held, both by the appellate tribunals and by this court, that in the absence of proper and sufficient evidence to sustain similar orders on the part of the board of medical examiners there exists such a lack of jurisdiction as would justify the annulment of such orders upon a writ of review. Thrasher v. Board of Medical Examiners, 44 Cal. App. 26, 185 P. 1006; Lanterman v. Anderson, 36 Cal. App. 472, 172 P. 625; Suckow v. Alderson, 182 Cal. 247, 187 P. 965.

The judgment is affirmed.

We concur: SHENK, J.; TYLER, Justice pro tem.

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204 Cal. 374

FLORES v. FITZGERALD. (S. F. 12319.)★

Supreme Court of California. June 19, 1928.
Rehearing Denied July 16, 1928.

1. Negligence 🔑136(9)—Contributory negligence is question of law only when one inference can be drawn from facts by reasonable men, pointing unerringly to such negligence.

Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, pointing unerringly to negligence of plaintiff contributing to his injury, and in all other cases the question is for the jury.

2. Automobiles 🔑245(82)—Contributory negligence of motorcycle driver, failing to observe automobile after first seeing it 150 feet from intersection, held for jury.

Contributory negligence of motorcycle driver, in crossing intersection without observing movements of automobile after first seeing it 150 feet from intersection, *held* for jury.

3. Automobiles 🔑213—Failure of motorcycle driver to stop for arterial street before crossing intersection did not defeat right of recovery for injury in collision with automobile.

Failure of motorcycle driver to bring machine to a stop for arterial street before crossing intersection *held* not to defeat right of recovery for damages sustained by reason of injury in collision with automobile, though failure

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★Rehearing denied.

to stop may have been negligence per se, in view of evidence failing to show that such negligence was direct or proximate cause of injury.

4. **Automobiles 🔑244(37)—Evidence held to establish that injury in collision between motorcycle and automobile was proximately caused by excessive speed of automobile.**

In action for damages as a result of injuries sustained in collision between plaintiff's motorcycle and defendant's automobile at a street intersection, evidence *held* to establish that proximate cause of injury was excessive and unlawful rate of speed at which automobile was traveling just before and while crossing intersection.

5. **Trial 🔑296(3)—Refusal of instruction that automobile driver could assume vehicle would stop before entering on arterial street held not prejudicial, in view of other instructions.**

In action for damages as a result of injuries sustained in collision between plaintiff's motorcycle and defendant's automobile, refusal of instruction that defendant had right to assume that any vehicle, including motorcycle of plaintiff, would be brought to a full stop before entering on arterial street, *held* not prejudicial, in view of other instructions thereon.

Department 1.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Raymond Flores, a minor, by his guardian ad litem, Irene Flores, against Philip Fitzgerald. Judgment for plaintiff, and defendant appeals. Affirmed.

Ford, Johnson & Bourquin, of San Francisco, for appellant.

Harry I. Stafford and Dean Cunha, both of San Francisco, for respondent.

CURTIS, J. Action to recover damages as a result of injuries sustained in a collision between plaintiff's motorcycle and defendant's automobile. The plaintiff being a minor, the action was instituted and is being prosecuted by his guardian ad litem. The jury before whom the action was tried rendered a verdict in favor of the plaintiff, and from a judgment entered thereon the defendant has appealed.

The first contention of appellant is that respondent was guilty of contributory negligence as a matter of law, and therefore that the trial court erred in denying appellant's motion for a nonsuit, made at the close of respondent's evidence, and also in denying appellant's motion for an instructed verdict in his favor, made at the conclusion of all of the evidence. The collision occurred at the intersection of Fulton and Buchanan streets in the city of San Francisco. The respondent, on a motorcycle, was traveling in a southerly direction on Buchanan street, at its intersection with Fulton street. He did not stop before entering this intersection, but was traveling at a speed of about 8 miles per hour, with his foot dragging, and, as he testified, could have stopped his machine at any time within one foot; that just before he entered the intersection he noticed appellant's machine, about 150 feet westerly on Fulton street, approaching the intersection at a rapid rate of speed between 35 and 40 miles per hour. He proceeded to cross the intersection, but did not again look toward appellant's machine until he was about 10 feet beyond the center of the intersection, when he looked to his right and appellant's automobile was "right on" him.

Appellant gave no warning, by sounding his horn or otherwise, of his approach. He was traveling at a rate of speed between 20 and 22 miles per hour when he entered the intersection. After striking respondent the machine of appellant dragged him and his motorcycle across the intersection and easterly on Fulton street a distance of about 55 feet, and stopped with one wheel on the sidewalk. There was evidence that a car of the type owned by appellant and driven at a speed of 15 miles per hour, upon the full pressure of the brakes being applied, could be stopped within 5 or 6 feet upon a street under the conditions existing at the time and place of the accident. Appellant admitted that he applied his brakes immediately on seeing respondent with such force as to leave black skid marks on the pavement for a distance of 10 feet.

[1, 2] "Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury." Reaugh v. Cudahy Packing Co., 189 Cal. 335, 336, 208 P. 125, 128; Smith v. Southern Pacific Co. (Cal. Sup.) 255 P. 500. In all other cases the question of contributory negligence is a question of fact for the jury. Wahlgren v. Market St. Ry. Co., 132 Cal. 656, 663, 62 P. 308, 64 P. 993; Jansson v. National Steamship Co., 189 Cal. 192, 208 P. 90; Smith v. Southern Pacific Co., supra. Appellant has suggested two circumstances as shown by the evidence in this case, which, he claims, support his contention that the respondent was guilty of contributory negligence which was the proximate cause of his injury. These two circumstances are that the respondent, after he saw the appellant 150 feet west of the intersection, proceeded to cross Fulton street without further observing appellant's automobile, and that respondent failed to stop before entering said intersection.

As to the contention that respondent failed to properly observe the movements of appellant's machine, after first seeing it 150 feet west of the intersection, appellant has cited Donat v. Dillon, 192 Cal. 426, 221 P. 193, where this court, on page 429 of the opinion (221 P. 194) said:

"The defendant seeks to take the case out of the operation of this rule, and would, in effect, have us decide as a matter of law that one having reached the intersection and having given the signal indicating his intention to turn has then relieved himself of all further care in the matter. But it is obvious that such is not the law. A motorist must at all times use due care to avoid colliding with another; he must be ever alert and watchful, so as not to place himself in danger, and, while he may assume that others will exercise due care, he cannot for that reason omit any of the care which the law demands of him. Assuming, therefore, that the defendant had the right of way, he was required to proceed across the intersection in a careful and prudent manner, ever watchful of the direction in which danger was most likely to be apprehended. He could not close his eyes so far as southbound traffic on Chester avenue was concerned. To the contrary, having observed Riddle's car approaching at an exceedingly fast rate of speed for that vicinity, the defendant was no longer entitled to rely upon the presumption that the driver of this machine would comply with the rules of the road, and he was bound to take such reasonable measures as he could, under the circumstances, to prevent the injury."

This decision, therefore, instead of being in favor of appellant's contention that the contributory negligence of respondent was a matter of law, plainly and in unequivocal language states that it is a matter of fact to be determined by the trial court, and that the finding of the ultimate fact by the trial court was binding upon this court.

[3, 4] Equally untenable is the contention of appellant that the respondent was guilty of contributory negligence which proximately caused his injury in failing to stop his motorcycle before attempting to cross the intersection. The board of supervisors of the city and county of San Francisco had adopted an ordinance making and designating Fulton street, in said city and county, from Van Ness avenue to Stanyan street, an arterial street, and making it unlawful for any driver or operator of any vehicle to cross an arterial street from an intersecting street, unless said vehicle shall have been brought to a full stop before entering the intersection. Buchanan street lies between Van Ness avenue and Stanyan street. This ordinance, if ever effective, went into effect the day of the collision. There had not been any "stop" signs installed at the intersection of Buchanan and Fulton streets at the time of said collision.

The point is made by respondent that under the authority of Ex parte Daniels, 183 Cal. 636, 639, 192 P. 442 (21 A. L. R. 1172), the board of supervisors was without authority to pass said ordinance at the time of its enactment, and that it was not until the amendment of the Motor Vehicle Act, in 1925 (Stats. 1925, p. 414), that boards of supervisors were authorized to legislate upon the subject. It is not necessary to pass upon the validity of said ordinance, for the reason that we are of the opinion, that, conceding said ordinance was valid and in full force and effect at the date of the collision, and that the respondent violated it by failing to stop before entering upon the intersection of said streets, we are not satisfied that such failure on his part in any way contributed to his injury. The evidence shows that upon entering the intersection he brought the speed of his motorcycle down to about 6 or 7 miles per hour, and while traveling at this low rate of speed he had his machine under complete control. It does not appear that his failure to stop his machine momentarily before entering the intersection had any direct connection with, or was in any manner responsible for, the collision with appellant's automobile. Although the violation of the ordinance may have been negligence per se, yet, as it was not shown that such negligence was the direct or proximate cause of his injury, it will not defeat his right of recovery for damages sustained by reason of said injury. Lawrence v. Southern Pacific Co., 189 Cal. 434, 442, 208 P. 966.

Had appellant been traveling at a lawful rate of speed just prior to, and at the time of, his entry upon the intersection of the two streets, respondent, even traveling at the low rate of speed at which the evidence shows he was traveling across the intersection, would have passed beyond the intersection before the appellant would have had time to enter thereon. These two streets are each 40 feet wide. The collision occurred 6 feet north of the southerly curb of Fulton street and 3 feet east of the westerly curb of Buchanan street. Therefore, if appellant was 150 feet west of Buchanan street at the time respondent started to cross the intersection, he traveled 153 feet, while respondent was traveling 34 feet, over 4½ times as fast as respondent. Respondent, as we have seen, was traveling between 6 and 7 miles per hour, which would make appellant's rate of speed from 27 to 31 miles per hour. It is evident from this showing that it was appellant's act of traveling at this excessive rate of speed, at or just prior to the collision, which was the cause of the collision. As already noted, appellant was not able to stop his machine until it had traveled about 55 feet after the collision, although he applied his brakes at full pressure and at such force as to leave skid marks on the street for a distance of 10 feet. Had respondent stopped before entering the intersection, and then proceeded to cross the street at from 10 to 15 miles per hour, which was within the legal limit, the collision would, no doubt, have happened in much the same manner as described above. If such is the case, then we think the conclusion is irresistible that the proximate cause of respondent's injury was not his failure to come to a full stop before attempting to cross the street intersection, but was due directly to the excessive and unlawful rate of speed at which the appellant was traveling just before and while crossing said intersection. There was no error, therefore, in the court's denial either of appellant's motion for a nonsuit or his motion for an instructed verdict.

[5] Appellant complains of the refusal of the court to give two instructions prepared by him. Each of these proposed instructions was refused, for the reason that they were covered by other instructions given by the court. Appellant claims that the refusal of the first of these two rejected instructions deprived him of his defense of contributory negligence. Upon an examination of the instructions given by the court, we think it clearly appears that the court fully and fairly instructed the jury upon the question of contributory negligence, and that appellant's rights in this regard were amply safeguarded by the instructions given. The other of said rejected instructions referred to and defined the right of appellant in case the jury believed he was himself in the exercise of ordinary care, to assume and act upon the assumption that any vehicle, including the motorcycle of respondent, traveling upon Buchanan street, should be brought to a full stop before entering upon the intersection of that street with Fulton street. While the trial court gave no instruction expressly defining this right of appellant, it did fully instruct the jury as to the force, effect, and meaning of said ordinance of the board of supervisors declaring Fulton street an arterial street, and that one of the requirements of said ordinance was that any vehicle before entering an intersection of such arterial street should be brought to a full stop. While the proposed instruction might well have been given, as it correctly stated the law governing the rights of parties using an arterial street as defined by said ordinance, we are not prepared to say that its refusal worked any serious prejudice to the rights of appellant, at least not sufficient to justify a reversal of the judgment.

The jury, by the instructions given, were explicitly told that by the terms of said ordinance it was the duty of respondent before entering the intersection to bring his motorcycle to a full stop; that a violation of said ordinance was negligence in itself; that negligence on the part of plaintiff was called contributory negligence, and that plaintiff could not recover, if guilty of contributory negligence proximately contributing to his injury. As the jury found in favor of the plaintiff, it must have believed that, notwithstanding his failure to comply with said ordinance by bringing his motorcycle to a full stop before entering upon the street intersection, such failure on his part was not the proximate cause of his injury. If respondent's failure to comply with the terms of the ordinance was not the proximate cause of the collision, then appellant's right to assume that the respondent would comply with said ordinance becomes a matter of no moment.

The judgment is affirmed.

We concur: SEAWELL, J.; PRESTON, J.

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204 Cal. 701

PEOPLE v. CAMPRIDON. (Cr. 3100.)

Supreme Court of California. June 13, 1928.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Appeal by Albert Campridon from a judgment of conviction of violating section 141 of the Vehicle Act (St. 1923, p. 562) and from an order denying motion for new trial. Reversed.

Superseding opinion in District Court of Appeal, 262 P. 428.

John V. Copren, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

PER CURIAM. The appellant's petition for a hearing in this court after decision by the District Court of Appeal for the First Appellate District, Division 1, was granted chiefly for the reason that one of the main questions presented upon this appeal was under submission before this court in the case of People v. Scofield, 265 P. 914. The judgment and order in that case were reversed for the reason, among others, that prejudicial error was committed by the trial court in the giving of substantially the same instruction to the jury which is the subject of appellant's criticism in the instant case. This being so, it follows that the judgment and order herein must be reversed upon the authority of People v. Scofield, supra, and for the reasons set forth therein.

It is so ordered.

92 Cal. App. 543

PEOPLE v. JORDAN. (Cr. 1647.) ★

District Court of Appeal, Second District, Division 1, California. June 15, 1928.

Hearing Denied by Supreme Court Aug. 13, 1928.

Constitutional law ⚷199—Conviction for taking money by false pretenses under subsequent statutory amendment charging designation of offenses held not invalid; amendment not aggravating punishment (Pen. Code, § 484, as amended by St. 1927, p. 1046, § 1).

Conviction under information charging offenses of grand theft under Pen. Code, § 484, as amended by St. 1927, p. 1046, § 1, to include larceny, grand larceny, false pretenses, and embezzlement, was not invalid because offenses charged were committed before such amendment, where offenses proved against defendant were the taking of money, previously known as obtaining property by false pretenses, since statute did not in any way aggravate offenses charged nor make punishment therefor greater than when committed.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Irvin Jordan was convicted of grand theft, and he appeals. Affirmed.

John A. De Weese and Josiah Coombs, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

YORK, J. The principal question raised on this appeal by the defendant is similar to the written objection to the information and the demurrer filed in the trial court on behalf of the defendant. The objection made is that counts 1, 2, 3, 4, and 5 of an information charged the defendant with the offenses of grand theft; objection being made that on the dates when the various offenses were alleged to have been committed section 484 of the Penal Code of California defined larceny as the felonious stealing, taking, carrying, leading, or driving away the personal property of another. A few hours before the time of the last offense charged, section 484 of the Penal Code was amended (St. 1927, p. 1046, § 1) so that it described as grand theft the offense charged, and included larceny, grand larceny and false pretenses, as well as embezzlement; that defendant objecting on the ground that at the dates when the crimes were alleged to have been committed the defendant would have had to have been tried only on an information limiting the offense to the felonious stealing, taking, carrying, leading, or driving away the personal property of another instead of having to stand trial on an indictment under which the people could have proven the additional offenses hereinbefore set forth.

If under the facts alleged the defendant could have been found guilty of a crime which would have carried a greater or different penalty, there might be something in the contention of counsel for the appellant, but apparently the only difference in penalty would be if the object stolen were an automobile valued at less than $200. In the given case the law as amended and under which the indictments were drawn does not alter the legal rules of evidence in the case at bar, and the portion of the section providing for a determination of the value of the property obtained would be inapplicable to the given case, as the taking of money only is charged in the various counts of the information. There is nothing in the law as amended and objected to under which the present proceeding is had that in any way aggravates the particular crime or crimes herein charged, or in any way makes it any greater crime than it was under the law as it stood at the time when it was committed. This is so because of the fact that the defendant is charged only with taking money, which offense the amendment to the act does not in any way aggravate or in any way make any greater. The evidence shows that the facts proved against appellant were those establishing the commission of the crime heretofore known as the crime of obtaining property by false pretenses. Furthermore, the law as amended does not change the punishment for the particular crime herein charged, and does not in any way provide for the infliction of any greater punishment than was annexed to the particular crime charged when the crime was committed.

In this instant case we are passing only upon the facts and circumstances of the case itself, the nature of the crime charged, and the evidence introduced to support it, and we are not intending that this rule should be extended to other crimes or facts other than the particular crime charged and the proof introduced to support the charge. For instance, if the charge were the taking of an automobile valued at less than $200, there would be an entirely different proposition for the court to pass upon, as the amendment aggravates such crime only and makes only that crime greater than it was before such amendment to the law was passed, and such amendment provides that same punishment for the crimes herein charged and only prescribes a greater punishment for the theft of an automobile less than $200 in value.

In People v. Campbell, 59 Cal. 243, at page 246, 43 Am. Rep. 257, the court quotes from Mr. Cooley in his work on Constitutional Limitations the following:

> "'The defendant in any case must be proceeded against and prosecuted under the law in force when the proceeding is had.' 'A law is not unconstitutional which precludes a defendant in a criminal case from taking advantage of remedies which do not prejudice him:'

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

* * * 'nor one which modifies, simplifies, and reduces the essential allegations in a criminal indictment, retaining the charge of a distinct offense.' "

Also quoting from that case at page 246, a quotation from the case of Springfield v. Hampden Commissioners of Highways, 6 Pick. (Mass.) 508:

> "But there is no such thing as a vested right to a particular remedy. The Legislature may always alter the form of administering right and justice, and may transfer jurisdiction from one tribunal to another."

Again, the rule has been summarized as follows:

> "*Amendatory Statutes.*—If an act is criminal and punishable when committed, and a statute is subsequently enacted also making it criminal and punishable, but giving the crime a designation not before given to it, the situation of the accused is not altered to his disadvantage, and hence it cannot be said that there has been any ex post facto legislation, nor does the new or amendatory statute obliterate the preexisting law so that a conviction and punishment after its enactment and the consequent repeal of the former statute can be regarded as a conviction and punishment of an act not criminal when committed." 37 Am. St. Rep. 582, at page 585.

Also see 6 R. C. L. 301, § 288.

The information, although drawn in conformity with the law as amended, did not in any way hinder defendant in the preparation of his defense as long as the facts constituting the substance of the offense charged were fully given therein.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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92 Cal. App. 428

BRAY v. SUPERIOR COURT IN AND FOR SISKIYOU COUNTY et al. (Civ. 3609.)★

District Court of Appeal, Third District, California. June 6, 1928.

Rehearing Denied July 6, 1928. Hearing Denied by Supreme Court Aug. 2, 1928.

1. Waters and water courses 🔑128—Law authorizing exceptions to determination of state water commission with hearing thereon held not unconstitutional, as authorizing review of administrative officer (Water Commission Act, § 36b, as added by St. 1917, p. 236, § 15; Const. art. 4, § 25, subds. 3, 33).

Water Commission Act (St. 1913, p. 1012) § 36b, as added by St. 1917, p. 236, § 15, authorizing filing of exceptions to determination of state water commission and a hearing thereon by court, and providing for proceedings as nearly as may be in accordance with rules governing civil actions, *held* not in violation of Const. art. 4, § 25, subds. 3, 33, as providing method for review of proceedings of administrative officers.

2. Waters and water courses 🔑128—Law authorizing exceptions to determination of state water commission held not unconstitutional because providing for bringing parties into court other than by issuance of summons (Water Commission Act, § 36b, as added by St. 1917, p. 236, § 15).

The fact that Water Commission Act (St. 1913, p. 1012) § 36b, as added by St. 1917, p. 236, § 15, authorizing exceptions to determination of state water commission and hearing thereon, provides for bringing parties into court other than by means of issuance of a summons, *held* not to render it unconstitutional.

3. Prohibition 🔑3(3)—Parties to proceedings on exceptions to determination of state water commission have adequate remedy at law other than writ of prohibition (Water Commission Act, § 36b, as added by St. 1917, p. 236, § 15).

Since an appeal lies from judgment of court decreeing rights of respective appropriators on exceptions to determination of state water commission, pursuant to Water Commission Act (St. 1913, p. 1012) § 36b, as added by St. 1917, p. 236, § 15, all parties have a plain, speedy, and adequate remedy at law other than by writ of prohibition to prevent hearing of such exceptions.

4. Waters and water courses 🔑133—Proceeding involving determination of water rights of river and its tributaries held properly entitled.

Proceeding involving determination of water rights of river and its tributaries, entitled "In the Matter of the Determination of the Relative Rights Based upon Prior Appropriation of the Various Claimants to the Waters of Shasta River and Its Tributaries in Siskiyou County, California," *held* properly entitled.

5. Waters and water courses 🔑133—State water commission has authority to deal only with appropriated waters and to grant permits to appropriate unappropriated waters of state (Water Commission Act).

The Water Commission Act (St. 1913, p. 1012, as amended) deals only with appropriated waters of the state and the ascertainment and determination of waters that have been appropriated, giving to state water commission power to grant permits to appropriate unappropriated waters therein.

6. Waters and water courses 🔑133—Constitutionality of law bearing on unused rights of riparian landowner held immaterial, as relating to decisions as to rights of appropriators (Water Commission Act, § 11).

Constitutionality of Water Commission Act (St. 1913, p. 1018) § 11, purporting to bar or terminate unused rights of riparian landowner after expiration of ten years, as taking property without due process, is immaterial, as bearing on decision of courts as to rights of appropriators.

Original application by George K. Bray for a writ of prohibition, prayed to be directed to the Superior Court of the State in and for the County of Siskiyou and Hon.

★For opinion on rehearing, see 268 P. 1081. Hearing denied by Supreme Court.

Charles J. Luttrell, as Judge thereof. Writ denied.

Hearing denied by Supreme Court: SEAWELL, RICHARDS, and CURTIS, JJ., voting for a hearing.

Horace V. Ley, of Yreka, and Wm. V. Cowan, of Oakland, for petitioner.

PLUMMER, J. This cause is before us upon the application of the petitioner praying that an order be issued by this court directed to the superior court of the county of Siskiyou and Hon. Charles J. Luttrell, as judge thereof, requiring him to show cause why a writ of prohibition should not be granted prohibiting said court and the judge thereof from proceeding with the hearing of a certain matter or action now pending in said court wherein the department of public works of the state of California, through the division of water rights thereof, has filed in said court its determination of the water rights of the Shasta river and its tributaries in the county of Siskiyou.

While the petition filed herein sets forth at great length a number of specifications why said order should be issued and said writ granted, only four of said specifications are set forth and urged upon our attention by the petitioner in his points and authorities accompanying the petition. These specifications are as follows: (1) That section 32 and sections 36a to 36f of the Water Commission Act, approved June 16, 1913 (Stats. 1913, p. 1012), and as amended by subsequent acts (see St. 1917, pp. 234, 236–238, §§ 9, 14–19), are unconstitutional, and particularly section 36b thereof; (2) that no issues are raised in the complaint, and the court has no jurisdiction to proceed with the hearing; (3) that the only proper order that can be made by the court below is one of dismissal; (4) that the petitioner has no plain, speedy, and adequate remedy at law.

As the petitioner's argument is directed particularly to the provisions of section 36b, we will in the consideration of his application proceed in the same line of thought. In his attack on said action reliance is based upon the recent case of Mojave River Irrigation District v. Superior Court of the State of California, in and for San Bernardino County, 262 P. 724, in which case the Supreme Court held that the provisions of section 1b of the Water Commission Act, added by act of the Legislature approved May 2, 1923 (Stats. 1923, p. 162), is unconstitutional. Following the reasoning of the court in that case it is contended that section 36b is likewise unconstitutional. This necessitates an analysis of the decision of the Supreme Court just referred to for the reason that, unless the provisions of the two sections are distinguishable, section 36b must, under the authority of the foregoing case, be likewise held inoperative and void.

In the Mojave Case it appears from the facts set forth in the opinion that a proceeding was instituted in the superior court to review the action of the water commission in granting a permit to the Mojave River irrigation district to appropriate water flowing in the Mojave river, and that the cause before the Supreme Court was based upon an application to prohibit the superior court from hearing and determining the proceeding pending therein, to review the action of the commission, on the ground that a writ of certiorari or writ of review so to do does not lie and that the provisions of section 1b of the Water Commission Act, as amended in 1923, purporting so to do, was unconstitutional. The court then takes up and reviews many of the recent cases wherein it is held that a writ of certiorari will not lie to review the action of an administrative officer, citing, among others, the case of Tulare Water Co. v. State Water Co., 187 Cal. 533, 202 P. 874, wherein it was held that the water commission, in granting a permit to appropriate water from the Kern river, was acting in an administrative, and not in a judicial, capacity, and for that reason the writ of review applied for was denied and the writ of mandate granted. Other cases are cited in the opinion which we need not set forth herein, but a consideration of the various cases all show that they are based upon the rule that certiorari will not lie to review the action of an administrative officer, but only lies to review the action of a judicial officer, and only then to determine whether the officer whose action is sought to be reviewed has or has not acted within the scope of his authority. Section 1b, as shown by the decision in the Mojave Case, is very similar to the section of the Irrigation District Act (Laws 1897, p. 254), purporting to give a right of appeal, held unconstitutional in the case of Chinn v. Superior Court, 156 Cal. 480, 105 P. 580, and also in the case of Inglin v. Hoppin, 156 Cal. 483, 105 P. 582, in that, while it does not specifically purport to grant an appeal from the action of an administrative body, it does specify that, by way of the writ of certiorari, the court shall review all the evidence, correspondence, data, etc., upon which the commission acted, and then base its judgment thereon. That this is the vulnerable portion of section 1b appears from the following excerpt, which we take from the opinion in the Mojave Case:

> "In providing that said courts shall 'review' all such matters as may have been considered by the division of water rights in its determination to grant or deny the application for the permit in question, the amendment assuredly contemplates that all of such matters shall be received in evidence before such court in such action or proceeding, whether receivable in evidence in an ordinary action or proceeding or not. In the foregoing respect it would seem to be obvious that said amendment provides for the particular action or proceeding which it purports to create a practice and procedure radically at variance with that which the gen-

eral laws provide for the practice and procedure of the superior courts in actions or proceedings of which such courts are given jurisdiction, and that in so doing said amendment runs counter to the provisions of section 25, art. 4, of the state Constitution which inhibits the Legislature from passing 'local or special laws' regulating the practice of courts of justice."

That section 1b purports specially to provide for a writ of review of the proceedings of an administrative officer which does not exist in any other case is clearly apparent from a reading of the section. Section 1b is different from any other of the sections of the act, in that it does not purport to lay the foundation for the institution of a trial, the introduction of evidence, and the determination of rights of parties as may be made to appear after the due and regular trial of a cause, but expressly limits the court to a determination of whether administrative officers have acted correctly or erred in judgment in granting a permit to appropriate water. In this particular the provisions of section 1b are distinguishable from the powers granted and the proceeding contemplated by section 36b. The Mojave Case had to do with a special proceeding providing for the review of an administrative officer. There is nothing in the opinion, as we read it, which in any way trenches upon the power of the Legislature to provide for the determination of the water rights of those taking water from the same stream as set forth in section 36b. The first section, though nominally providing for a writ of review, gives what in fact amounts to an appeal from the actions of an administrative officer, while the latter section simply provides that the proceedings of an administrative officer may be taken as the preliminary basis upon which an action may be had in the superior court to determine the respective rights of claimants to appropriate water from any certain stream and its tributaries. That section 1b is unconstitutional for the reasons stated in the opinion in the Mojave Case does not necessitate a holding that section 36b, which is wholly dissimilar in all its intendments, is likewise unconstitutional.

[1] We may now consider section 36b and the various cases from different states passing upon water laws containing identical provisions. After providing for an investigation of the water rights of various claimants appropriating water from any certain stream and its tributaries, the hearing of the various claimants, taking of proofs, examination of streams, their tributaries, dams, ditches, etc., the act provides that the commission shall come to a determination as to the respective quantities of water the different claimants are entitled to divert and the lands upon which the waters may be used, setting forth in minute detail so that the quantity of water to which each claimant may be entitled, and the lands upon which it is entitled to be used may be readily ascertained, etc., the water commission is directed to file the same in a county through which the stream runs, together with the transcript of all the testimony taken by the commission, and then obtaining from the court of said county an order for a hearing upon such determination, which order must be published for a specified length of time and a certified copy of the notice of the time and place of the hearing served upon all the parties. Section 36b of the act then provides as follows:

> "At least ten days prior to the day set for hearing, all parties in interest who are aggrieved or dissatisfied with the order of determination of the state water commission shall file with the clerk of said court notice of exceptions to the order of determination of the state water commission, which notice shall state briefly the exceptions taken, the reasons therefor, and the prayer for relief and a copy thereof shall be transmitted by registered mail at least ten (10) days prior to such hearing, to the state water commission and to each claimant who was an adverse party to any contest wherein such exceptor was a party in the proceedings. The order of determination by the state water commission and the statements or claims of claimants and exceptions made to the order of determination shall constitute the pleadings, but the court may allow such additional or amended pleadings as may be necessary to a final determination of the proceeding. If no exceptions shall have been filed with the clerk of the court as aforesaid then on the day set for the hearing, on motion of the state water commission, or its attorney the court shall enter a decree affirming said order of determination. On the day set for hearing all parties in interest who have filed notices of exceptions as aforesaid shall appear in person or by counsel, and it shall be the duty of the court to hear the same or set the time for hearing until such exceptions are disposed of, and all proceedings thereunder shall be as nearly as may be in accordance with the rules governing civil actions."

It requires but a cursory reading of this section to show that the court is empowered to permit the filing of additional or amended pleadings as may be desired by the parties to set forth fully and completely, all and singular, their rights, or to whatever rights the parties may deem themselves entitled, as fully and completely as is provided for in any of the sections of the Code of Civil Procedure. The specific language of the section also is to the effect that the proceedings shall be as nearly as possible in accordance with the rules governing civil action. This means that the testimony upon which the court finally acts must be such as would entitle the court to act in any civil proceeding. The section does not provide simply for a review of the testimony taken by the commission, nor of the correspondence or data which may have been deemed sufficient by the commission. The essential requirement of the language of the section, taken as a whole, is that the court, in the light of the findings of the commission before it, shall proceed as nearly as possible as would be the case in an ordinary civil action to hear whatever the parties in interest may have to present in the way of proper testimony, and after such hearing enter a decree determining the quantity of water that each claimant is entitled to appropriate from the stream in question, and also fixing and determining the place of use thereof. The subsequent sections provide for the taking of additional testimony by way of reference to the commission, but that is no different in effect than where a court issues a commission to take testimony. This brief summary shows the distinction between section 1b and section 36b of the Water Commission Act.

[2] That the parties were brought into court other than by means of the issuance of a summons does not appear to us to affect the constitutionality of the act. The question really is, in every case, whether the court has jurisdiction of the parties and of the cause. In this particular there is no essential difference in obtaining jurisdiction of the parties, than when the court issues its order to show cause why a certain action should not be taken. It is not in all cases absolutely necessary that a summons may be issued in order to give the court jurisdiction of the parties. For instance, in the present application this court is asked to acquire jurisdiction over the superior court of the county of Siskiyou and Hon. Charles J. Luttrell by issuing and having served upon him an order to show cause. That, after having acquired jurisdiction of the parties, the subsequent proceedings may not be in all particulars identical with the trial of some other civil action, such as a damage suit, does not affect the constitutionality of the section in question. If void because in detail it differs slightly from the procedure in other cases, then, and in that case, the provisions of the Code of Civil Procedure having to do with eminent domain actions would likewise be vulnerable. It only requires a reading of the various sections of the Code of Civil Procedure to show the dissimilarity between the summons in an ordinary action and the summons provided for in eminent domain proceedings. Again, if exactly the same procedure must be followed in all cases, the section of the Code setting forth that in the first instance only an interlocutory judgment may be entered in a divorce action, and then a final judgment a number of months later, would likewise be unconstitutional.

In the present case the petition sets forth that there are 131 claimants asserting rights to the waters of the Shasta river and its tributaries, based upon appropriation. These rights are not absolutely independent and unrelated, but they are all dependent and correlated, each depending upon the lawful exercise of the right claimed by the others. There is only so much water in a stream and its tributaries to be used, and each claimant owns really the use and not the water itself, which, from the very nature of the case, demands an enactment suitable to the conditions presented. In this regard we read the Water Commission Act as a general law applicable to a particular subject, to wit, the use of the waters of the various streams of the state. Other states having constitutional limitations similar to subdivisions 3 and 33 of section 25 of article 4 of our Constitution, relating to legislative acts regulating the practice of courts of justice have upheld identical statutes with the one now under consideration. In the case of Eden Irrigation Co. v. District Court, 61 Utah, 103, 211 P. 957, the Supreme Court of Utah had under consideration a water act containing the provisions which are similar in substance to the Water Commission Act of this state. So far as pertinent here, the Utah act reads:

> "After full consideration of the statements of claims the surveys, records and files and after a personal examination of the river system or water source involved if such examination is deemed necessary, the state engineer shall formulate a proposed determination of all rights to the use of the water of such river system or water source, and a copy of such proposed determination shall be mailed by regular mail to each claimant with notice that any claimant dissatisfied with such determination may within ninety days from such date of mailing, file with the clerk of the district court a written objection thereto duly verified on oath." Laws 1919, c. 67, § 32.

The act then goes on to provide for hearing, contests, and entry of final decree. It was there objected that such a proceeding was inhibited by the Constitution, in that the Legislature was prevented from passing any local or special laws regulating the practice of courts of justice, just as it is insisted here. The court, in passing upon this contention, expressed its views in these words:

> "Finally it is insisted that the act in question offends against that provision of our Constitution (Const. art. 6, § 26), which prohibits the Legislature from enacting a special law 'regulating the practice of courts of justice.' This contention, it seems to us, is somewhat far-fetched. In the first place we cannot conceive how the law in question is special nor how it regulates the practice of courts of justice. Nothing of that character is attempted. Neither is that the effect of anything that is contained in the act. The question respecting the regulation of the waters of this state is a very comprehensive one and in some respects, for the purpose of simplifying and expediting the administration of the law with respect to that matter and the protection of water rights, the Legislature no doubt would have the right to direct the courts how to proceed in certain matters and, so long as the law applied to all courts and governed all persons claiming water rights there is nothing special about such a law."

In the case of Stuart v. Norviel et al., 26 Ariz. 493, 226 P. 908, the Supreme Court of

Arizona had before it a water law containing an identical procedure for obtaining jurisdiction both of the cause and of the parties. In considering the objections urged by counsel to the validity of the various provisions leading up to the final hearing by the trial court, the opinion uses language which is applicable to this cause, to wit:

> "This summary of the provisions of the statute suffices to show that the water commissioner is not invested with judicial power. Judicial power is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision. The power to decide and pronounce the judgment affecting the rights of the parties to the use of the water of the stream and to carry the judgment into effect between the persons and parties is, by the act of the Legislature in question, reposed in the superior court and not in the commissioner. In the initiating of the proceedings by the commissioner, in the giving of notice to the claimants, in the taking of the statements of claims, in receiving evidence and in making "findings" the duties of the commissioner are not unlike those of a referee. * * * The commissioner, upon his own initiative or upon the petition of the water users upon the stream, merely brings the matter to the court for its adjudication, for its determination, for its decree establishing the rights of the several claimants. This adjudication, this determination, this decree, is the adjudication, determination, and decree of the court and not of the commissioner"—citing Pacific Live Stock Co. v. Lewis, 241 U. S. 441, 36 S. Ct. 637, 60 L. Ed. 1084; Vineyard L. & S. Co. v. District Court, 42 Nev. 1, 171 P. 166; Pitt v. Scrugham, 44 Nev. 418, 195 P. 1101; In re Willow Creek, 74 Or. 592, 144 P. 505, 146 P. 475; Enterprise Irr. Dist. v. Tri-State L. Co., 92 Neb. 121, 138 N. W. 171; Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

This case likewise holds that it is evident that all the proceedings provided for in the water act are in accordance with the rule requiring due process of law.

In Pacific Live Stock Co. v. Oregon, 241 U. S. 440, 36 S. Ct. 637, 60 L. Ed. 1084, the Supreme Court, passing upon an act of the Legislature of the state of Oregon, similar to ours, affirmed the decision of the Oregon Supreme Court holding that the bringing of interested parties into court, just as it is sought to bring parties into court in this action, constituted due process of law.

In the case of In re Willow Creek, 74 Or. 592, 144 P. 505, appears an elaborate opinion from the Supreme Court of Oregon in which every phase of the water act of that state is taken up and thoroughly considered and every question raised by the petitioner in this cause completely answered. From that opinion we will, however, take only the following excerpt:

> "It is within the province of the Legislature to say that registered mail may be used as a means of conveying a notice, when publication is also required, and especially where in case of dispute a notice of contest is required to be served and returned the same as a summons in an action in the courts"—citing a number of cases.

In the case of Humboldt Land & Cattle Co. v. District Court, 47 Nev. 396, 224 P. 612, the Supreme Court of Nevada, in considering an act similar in its provisions to ours, says:

> "The section discloses a fixed purpose to secure timely notice to all claimants of the hearing, and of the time and place for the hearing of all parties in interest dissatisfied or aggrieved with the order of determination of the engineer. It requires all those aggrieved or dissatisfied to file notice of their exceptions with the clerk setting forth the grounds and prayer for relief, thus affording all parties in interest who are [not] satisfied with the order of determination an opportunity to appear before the court and oppose any alteration or modification of the order as proposed by those excepting. The statute is always presumed to be known, and, in view of the character of the proceeding, hedged about, as it is, with notices of every material step taken in the one comprehensive proceeding, the law presumes that each water claimant will keep in touch with his water right defined by the order of determination of the engineer and straightway inform himself if any peril threatens it by those excepting. No further notice is required, and since each claimant is a party to the proceeding, and has notice, and a reasonable opportunity is afforded him to defend his claim, the procedure satisfies the requirement of due process of law."

The same court, in the case of Vineyard L. & S. Co. v. District Court, 42 Nev. 1, 171 P. 166, really says everything that can be said in support of the act of the Legislature in providing for determining water rights, just as has been provided by the Legislature in this state, and conclusively refutes every objection which has been brought to our attention and urged against our Water Commission Act.

In a proceeding to determine the water rights in the Humboldt river (246 P. 692), the Supreme Court of Nevada took occasion again to uphold provisions of the water law of that state which contained in substance the same provisions as we find in section 36b of the Water Commission Act of this state.

In addition to the cases which we have reviewed, the following may also be cited supporting the decisions from which we have quoted: Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Enterprise Irr. Dist. v. Tri-State Land Co., 92 Neb. 121, 138 N. W. 171; In re Silvies River (D. C.) 199 F. 495; Ormsby Co. v. Kearney, 37 Nev. 314, 142 P. 803; Bergman v. Kearney (D. C.) 241 F. 884; Humboldt L. & C. Co. v. Allen (D. C.) 14 F.(2d) 650; Caldwell v. Erickson, 61 Utah, 265, 213 P. 182. Practically all of these cases consider the objection urged, that the act is not in accordance with the rule requiring due process of law, and hold such objection untenable. The cases also take up and show that the determination of the water commission (in some of the states called water commission and in some of the states called water engineer) is only a proposed finding and is not a judicial decision fixing and decreeing the rights of the respective claimants, but is only in fact a preliminary investigation which brings to the attention of the court the various matters, rights and interests to be considered in order that a full and final hearing may be had and the rights of the respective claimants to appropriate water from the stream and its tributaries under consideration, ascertained, and determined in a proceeding where all can be heard, and to the intent and purpose that the otherwise almost interminable dispute as to the use of water from any particular source may be once and for all equitably, justly, and finally decreed, established, guaranteed, and placed of record where all the users of water may readily ascertain and forever know his own rights and the rights of all other appropriators.

[3-6] An appeal lies from the judgment of the trial court in decreeing the rights of the respective appropriators, and thus all parties are given a plain, speedy, and adequate remedy at law, and is a sufficient answer to the petitioner's objection that no adequate remedy exists other than that prayed for herein. Nor do we find any merit in the contention that the proceeding is not properly entitled. Excluding the cover pages of the report of the commission, we find the following:

> "In the Matter of the Determination of the Relative Rights Based upon Prior Appropriation of the Various Claimants to the Waters of Shasta River and Its Tributaries in Siskiyou County, California,"

—which is as full and complete a title as we find in many proceedings, as, for example, in probate matters where the cause is entitled "In the Matter of the Estate [giving the name of the person], Deceased."

Nor is there any merit in the petitioner's contention that the Water Commission Act does not purport to determine the rights of riparian owners. The petitioner does not base his rights upon riparian ownership, as it is expressly stated that he is an appropriator of the waters of one of the tributaries of the Shasta river. The Water Commission Act under consideration does not purport to deal with other than the appropriated waters of the state and the ascertainment and determination of the waters that have been appropriated, and then giving to the commission power to grant permits to appropriate the unappropriated waters of the state. That the third subdivision of section 11 of the act purporting to bar or terminate the unused rights of a riparian landowner after the expiration of ten years may or may not be unconstitutional, as the taking of property without due process of law, is wholly immaterial, as any holding relative to that section would not have any bearing whatever upon the decision of the courts as to the rights of appropriators. The whole tenor of the act deals only with appropriators. Section 29 (St. 1917, p. 232, § 6) sets forth the form by which an appropriator shall set forth all the facts upon which his right to the use of the waters is predicated, and includes only such rights as have their origin in appropriation, and following all these various proceedings, the judgment of the court finally to be entered deals only with the rights of appropriators.

That the various sections of the Water Commission Act are new to the legal profession does not affect their validity, for, as said by the Supreme Court of Nevada in one of the cases to which we have referred, every forward looking piece of legislation meets the old and time-honored objection—unconstitutional.

The petition for an order to show cause is denied.

We concur: FINCH, P. J.; HART, J.

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92 Cal. App. 513

GUTLEBEN BROS. v. STEVENSON. ★

(Civ. 6329.)

District Court of Appeal, First District, Division 2. California. June 13, 1928.

Rehearing Denied July 13, 1928. Hearing Denied by Supreme Court Aug. 9, 1928.

1. Trial 🔑260(1)—In contractor's action for balance due, denial of requested instruction held not error, in view of instructions given.

In contractor's action for balance claimed to be due, denial of requested instruction as to manner of computing amount *held* not error, in view of instructions given.

2. Trial 🔑252(12)—In contractor's action, requested instruction as to deduction or addition of value of omissions and additions held properly denied as without supporting evidence.

Where construction contract appointing contractor and architect as valuers of additions and omissions, where such parties never made any valuation, *held*, an action for unpaid compensation, denial of instruction as to deduction of the value of omissions and the addition of the value of additions was properly refused as without evidence to which it could apply.

3. Contracts 🔑353(1)—Evidence held to warrant instruction as to waiver of cost guaranty clause of building contract.

Where building contract provided for deduction or addition of cost of the omissions or additions, and provided that architect and contractor should agree as to value of omissions or additions, and contained a guaranty as to cost by contractor, *held*, in action by contractor

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★Rehearing denied. Hearing denied by Supreme Court.

for compensation, evidence that many omissions and additions were made without orders or any attempt at agreement as to value by architect and contractor warranted instruction as to waiver of guaranty provisions.

4. Contracts 🔑322(4)—Evidence held to sustain judgment for contractor's compensation as against claim for deductions under cost guaranty clause.

Evidence *held* to sustain judgment for contractor in action for compensation as against claim for deductions under cost guaranty clause.

5. Work and labor 🔑27(3)—Where action on principal contract contained common count for value of work, admission of testimony that work was worth in excess of contract price was not error.

In contractor's action for compensation under written contract fully performed, providing for compensation of $24,000, admission of plaintiff's testimony in support of a common count, that value of his services was approximately $47,000, *held* not error.

6. Appeal and error 🔑1050(2)—In contractor's action for compensation, alleged error in admitting testimony material only to clause of contract which had been waived held immaterial.

In construction contractor's action for compensation, where waiver of cost guaranty clause was shown, alleged error in admission of testimony regarding cost of certain heating apparatus other than that called for in contract was immaterial.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Gutleben Bros. against Gilbert F. Stevenson. Judgment for plaintiff, and defendant appeals. Affirmed.

Robert Young, of Los Angeles, for appellant.

Paul Barksdale D'Orr, of Los Angeles, and A. G. Kazebeer, of San Francisco, for respondent.

STURTEVANT, J. The defendant is the owner of the Hotel Miramar Annex at Santa Monica, Cal. Before building the hotel he employed an architect to draw plans and prepare specifications. Afterwards he engaged the plaintiff as manager and superintendent to build the building. A written contract was drawn up, executed and recorded. By the terms of the written contract the plaintiff undertook to superintend all of the building, etc., to make bimonthly statements of his transactions, to pay the bills, and thereafter to submit the vouchers to the owner. All of these things were done, and the record presents no question on the subject. The plaintiff agreed that the building would not cost in excess of $428,686. It was also agreed that changes might be made when "authorized by a written order from said architect." It was further agreed that the compensation of the plaintiff would be $24,000; "that, should the architect at any time during the progress of the work require and order any alterations, deviations from, additions to, or omissions from the work shown in said plans and specifications, the same shall in no way injuriously affect or make void this contract, but the difference in value for work or materials omitted shall be deducted from the aggregate total of said contractor's estimate by a fair and reasonable valuation, and said estimate shall be deemed to be modified accordingly; and the value of any additional work or materials required shall be agreed upon between the contractor and the architect before such additional work or material is furnished, and the agreed value thereof shall be added to the aggregate total of said contractor's estimate by a fair and reasonable valuation, and said estimate shall be deemed to be modified accordingly. Such agreement for omissions from or additions to the work shall state also any change in the time of completion as herein set forth which is to be granted by reason thereof. The contractor further agrees that any excess of said cost over the contractor's estimate up to the amount of half of the total compensation to be paid the contractor shall be charged to and be borne by the contractor and offset against the final payment of the contractor's compensation hereinabove referred to." Numerous changes were made. Some of the changes constituted omissions and some were additions. At no time did the architect issue a written order, but the orders were all oral, and at no time did the architect and the contractor agree on the valuation of an item to be omitted or the valuation of an addition to be made. At no time did they agree on the allowance to be made for the performance of the change so ordered. The contract contained a provision that the building should be completed by May 15, 1924, and for certain penalties if the building was not completed within that time. It also provided for a bonus in favor of the contractor for each day if the building was completed before May 15, 1924. All payments were made by the owner down to the date that the last payment fell due. At that time a dispute arose as to what was the liability of the owner. As the parties failed to agree, the plaintiff commenced this action a short time after the owner had recorded the notice of completion.

The plaintiff pleaded his case in three different counts: (1) On the contract for the balance of the agreed price stated in the contract; (2) for moneys laid out and expended; and (3) for the reasonable value of services performed and material furnished. The defendant answered, and a trial was had in the trial court before the court sitting with a jury. The jury returned a verdict in favor of the plaintiff in the sum of $27,103.60.

That amount included $16,000 of the $24,000 alleged to be unpaid, and $9,040.22 for moneys laid out and expended, together with interest on those two items. The defendant paid to the plaintiff $14,168.01 under a stipulation protecting the rights of both parties. From a judgment entered on the verdict, the defendant has appealed. The appeal presents the question what sum, if any, should have been charged against the plaintiff by reason of an alleged excess of the total cost of construction. That question is presented under six different attacks.

The defendant requested, and the trial court refused to give, two instructions as follows:

> "III. By the contract there was an estimate made by the plaintiff that the entire cost of labor and material necessary for constructing the Miramar Hotel Annex in the manner contemplated by the plans and specifications attached to said contract would not exceed the sum of $428,686.00. In said contract is a provision that, if the said cost exceeds the amount of said estimate, then the plaintiff must forfeit the amount of the excess up to the amount of one-half of the contract compensation, that is, to the amount of $12,000. Changes in the manner of doing the work were made after the contract was signed and recorded by the omission of some work and by the addition of other work. The contract provides for such changes. You are to decide whether the cost of doing the work of constructing the Miramar Hotel Annex was increased or diminished by these changes for the purpose of deciding whether or not the defendant should be released from paying any part of the compensation provided for in the contract. To determine this, the difference in value for work or materials omitted shall be deducted from the aggregate total of the contractor's estimate by a fair and reasonable valuation and the value of any additional work or materials shall be added to the aggregate total of the contractor's estimate by a fair and reasonable valuation to determine the modified estimate under change made. The difference between the modified estimate and the entire cost of the work will determine whether or not and to what extent the cost of the work has exceeded the estimate. If you find after deducting omissions from the contract estimate and adding additions to it the cost of the entire work does not exceed the amount of the estimate so modified, then there will be no deduction made from the said unpaid portion of the contract compensation.
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> "IV. If you find after deducting from the estimate the value of omissions and adding to the estimate the value of the additions that the cost of the work exceeds the amount of the estimate so modified, then there is to be deducted from the $16,000 remaining unpaid as part of the contract compensation the amount of the excess of the cost over and above such modified estimate to an amount not exceeding $12,000."

[1] The trial court did not err in refusing either instruction. The third instruction told the jury to subtract from the contractor's original estimate, $428,686, the "fair and reasonable valuation" of the things omitted. The instruction then told the jury to add to the remainder the "fair and reasonable valuation" of the additions that were made. The contract provided what should constitute the evidence; namely, the contractor and the architect should first agree on the amount of an addition and the amount so agreed upon should be inserted in a written order before any change was made. It is an admitted fact that such agreements and such orders were never made.

[2] Instruction IV was properly refused because there was no evidence before the jury which would enable the jury to apply the instruction as worded. If it be said that the record shows some evidence of the actual cost of the additions and that the actual cost is some evidence of the "fair and reasonable value," the answer is that the contract ex industria appointed the contractor and the architect as the valuers and under the undisputed record they never made the valuation. It follows that the trial court did not err in refusing to instruct the jury to apply the rule stated in the contract when the parties by their actions had precluded either party from producing the data which constituted the evidence specified in the contract.

[3] The defendant then complains because the trial court did instruct the jury as follows:

> "If you find that the total cost of the work provided for by the contract was increased—that is, the work originally provided for by the contract—if you can separate that and find that the cost of that work was increased, then you should deduct that increase but not exceeding $12,000, from plaintiff's compensation, *unless you find that the guaranty clause of the contract has been waived by agreement or dealings of the parties.*" (Italics defendant's.)

The defendant's principal objection to the instruction is addressed to the part which he has placed in italics. He earnestly contends there is "absolutely no evidence anywhere in the case of a waiver by the defendant of the guaranty clause of the contract." In this he is certainly mistaken. He admits that his architect and the contractor from the very beginning failed to make "fair and reasonable valuations" before changes were ordered; that numerous changes were ordered; that some changes were of omissions and some changes were for additions; and that no written orders were made. He admits, as, indeed, he must, that these acts excused the plaintiff, at the time of the trial, from producing the written orders. But those written orders were the evidence designated in the contract by the use of which the parties were thereafter to determine what, if any, liability had arisen on the guaranty. The question of waiver or nonwaiver was the principal question litigated in the trial court. The trial court instructed thereon. Unquestionably the jury, at least in part, rested its verdict thereon. This court may not disturb the judgment under such circumstances. Cavanagh v. Keplinger (Cal. Sup.) 266 P. 287, is directly in point and involved a similar set of facts.

[4] In his third point the defendant contends that the evidence is insufficient to show that the plaintiff was entitled to any greater compensation than $12,000. He states that the point involves a reference to his contentions under points 1 and 2. Without repeating, we think we have made it clear that the evidence did not show that the plaintiff had constructed the building at an increased cost in such a manner as to authorize any deduction whatever from $24,000, the compensation provided in the written contract. Nevertheless we will state our views in a slightly different manner. The contract provided that the compensation of the plaintiff would be $24,000. It further provided how, under certain circumstances, that compensation should be diminished. Turning to defendant's proposed instructions III and IV, it is clear that it was and is the contention of the defendant that the contract provided in effect that at the final settlement the compensation of the plaintiff would be ascertained as follows: From the total cost of the building deduct the original estimate as modified by the changes made in the manner stated in the contract and thus ascertain the excess, if any, over such estimate; from $12,000 deduct of the excess not more than $12,000; and, if there is a remainder, the plaintiff is entitled to it. The contract, when introduced, made a prima facie showing as to the amount claimed by the plaintiff, $24,000. But there was no evidence from which we can obtain the data to deduct any sum, or sums, therefrom except $8,000, which it is admitted had been paid. The defendant contends that the trial court erred in denying his motion for a new trial. In presenting that point we undertand that he but emphasizes the foregoing points. For the reasons already stated, this point is without merit.

[5] Over the objection of the defendants, the plaintiff testified that the reasonable value of his services was $47,561.96. As there was a written contract fixing an agreed value, the defendant asserts that this ruling was error. The point is not well taken. As the contract had been fully performed, the plaintiff was within his rights when he inserted as the third cause of action a common count. Castagnino v. Balletta, 82 Cal. 250, 258, 23 P. 127. The evidence objected to was directly and clearly responsive to the allegations contained in that cause of action. As we have shown above, the parties had made many changes in their contract, but nevertheless they had proceeded to execute it. Under well-established rules the contractor was entitled to the reasonable value of his services and not the value stated in the contract, from which the parties had departed. Naylor v. Adams, 15 Cal. App. 548, 556, 115 P. 335. Furthermore, the verdict of the jury showed on its face that the jury did not award the plaintiff any sum not authorized by the express terms of the contract.

[6] The last point made is that the trial court erred in allowing the plaintiff to give testimony regarding the cost of apparatus for supplying steam heating as distinguished from gas heating, because, as the defendant contends, the contract covered the subject. If we had been in a position to uphold the defendant in his contentions regarding the guaranty, the point now under consideration would be material. However, in view of what is said above regarding the acts of the parties in waiving certain provisions of the contract, this point is wholly immaterial. It is admitted that gas heating was provided for in the contract, that the apparatus has been installed, and that the defendant is liable for the cost. It is not disputed but what steam-heating apparatus was also installed, and the sole question regarding that matter is as to whether the cost of the steam-heating apparatus increased or decreased the cost over the sum as estimated.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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92 Cal. App. 417

PEOPLE v. RAY. (Cr. 1614.) ★

District Court of Appeal, Second District, Division 2, California. June 4, 1928.

Hearing Denied by Supreme Court Aug. 2, 1928.

1. Automobiles ⚷355(6)—Evidence held to sustain conviction for operating automobile on public highway while under influence of liquor (Motor Vehicle Act, § 112).

Evidence in prosecution for operating an automobile upon a public highway while under the influence of intoxicating liquor in violation of Motor Vehicle Act, § 112 (St. 1927, p. 1436 [Deering's Consol. Supp. 1925–1927, Act 5128]) *held* sufficient to sustain conviction.

2. Criminal law ⚷1175—Verdict finding defendant guilty of violation of Vehicle Act "a felony," but recommending imprisonment in county jail, held not cause for complaint by defendant (Motor Vehicle Act, § 112).

Verdict, in prosecution for operating an automobile on a public highway while under the influence of liquor, finding defendant guilty of violation of Motor Vehicle Act, § 112 (St. 1927, p. 1436 [Deering's Consol. Supp. 1925–1927, Act 5128]), a felony as charged in count 2 of the information and recommending imprisonment in county jail, *held* not ground for complaint by defendant, in view of Pen. Code, § 17, on ground that verdict was defective as not complying with provision of act requiring that jury shall recommend punishment and limiting sentence to such recommendation.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

3. Criminal law ⚷992—Crime designated as felony in verdict shall be deemed "misdemeanor" after judgment imposing punishment other than imprisonment in state prison.

In any case where term "felony" is written into a verdict through inadvertence or otherwise, it shall be deemed a misedmeanor for all purposes after judgment imposing a punishment other than imprisonment in state prison.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Misdemeanor.]

4. Criminal law ⚷992—Sentence of one year in county jail pursuant to recommendation of jury finding defendant guilty of violating vehicle act held proper; "recommend"; "assess"; "declare" (Motor Vehicle Act, § 112).

Sentence of one year in the county jail pursuant to verdict finding defendant guilty of violation of section 112, Motor Vehicle Act (St. 1927, p. 1436 [Deering's Consol. Supp. 1925–1927, Act 5128]), a felony, and recommending imprisonment in county jail, *held* fully within recommendation of the jury and the court's discretion, since provision of the act limiting sentence to recommendation of jury only requires that judge may not impose a greater sentence than that recommended by jury; the word "recommend" meaning to advise or counsel and not expressing finality such as words "assess" or "declare."

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Declare; First and Second Series, Assess; Recommend.]

Works, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Stanford Ray was convicted for operating an automobile upon a public highway while under the influence of intoxicating liquor, and he appeals. Affirmed.

C. B. Conlin and E. R. Simon, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant was charged by information, filed by the district attorney of Los Angeles county, consisting of two counts, with having violated the Motor Vehicle Act (St. 1923, p. 517), in that while driving an automobile in said county he collided with another vehicle, causing personal injury to the driver thereof, and did then and there fail, neglect, and refuse to stop and render aid; and also that he drove and operated said automobile upon a public highway while under the influence of intoxicating liquor. Appellant was convicted of the latter charge, and appeals from the judgment and an order denying his motion for new trial.

It is strenuously urged that "there was no evidence of any kind or description that the defendant was operating the motor vehicle, to wit, the Cadillac roadster, at the time of the accident while in an intoxicated condition, or while under the influence of intoxicating liquor," as defined by section 112 of the Motor Vehicle Act (Stats. 1927, p. 1436; Deering's Consol Supp. 1925–1927, Act 5128). The portions of said section here applicable read as follows:

> "It shall be unlawful for any person * * * who is under the influence of intoxicating liquor * * * to drive a vehicle on any public highway within this state.
>
> "Any person violating the provisions of this section shall upon conviction be punished by imprisonment in the county jail for not less than ninety days nor more than one year or by imprisonment in the state prison for not less than one nor more than three years, or by a fine of not less than two hundred dollars, * * * nor more than five thousand dollars * * *, and upon every verdict of guilty under this section, the jury shall recommend the punishment and the court in imposing sentence shall have no authority to impose a sentence greater than that recommended by the jury."

It is conceded that on September 25, 1927, at about 4 o'clock a. m., Melvin W. Metcalf, with three companions, was driving a Ford coupé in a southerly direction on Lincoln boulevard, in the city of Santa Monica, and that appellant was at the same time driving a Cadillac car in a northerly direction upon said boulevard, he also having three passengers; that when Metcalf reached a point south of the intersection of Lincoln and Pico boulevards, the two machines collided, appellant's car running into the left side of the Ford; that because of the crowded condition of the latter machine, Metcalf permitted his left foot to hang outside the door, which was partly open, and at the impact of the automobiles his foot was severed from the leg.

[1] It appears from the testimony of various witnesses called by the people that immediately after the accident Ray alighted, stating that he could not drive his machine further because it was damaged, and that he assisted in summoning an ambulance; that during his conversations with the witnesses they smelled wine or liquor on his breath. Metcalf, and others who were riding with him, swore that they noticed the headlights of a machine approaching, and that almost instantly it swerved to the left and sideswiped the Ford, turning it completely around. Appellant and one of his witnesses testified that Ray had previously taken two or three drinks of wine only, but a detective who removed appellant from the Georgia street police station, at about 10:30 a. m. of the same day, stated that he asked Ray how he was feeling, to which the latter replied that he was not feeling well, and that he talked and staggered "like a drunken man," and plainly smelled of liquor, and admitted that although informed that Metcalf had been killed, he did not remember very much about the accident. A Santa Monica police officer searched the Cad-

illac while Metcalf lay on the ground awaiting an ambulance, and testified that he found a bottle of gin and a pint bottle containing "bootleg corn liquor" in appellant's machine. It was testified that Ray talked as though he had been drinking some kind of intoxicating liquor; that "he was thick-tongued like he had a mouthful of mush; * * * he could not bring his speech out clear." It may well be that the jury concluded from the defendant's inability to control his automobile, and from his breath, speech, and unsteady walk, as well as his lapse of memory as to the most important event of the day, that he was under the influence of liquor while driving, and was intoxicated at the time of the accident. We cannot say as a matter of law that the jury were not warranted in so finding, and it appears from the record that there is ample evidence to support the verdict and judgment.

The verdict returned by the jury reads as follows:

> "We, the jury in the above-entitled action, find the defendant guilty of violation of section 112, California Vehicle Act, a felony, as charged in count II of the information, and recommend imprisonment in the county jail."

[2, 3] It is contended that this verdict is defective for the reason that it does not comply with the provision of said act requiring that "the jury shall recommend the punishment," and limiting the sentence to such recommendation. Section 17 of the Penal Code provides that a felony is punishable by imprisonment in the state prison, and that every other crime is a misdemeanor. The jury in the instant case recommended imprisonment in the county jail, and the court pronounced sentence in accordance therewith, and fixed the period of imprisonment at one year. We think appellant cannot complain of the fact that while the jury may have deemed his offense of such a serious nature as to be classed as a felony, they recommended, and the court administered, the lesser degree of punishment. It is not impossible that the term "felony" was written into the verdict through inadvertence, but, however that may be, it is the established rule in this state that in any such case "it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison." People v. War, 20 Cal. 117; Doble v. Superior Court, 197 Cal. 556, 241 P. 852.

[4] It is clearly the intent of the statute that the judge shall have some discretion, for in pronouncing sentence the only curtailment of his authority is that he may not impose a greater sentence than that recommended by the jury. In this instance, had the jury specifically recommended a term of one year, of course the situation here presented would not have arisen. But its members must be presumed to have known both their own authority and the punishment which might be imposed, and the effect of this verdict is to recommend imprisonment in a county jail for a term not more than the maximum provided by the statute, to wit, for a period of one year. The sentence pronounced was, therefore, fully within the recommendation of the jury and the court's jurisdiction. But appellant insists that the language "shall recommend the punishment," coupled with the provision of the same section that a jail sentence shall be from 90 days to one year, requires that the jury fix the length of term, and that, having failed to do so in this case, the trial court had no authority to pronounce sentence, that the jury may have intended that the minimum penalty be inflicted, whereas the court was left with a discretion to direct that appellant be confined for any length of time from 90 days to one year, and did in fact pronounce sentence of imprisonment in the county jail for one year. No authorities are cited, and we have been unable to find any passing upon the exact question here presented, which is: Was it the legislative intent in imposing upon juries the power to "recommend the punishment" that they merely determine the maximum by stating whether time be served in the county jail or in the penitentiary or the punishment shall be payment of a fine, or, that they must exercise the discretion usually vested in the court and decide what sentence shall be imposed by specifying the length of the term? We think that this language of section 112 of the Motor Vehicle Act is meant to be used in the sense of character of punishment. It states that: "Any person violating the provisions of this section shall upon conviction be punished by imprisonment in the county jail," or by fine, "or by imprisonment in the state prison," or fine, "and upon every verdict of guilty under this section, the jury shall recommend the punishment and the court in imposing sentence shall have no authority to impose a sentence *greater* than that recommended by the jury." Had it been intended that the jury should fix the exact term of imprisonment, it seems clear that the provision would have so stated by depriving the court of "authority to impose a sentence *other* than that recommended," whereas a discretion now remains with the trial judge to pronounce a sentence within that recommended by the jury. Had the intent been as contended by appellant, it would seem, too, that other and more appropriate terms would have been employed to indicate it. For example, it might have provided that the jury "fix," or "declare," or "assess" the punishment; or the language used in section 190 of the Penal Code might well have been employed to the effect that the punishment be "at the discretion of the jury." The word "recommend" is certainly not apt if it was the intention of the Legislature to commit to the jury the duty and authority of fixing the exact punishment. It means to advise or counsel, and is not a word expressing finality such as the words

"assess" or "declare," used in the statutes of a number of other states where the right to fix the exact punishment upon conviction of crime has been given to the jury. Discretion of this nature is vested in the trial court in all cases except when otherwise expressly provided by the Legislature. To construe this provision otherwise would be strained and, we think, contrary to the legislative intent.

The judgment and order denying a new trial are affirmed.

I concur: THOMPSON, J.

WORKS, P. J. I dissent. Section 112 of the Motor Vehicle Act declares that the jury shall recommend *the* punishment, and under its provisions punishment may take on any one of three forms: (1) Confinement in the county jail for a fixed period; (2) confinement in the state prison for a fixed period; (3) fine in a fixed amount. *The* punishment, therefore, in my opinion, is not recommended if the verdict contemplates only a confinement in either of the two places, without specifying a period of time, or a fine without specifying an amount.

It is provided in the section that the court "shall have no authority to impose a sentence greater than that recommended by the jury." It is obvious that in imposing "sentence" the court must either order imprisonment for a stated term, either in the county jail or in the state prison, or must order a fine in a stated amount. The statute provides a range within which imprisonment may be ordered, or a fine imposed. Imprisonment in the county jail is to be "not less than ninety days nor more than one year"; in the state prison "not less than one nor more than three years". A fine may be "not less than $200 nor more than $5,000." It will be observed how wide a discretion is left to the court, under the construction placed upon the statute by the majority opinion, after the jury has recommended *the* punishment. This is particularly to be noted in case a fine is recommended. The court may then impose a fine as low as $200, practically a nominal sum when placed beside the comparatively enormous amount of $5,000, an amount 25 times as great as the minimum which may be named. Under such circumstances it seems to me obvious that the jury does not recommend *the* punishment when it prescribes merely an imprisonment, either in the county jail or in the state prison, or prescribes merely a fine.

I think the Legislature intended the words, "a sentence greater," in that part of the section limiting the power of the court, to connect with and to relate principally to the words "less" and "more" where they appear three times in the statute. I think, finally, under the entire language of the enactment, that a jury fails to recommend *the* punishment unless it prescribes a maximum period of confinement in the county jail or in the state prison, or a maximum fine. If section 112 were intended to operate as declared in the majority opinion, it seems that the Legislature would have provided that the jury should recommend whether the punishment be by confinement in the county jail, or in the state prison, or by fine. The jury is, instead, required to recommend *the* punishment.

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92 Cal. App. 230

HANLON DRYDOCK & SHIPBUILDING CO. et al. v. SOUTHERN PAC. CO. (Civ. 6051.)

District Court of Appeal, First District, Division 2, California. May 28, 1928.

1. Appeal and error 🔑979(2)—Granting of new trial for insufficiency of evidence is conclusive, on appeal, in absence of abuse of discretion.

On appeal from order granting motion for new trial on ground of insufficiency of evidence to sustain verdict, trial judge's action is conclusive on appellate court, in absence of abuse of discretion.

2. New trial 🔑65—Trial judge must weigh both parties' evidence and grant new trial, if not legally satisfied with decision.

On motion for new trial, the trial judge must weigh and consider the evidence of both parties and grant a new trial, if not legally satisfied with the decision.

3. Appeal and error 🔑948—On appeal from order granting new trial for insufficiency of evidence, appellant must show abuse of discretion.

On appeal from order granting new trial on ground of insufficiency of evidence to sustain verdict, it is incumbent on appellant to show that trial judge abused his discretion, which can rarely be done except by showing that there is no evidence to support verdict for respondent.

4. Appeal and error 🔑757(3)—Appellant railway company, not printing in brief evidence explaining unreasonable delay in moving train from street crossing, showed no error in granting plaintiffs' motion for new trial of action for resulting loss by fire (Code Civ. Proc. § 953c).

Railway company, not printing in its brief or appended supplement evidence explaining its unreasonable delay in removing train from street crossing, as required by Code Civ. Proc. § 953c, on appeal taken on typewritten transcript from order granting plaintiffs' motion for new trial of action for damages because of fire department's inability to reach fire, showed no error in such respect.

5. Railroads 🔑222(3)—Unexplained blockading of street crossing by railroad train is negligence.

The unexplained blockading of a street crossing by a railroad train is negligence on the part of the railroad company.

6. Railroads 🔑222(5)—Evidence held to make out prima facie case of negligence in leaving train across street, preventing fire department from reaching fire.

Plaintiff's evidence, in action against railway company for loss by fire because of fire department's inability to reach it, due to blockading of street crossing by train, *held* sufficient to make out prima facie case of negligence.

7. Railroads 🔑222(5)—Evidence held to show that unexplained blockading of street crossing by train was proximate cause of loss by fire.

Evidence *held* to show that defendant railway company's unexplained blockading of street crossing by train was proximate cause of loss by fire, which firemen were unable to reach promptly with their apparatus.

8. Railroads 🔑222(3)—Plaintiff's failure to provide better fire-fighting apparatus and employees and dumping of rubbish where fire started held not contributory negligence barring recovery of damages from railroad blocking street crossing with train.

Plaintiff corporation's failure to provide better fire-fighting equipment and employees experienced in fighting fires and its dumping of rubbish in yard at point where fire started *held* not, as matter of law, contributory negligence barring recovery of damages from railway company negligently blockading street crossing with train, thereby preventing firemen from reaching fire.

9. Negligence 🔑136(9)—Contributory negligence is fact question, when reasonable minds might differ.

When the question of contributory negligence is one upon which reasonable minds might differ, it is a question of fact and not one of law.

10. Damages 🔑6—That extent of damage, proximately caused by acts complained of, cannot be accurately measured does not relieve guilty party.

When acts complained of are proximate cause of damage suffered, the guilty party is not to be relieved merely because the extent of the damage cannot be accurately measured.

11. Railroads 🔑222(5)—Damages by fire, which had not reached property lost when firemen tried to cross railroad tracks blocked by defendant's train, held recoverable as against contention that they were speculative, contingent, and remote.

Evidence that fire was confined to rubbish pile in yard and had not reached building in which property lost was stored, when firemen endeavored to cross railroad tracks blocked by defendant's train, *held* to warrant recovery of damages sustained, as against contention that they were speculative, contingent, and remote, on theory that entire loss could have been prevented and damages easily ascertained had street not been blocked.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by the Hanlon Drydock & Shipbuilding Company and others against the Southern Pacific Company. Verdict for defendant, and, from an order granting plaintiffs' motion for a new trial, defendant appeals. Affirmed.

Ford, Johnson & Bourquin, of San Francisco, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondents.

NOURSE, J. Plaintiffs sued for damages alleged to have been caused by defendant's negligence in permitting one of its freight trains to remain standing an unreasonable length of time across the public streets leading into the plant of the Hanlon Drydock & Shipbuilding Company located on the water front in East Oakland. The damage to plaintiffs is alleged to have resulted from a fire which broke out in this plant and which could not be reached by the fire department because the only means of ingress were obstructed by defendant's train. The cause was tried before a jury, which returned a verdict for the defendant. The trial judge granted plaintiff's motion for a new trial upon the grounds of insufficiency of the evidence and that the verdict was against law. Defendant has appealed from this order upon a typewritten transcript. As the Hanlon Drydock & Shipbuilding Company is the real party in interest, we will hereafter refer to it as the plaintiff and respondent.

[1-3] In appeals of this nature, where a new trial has been granted on the ground of insufficiency of the evidence, the action of the trial judge "is conclusive in the appellate court, unless there has been an abuse of discretion" (Daniels v. McGuire, 52 Cal. App. 188, 189, 198 P. 421), because the trial judge "must weigh and consider the evidence of both parties and determine for itself the just conclusion to be drawn from it; and it is the duty of such court to grant a new trial if not legally satisfied with the decision" (20 Cal. Jur. 111). When, therefore, an appeal is taken from an order granting a new trial on this ground, it is incumbent upon the appellant to show that the trial judge abused the discretion lodged with him, and this can rarely be done except by showing that there is no evidence which would have supported a verdict for the respondent.

[4-6] Assuming this burden, the appellant contends that there is no evidence of negligence on its part, that the alleged acts of negligence were not the proximate cause of any of respondent's loss, that the respondent was guilty of contributory negligence as a matter of law, and that its damage was purely speculative. At the outset it is pertinent to

say that when an appeal is taken upon a typewritten transcript the appellant is required to print in its brief, or in a supplement appended thereto, such portions of the record as it desires to call to the attention of the appellate court. Section 953c, Code Civ. Proc. The appellant here has made no pretense of meeting the demands of the statute, but merely states that there is no evidence to show negligence on the part of the engineer, or conductor of the train, or of any other employee of the company. The respondent points out that the undisputed evidence is that at about 8:40 p. m. of September 6, 1923, the freight train, containing 44 cars and measuring about 1,800 feet in length, left the yards of the appellant in West Oakland, being pulled by a regular passenger engine; that, before it had proceeded a mile from the starting point, the engineer discovered that the steam pressure was dropping and that fire was flashing "from the firebox into the cab"; that though he knew that "something was wrong" he continued on his way for more than a mile to Ninth avenue at a continually decreasing speed until the train stopped because the steam pressure was so low that the brakes were applied automatically and the engine could not move the cars; that the engineer thereupon detached the engine from the train, ran the engine into the roundhouse, and left the cars standing without an engine for a period of an hour and three-quarters; that these public thoroughfares—Fifth avenue and Ninth avenue—were thus obstructed, shutting off all means of ingress and egress from the plant of respondent and of other industrial concerns in the vicinity; that, though the engineer, conductor, and brakeman all telephoned to the offices of appellant, no attempt was made to move the train, or to "break" it at either street crossing, until after the company was notified that a fire had broken out in respondent's plant. In addition to this undisputed evidence, the respondent argues that the court and jury should take judicial notice that for a distance of about half a mile the right of way of appellant was not intersected by any public street crossing, and from this it is said that negligence might be inferred from the failure of the engineer to stop in this space when he knew that his engine was out of order and that it was gradually failing to pull the train. Attention is also directed to the rules of the appellant company which prohibit leaving trains standing upon a street crossing, and from this it is argued that appellant was negligent both in not stopping before reaching Ninth avenue, and in not breaking the train at these crossings until the lapse of an hour and three-quarters.

There is ample authority for the rule that the unexplained blockading of a street crossing by a railroad train is negligence on the part of the railroad company. So. Ry. Co. v. Floyd, 99 Miss. 519, 55 So. 287, 288; Central of Georgia Ry. Co. v. Chambers, 183 Ala. 155, 62 So. 724, 727; Chicago, B. & Q. R. Co. v. Roberts, 3 Neb. (Unoff.) 425, 91 N. W. 707, 709; Matoza v. S. P. Co., 59 Cal. App. 636, 640, 211 P. 252; Houren v. Chicago, M. & St. P. Ry. Co., 236 Ill. 620, 86 N. E. 611, 613, 20 L. R. A. (N. S.) 1110, 127 Am. St. Rep. 309. The respondent may safely rely on this rule, having shown sufficient evidence to make out a prima facie case of negligence. The appellant, not having printed the evidence in explanation of its unreasonable delay in removing the obstruction, has failed to show error in this respect.

[7] The appellant argues that the acts complained of were not the proximate cause of any of the damage to the respondent. Here again the appellant has failed to print the evidence upon which it relies. The respondent directs our attention to the evidence showing that two companies of firemen responded to the alarm, that they were unable to cross the railroad tracks with their apparatus, and that, after some delay, they climbed through the train and went on foot to respondent's plant, where they endeavored to control the fire with the inadequate hose on the premises. It also appears that after a half hour's delay the fire apparatus was brought up and the fire was then quickly extinguished. Expert witnesses testified that but for this delay the fire could have been extinguished sooner and the greater part of respondent's property could have been saved. These facts bring the issue within the rule of Houren v. Chicago, M. & St. P. Ry. Co., 236 Ill. 620, 86 N. E. 611, 614, 20 L. R. A. (N. S.) 1110, 127 Am. St. Rep. 309.

[8, 9] The issue of contributory negligence is argued on the theory that respondent should have provided better fire-fighting equipment and employees experienced in fighting fires. The suggestion is also made that respondent was negligent in dumping rubbish in the yard at the point where the fire started. The appellant does not cite any authorities to support its argument that such acts constitute contributory negligence as a matter of law. The rule is settled that, when the question of contributory negligence is one upon which reasonable minds might differ, it is a question of fact and not one of law. Erdevig v. Market St. Ry. Co. (Cal. Sup.) 264 P. 252.

[10, 11] Finally, it is argued that respondent could not recover in any event because the damages it suffered were speculative, contingent, and remote. When the acts complained of are the proximate cause of the damage suffered, the guilty party is not to be relieved merely because the extent of the damage cannot be accurately measured. 17 Cor. Jur. 756, 759; Learned v. Castle, 78 Cal. 454, 461, 18 P. 872, 21 P. 11. It has been said

that, where the circumstances are such that an exact computation of the damages cannot be made:

> "The approved practice is to leave it to the good sense of the jury, as reasonable men, to form from the evidence the best estimate that can be made under the circumstances, as a basis of compensatory damages for the actionable injury." Jenkins v. Pennsylvania R. Co., 67 N. J. Law, 331, 334, 51 A. 704, 705, 57 L. R. A. 309.

Here the evidence tended to prove that when the firemen endeavored to cross the railroad tracks the fire was confined to a rubbish pile in the yard and had not reached the building in which the property lost was stored. It is respondent's contention that if the street had not been blocked by appellant the firemen would have been able to prevent all this loss, and hence that the damages could have been easily ascertained.

The order is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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92 Cal. App. 69

HUMPHREYS et al. v. CITY AND COUNTY OF SAN FRANCISCO et al.

(Civ. 6069.)

District Court of Appeal, First District, Division 2, California. May 21, 1928.

1. Municipal corporations 🔑721(1)—Where board of supervisors transferred land previously held as hospital land to park commissioners for park, park could be used generally for "park" purposes.

Where lands embraced within boundaries of Duboce park were originally part of pueblo lands of city of San Francisco, and such lands, by ordinances ratified by St. 1858, p. 52, and confirmed by Act Cong. July 1, 1864 (12 Stat. 333), were dedicated to public use for uses of hospital, but lands were not used for hospital purposes, and board of supervisors, under power conferred by city charter confirmed by Legislature by St. 1899, p. 241, transferred such land to board of park commissioners to be set aside as a park, such park is not limited to any particularly specified use, but to use generally for park purposes; a "park" being a pleasure ground, a place of enjoyment and recreation, and for public generally.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Park.]

2. Municipal corporations 🔑513(7)—Evidence supported finding that tunnel opening in park did not obstruct free use of park.

In action to enjoin collection of assessments for construction of tunnel through, over, and on portion of park, evidence *held* to support finding that area to be occupied by portal and approach to tunnel was generally unfrequented by visitors to park, and that construction and operation of such portal would not obstruct free and comfortable use and enjoyment in customary manner of park or any portion thereof.

3. Municipal corporations 🔑721(1)—Public use of small area of park for tunnel opening held not an unlawful use.

Public use of small area of park, which part was used infrequently by public, for opening of tunnel, to provide way of rapid transit between residential part of city and down town section, *held* not to be so inconsistent with purposes for which park was dedicated as to constitute an unlawful use thereof.

4. Constitutional law 🔑251—"Due process of law" requires orderly proceeding adapted to nature of case in which citizen has opportunity to be heard and protect rights (Const. U. S. Amend. 14).

"Due process of law" under Const. U. S. Amend. 14, requires an orderly proceeding adapted to nature of case in which citizen has had an opportunity to be heard and to defend, enforce, and protect his rights.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

5. Municipal corporations 🔑513(7)—Objectors had burden of showing errors in decision of board of supervisors assessing property for tunnel, except as shown on face of record.

In action to enjoin collection of assessments for construction of tunnel, burden of proof rested on objectors to show errors in decision of board of supervisors assessing lands, except in so far as they were shown on face of record.

6. Municipal corporations 🔑493(6)—Board of supervisors' conclusions regarding assessments for tunnel were conclusive, except as against attack for fraud or mistake.

No appeal lying from finding of board of supervisors regarding assessment of lands for construction of tunnel in city, their conclusion was final and conclusive, except as against attack on ground of fraud or mistake.

7. Municipal corporations 🔑513(7)—Finding that lots excluded from assessment for tunnel would not be benefited held warranted.

Trial court's finding that there would be no benefits to lots excluded from assessments for construction of tunnel *held* warranted from examination of face of record showing that such conclusion was reached by board of supervisors after due notice of protest and hearing and from expert testimony admitted at trial; court being at liberty to adopt views of either of two experts.

8. Constitutional law 🔑290(1)—Assessments for tunnel held not levied on fundamentally incorrect basis or in disregard of actual benefits so as to constitute taking of property without due process (Const. U. S. Amend. 14).

Assessments for construction of tunnel through city *held* not to be levied on fundamentally incorrect basis or to be arbitrary and in disregard of actual benefits so as to constitute taking of property without due process of law, in violation of state Constitution and Const. U. S. Amend. 14.

9. Municipal corporations 🔑449(2)—Assessment for tunnel held not invalidated by participation of new members of board of supervisors acting in judicial or quasi judicial capacity, where more than necessary majority of old board voted for resolution.

Assessment for construction of tunnel *held* not invalidated by participation of new members of board of supervisors acting in judicial or quasi judicial capacity, where three more than necessary majority of old board voted for resolution levying assessment, and at least one hearing was had before new board prior to its final action, and new members of board had more than year for investigation and consideration before final vote was cast.

10. Municipal corporations 🔑513(7)—In action to enjoin collection of assessments for tunnel, evidence regarding assessment of property in other tunnel proceedings and proposed assessment, if tunnel had gone through to other lands, held properly excluded.

In action to enjoin collection of assessments for construction of tunnel through parks, evidence that in other tunnel proceedings down town property was assessed, and that report regarding tunnel connecting approximately same sections of city by different route and location recommended that certain lands should be assessed *held* properly excluded, since each project presents different set of facts.

11. Appeal and error 🔑1051(1)—If questions called for conclusions of law, error in permitting testimony was harmless, where facts were before court.

In action to enjoin collection of assessments for construction of tunnel for railroad purposes permitting witnesses to testify that portion of parks to be used for railroad purposes would in no way interfere with use of parks for purposes for which they were dedicated, if error, because questions called for conclusions of law, *held* harmless, where facts were before court.

12. Appeal and error 🔑1058(2)—Excluding plaintiff's witness's testimony on question on which defendant's witness testified held harmless where plaintiff's witness subsequently testified regarding matter.

In action to enjoin collection of assessments for construction of tunnel, where defendant's witness was permitted to testify that exempted lands would not be benefited to same extent as lands on which assessments were levied, denying plaintiff's witness privilege of testifying on question *held* harmless, where he subsequently testified that lands excluded would be benefited in same way as adjoining property.

13. Witnesses 🔑280—Sustaining objection to cross-question which was argumentative and called for speculation held not error.

In action to enjoin collection of assessments for construction of tunnel, sustaining objection to question asked defendant's witness on cross-examination, "If this property had been owned by private individual which is now owned by city you would have assessed it, wouldn't you?" *held* proper, since question was argumentative, and called for speculation, and answer would have no material bearing on case.

14. Municipal corporations 🔑513(7)—In action to enjoin collection of assessments for tunnel, excluding testimony regarding sale of church lands and city school lands outside assessment district held not error.

In action to enjoin collection of assessments for construction of tunnel, evidence with reference to sale of church lands and city school lands outside assessment district *held* properly excluded.

Appeal from Superior Court, City and County of San Francisco; Walton J. Wood, Judge.

Action to enjoin collection of assessments for construction of Duboce tunnel by J. H. Humphreys and others against the City and County of San Francisco and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Treadwell, Van Fleet & Laughlin, of San Francisco, for appellants.

John J. O'Toole, City Atty., and Dion R. Holm, Asst. City Atty., both of San Francisco, for respondents.

LUCAS, Justice pro tem. By this action the ten parties plaintiff (appellants herein), residents and taxpayers of, and property owners in, the city and county of San Francisco, seek, on behalf of themselves and 1,700 other property owners, to enjoin the mayor and board of supervisors of said city and county from collecting assessments levied for the construction of a tunnel through Buena Vista Park, and through, over, and upon a portion of Duboce Park. Buena Vista Park lies on a high ridge of land separating that part of San Francisco lying easterly of the eastern portal of the proposed tunnel and generally known as the "down town section," and a residential part of said city lying west of the western portal of said tunnel and known as the "Sunset district." The purpose of the tunnel is to provide a way of rapid transit between these two sections of the city.

Proceedings were taken by the board of supervisors under the provisions of the so-called "Tunnel Procedure Ordinance," resulting in the assessments complained of. Authority for the enactment of this ordinance is found in certain charter amendments adopted by the electors of the city and county of San Francisco in December, 1912, and ratified by the state Legislature in 1913. Stats. 1913, at p. 1621. These amendments contain the following provisions relating to the construction of tunnels:

"Section 1. The board of supervisors are hereby empowered to order the construction of and construct any tunnel, subway or viaduct in, on, under or over any accepted or unaccepted open public street, avenue, lane, alley, place or court within the city and county, or any other land of the city and county. * * * The board of supervisors may, by an affirmative vote of at least twelve of its members, adopt an ordinance which may from time to time be revised or amended, providing a method of procedure for such improvement, work and assessment and for the ascertainment and payment of damages and for the manner in which protests against such assessments and damages awarded may be heard and determined, and for the manner in which such assessment may be collected, and paid and property delinquent thereunder may be sold, and for the procedure for fully and completely exercising the powers conferred in this section."

On the trial of the cause the court gave judgment against plaintiffs, and upheld the validity of the proceedings. From this judgment the appeal herein was taken.

Appellants raise four points on appeal, contending respectively that:

I. The tunnel, if constructed, will necessitate the unlawful use of lands now used by the people as public parks, and held by the city in trust for such purpose.

II. The assessments are either levied on a fundamentally incorrect basis or are arbitrary and in disregard of actual benefits, and in either case constitute the taking of property in violation of the state and federal Constitutions.

III. The assessments were not made by the same body which heard the protests, and the assessed landowners have never had a hearing before the board of supervisors which made the levy.

IV. The trial court, in excluding evidence offered by the plaintiffs, committed prejudicial error.

These questions will be discussed in the order stated.

In considering the question as to whether the construction of the proposed tunnel and its subsequent use as a street railway right of way would result in an unlawful use of a portion of the parks in, on, under, or over which the street cars would run, the following facts established by the evidence are important:

It is proposed that a street car line be constructed so as to enter Duboce Park on its easterly side, run a distance of 145 feet over the surface of the park to the commencement of a cut 16 feet wide and 220 feet long, varying in height from a fraction of an inch to 21 feet, where the tracks will then enter the tunnel proper through its eastern portal. Preparation for laying the tracks would necessitate the removal of a 16-foot strip of the 19-foot sidewalk and curb on the eastern boundary of the park, the removal of all lawn, shrubs and trees growing on a strip of land 16 feet wide by 365 feet in length, the obliteration of a portion of a 10-foot path across the proposed cut, the removal of the earth within the boundary of said cut, and the abandoning of at least that portion of the park occupied by the cut to exclusively railway uses. The tunnel proper would also be used exclusively as a street railway right of way. The portion of the park to be thus used is in the form of a narrow strip of land running along its southern boundary, constituting but a small fraction of the entire park area.

But little consideration need be given the situation which would exist in Buena Vista Park after the construction of the tunnel. At all points this tunnel will be entirely beneath the surface of the park at a depth ranging from 200 to 340 feet. The construction and use of this tunnel could not possibly interfere with the free or customary use of the park for any or all park purposes.

As to Duboce Park, however, conditions are, as pointed out above, different. An inquiry into the exact legal status of this park is therefore pertinent.

The lands embraced within its boundaries were originally part of the pueblo lands of the city of San Francisco. By virtue of certain ordinances passed by the common council of said city in 1885, ratified by the state Legislature on March 11, 1858 (St. 1858, p. 52) and confirmed by Act of Congress on July 1, 1864 (12 Stat. 333), these lands were dedicated to public use for the purposes of a hospital. City and County of San Francisco v. Sharp, 125 Cal. 535, 58 P. 173. That is to say, the lands were owned by the city and county of San Francisco "in trust for the use and benefit of the people of the state of California, and the inhabitants of the city and county of San Francisco, for the purposes of a public hospital." The lands, however, were never put to use for hospital purposes.

In 1897 a board of freeholders of San Francisco, elected pursuant to the provisions of section 8, article 11, of the state Constitution, prepared a charter for the city and county of San Francisco, which was ratified by the people in 1898 and confirmed by the Legislature in 1899 (Stats. 1899, p. 241). By this charter it was provided (article 2, chap. 2, § 1, subd. 31) that the board of supervisors shall have power "to transfer from one department of the city government vacant and unused lots of lands to another department." Acting under this authority, the board of supervisors, in the same year that the charter became effective, transferred the land previously held as hospital land, but thereafter known as Duboce Park, to the board of park commissioners.

On the subject of dedication the record is silent, except for a stipulation to the effect that on April 2, 1900, the board of supervisors passed an ordinance by which they named the lands in question Duboce Park, purported to set it apart as a park, and placed it under the jurisdiction of the park commissioners.

Article 14, § 1, of the charter of the city and county of San Francisco, provides that all the "parks and squares in the city and county, * * * shall be under the exclusive control and management of a board of commissioners, who shall be known and designated as park commissioners." Under the provisions of section 6 of said article the commission is given complete and exclusive control, management, and direction of the park, and exclusive right to erect structures thereon, but it is expressly provided therein that no part of said park may be leased to any person, company or corporation, nor shall any structures be erected thereon, by any one except the commissioners, and, further, that no structures shall be erected by the commissioners, "except it be within the objects and purposes for which said parks, squares, avenues and grounds were dedicated to the public." The park commissioners have continuously since April 2, 1900, exercised exclusive management and control over Duboce Park, and have expended money from park commission funds for its improvement and maintenance as a park. Since its improvement and maintenance as a park it has been used as such by the public.

[1] The terms of dedication of lands for park purposes and the manner of acquisition have an important bearing upon the uses to which such lands may be put. The rule, amply supported by cited authorities, is fairly expressed in 20 California Jurisprudence, p. 466:

> "A distinction is to be observed between cases where land for a public park or square was dedicated without special restriction and cases where the dedication was restricted to a particular purpose. Where the dedication was without restriction any usual proper and reasonable public use may be made of the park; but where a particular purpose was expressed the land must be used accordingly. This distinction is clearly apparent where, on the one hand, land has been dedicated for park purposes by a private individual, and where, on the other hand, the municipal corporation holds the full title to the land for public uses without restriction. Where title is in an individual the land must be used as directed by him. But when the municipality holds the title for public uses, without restriction, the legislative power may regulate the purposes for which the public may use the land, so long as such use is consistent with park purposes."

From the foregoing, it is apparent that the use to which Duboce Park, or any part thereof, may be put is not limited to any particularly specified use, but to use generally for park purposes. The language of the decisions seems to indicate that a park is a pleasure ground—a place of enjoyment and recreation, and for the public generally. Hall v. Fairchild-Gilmore-Wilton Co., 66 Cal. App. 615, 227 P. 649. It eliminates all idea of business or administrative uses, or enjoyment by a limited number of people.

Chief Justice Searls, in the case of People ex rel. Britton v. Park & Ocean R. R. Co., 76 Cal. at page 160, 18 P. 141, 143, ably discusses a situation existing in Golden Gate Park, probably one of the greatest places for recreation and enjoyment in any city, when, in 1888, it was sought to abate as a nuisance the steam railroad running across a portion of the park, and to enjoin its use and operation. He said:

> "A purpresture exists where one incloses or makes several to himself that which ought to be common to many.
>
> "The title to the Golden Gate Park under the several acts cited is in the city and county of San Francisco. But it is dedicated to the use of the public. The city holds it in trust for the public use. The right of the public is to have the free use and enjoyment of the park as such.
>
> "Whatever materially interferes with and unlawfully abridges this right of the public it is their right to have corrected.
>
> "The unlawful construction of a railroad, a statute, or any building upon the park is a purpresture. But every purpresture is not a nuisance. It may or may not be a nuisance.
>
> "In the case of a park, if it unlawfully obstructs the free passage or use in the customary manner of such park by the public, it is a nuisance, and may be abated as such by a court of equity.
>
> "If it falls short of this, the remedy is not by the people, who are not injured, but by the holder of the legal title."

The question to be decided in that case was whether or not the railroad unlawfully obstructed the free passage over or use of the park in the customary manner by the public. The court found that the roadbed of the defendant railroad company passed through a portion of the park that had always been, and then was, unused, with the exception of about half an acre, which, until the construction of the road, had been used for the purposes of a temporary nursery; that all of the lands within the park occupied by said defendant had always been, and then were, generally unfrequented by visitors to the park, and that the construction, maintenance, and operation of the railroad in no way affected or obstructed the free and comfortable use and enjoyment of said park, or any portion thereof, in the customary manner by persons frequenting the same, and that the people of the state of California had not been prevented from going with safety and comfort from one part of the park to another. Following these findings the court held that:

> "A railroad in a public park, constructed and managed as in the case at bar, may be a nuisance, calling for the intervention of the supreme power of the state to conserve the rights of the general public; or it may be a medium of ingress, egress, and transportation essential to the full enjoyment by the people of the privileges and blessings accorded them in the creation and dedication of such park. We deem the findings conclusive of the case, and are of opinion they are supported by the evidence. * * * For any and all intrusions upon the park which work no injury to the public, the city and county of San Francisco, as the

trustee holding the legal title, can alone maintain an action."

[2, 3] In the case under consideration, the witness M. M. O'Shaughnessy, city engineer of the city and county of San Francisco, testified that the space to be used by the proposed tunnel and railway in Duboce Park is now mostly occupied by brush and shrub, and would not, in his judgment, impair the usefulness of the park in any way; that he had been in the park probably 20 times in the last three years, and had never seen anybody in that portion of the park, and that it was unfrequented.

B. P. Lamb, the secretary of the board of park commissioners, called as a witness by the plaintiffs, testified on cross-examination that he was familiar with Duboce Park, had been there frequently, and that the portion in question was not a frequented part of the park.

M. J. Callahan, another witness, testified that he made a preliminary study of the park, visited it about 20 times—for a while nearly every day, and then every other day for about a month, and thereafter not less than once a week and sometimes twice a week—that the major portion of the surface of the ground within the area in question was occupied by high shrubs and trees growing densely together, and that in his opinion its use for tunnel purposes would not interfere with the use and enjoyment of the park.

Based on this evidence, the court found:

> "* * * That the area so to be occupied by said portal and approach consists of a strip about 16 feet wide measured at right angles to Duboce avenue and about 220 feet long measured along the northerly line of Duboce avenue; that said strip of land is along the southerly line of said so-called Duboce Park consisting of a lawn and a small amount of shrubbery; that all of said strip of land has always been, and now is generally, unfrequented by visitors to said so-called park, and that the construction, maintenance, and operation of said easterly portal, as aforesaid, as the same is by said plan to be constructed, operated, and maintained, in nowise affects, or will in nowise obstruct, a free and comfortable use and enjoyment in the customary manner of the said so-called park or any portion thereof by all or any persons frequenting the same, nor will any person be prevented from going in safety and comfort from one part of said so-called park to another part thereof, or from using and enjoying the same by reason thereof."

While the expressed purpose for the construction of the Duboce tunnel was to facilitate transportation between two distant parts of the city, the construction of the tunnel and the street railroad leading thereto and therein would incidentally, and to some extent at least, be a medium of ingress, egress, and transportation, adding to the full enjoyment by the public of the privileges of the park.

In the light of the foregoing legal principles, the evidence, and the findings of the court, we are of the opinion that the court was justified in making the finding above quoted, that the finding is supported by the evidence, and that the public use to which the small area of the park in question will be put when the proposed improvements are completed would not be so inconsistent with the purposes for which the park was dedicated as to constitute an unlawful use thereof.

In connection with the second point raised by appellants, namely, that the assessments complained of were so levied as to amount to the taking of property without due process, the following facts are to be considered:

While, as above stated, the object of the proposed tunnel is to provide a way of rapid transit between two sections of the city and county of San Francisco ,one lying to the east and one to the west of said tunnel, the assessment district includes only lands west of the tunnel.

Within the boundaries of the assessment district itself are several parcels of land owned by various churches and religious bodies, upon which are constructed houses of worship used for religious purposes; also within said assessment district are several parcels of vacant land owned by the city and county of San Francisco. These are either school lands or lands reserved for fire department purposes. No assessment was levied against such church property or city lands, although church lands devoted to purposes other than religious purposes were assessed.

In following the procedure provided for under the terms of the tunnel procedure ordinance, opportunity was afforded by the board of supervisors for the filing and hearing of protests as to the extent of the proposed assessment district, the exclusion of lands therefrom, and any and all other matters in connection with the proposed tunnel construction to which interested parties might legally object.

Protests were filed by appellants herein and at a hearing thereon before the board, the points raised above as to the exclusion from assessment of church and city properties and lands lying east of the tunnel were fully presented. Witnesses were sworn and oral and documentary evidence introduced in support thereof, and thereafter the board of supervisors, in denying said protests, found and determined that the excluded lands would receive no benefit from the tunnel construction, and that they should not be assessed for said work. Appellants contend that, while the church lands and the city lands may not be subject to general taxation, they are nevertheless subject to assessment for specific benefits conferred by particular improvements. Respondents have no quarrel with this, and, indeed, when the distinction between general taxes and special assessments is considered in the light of legal authority, the correctness of such contention appears to be well established.

As to the exclusion of land east of the tunnel, appellants have this to say:

> "It is beyond the realm of reason to say that a tunnel such as this, which is constructed between two points to provide rapid transit between such points, benefits only the land which is situate at one end."

As to the exclusion of church and city lands, they contend that, since such lands are subject to assessment, failure to assess them invalidates the other assessments for the reason that, if the adjoining assessed lands within the district are benefited, the church and school lands must of necessity be also benefited, a finding to the contrary is unwarranted and untruthful, and the placing of the burden of the assessment from which such lands are freed upon the other lands in the district amounts to confiscation and to the taking of property without due process.

"Nor shall any state," reads the Fourteenth Amendment to the Federal Constitution, "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

A similar provision is contained in the Constitution of California (article 1, § 13).

[4] "Due process of law" has been variously defined. As was said in the case of Jones v. Franklin County Commissioners, 130 N. C. 465, 42 S. E. at p. 149:

> "It is difficult to define with precision the exact meaning and scope of the phrase 'due process of law.' Any definition which could be given would probably fail to comprehend all the cases to which it would apply. It is probably wiser, as recently stated by Mr. Justice Miller, of the United States supreme court, to leave the meaning to be evolved 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' It may, however, be stated generally that due process of law requires an orderly proceeding, adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing, or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this. In his argument in the Dartmouth College Case, 4 Wheat. 519, 4 L. Ed. 629, Webster defined 'due process of law,' as a proceeding 'which proceeds upon inquiry, and renders judgment only after trial.'"

It cannot be said that the Legislature of California, in approving the charter amendments of 1912, violated the provisions of the Fourteenth Amendment, for the charter amendments direct that the tunnel procedure ordinance provide a method for the ascertainment and payment of damages and for the manner in which protests may be heard and determined. Neither did the board of supervisors violate the provisions of the Fourteenth Amendment when the ordinance was enacted, for it followed the directions of the charter, and made provision for such hearing and determination. The only question, therefore, is whether or not the board of supervisors in following the proceedings outlined by the tunnel procedure ordinance did something, or failed to do something, which resulted in the taking of property without due process.

[5, 6] A case similar in many respects to the one under consideration is the case of Larsen v. City and County of San Francisco, 182 Cal. p. 1, 186 P. 757, wherein the validity of the assessment levied for the construction of Twin Peaks tunnel under the provisions of the tunnel procedure ordinance was attacked on several grounds. One of the grounds was that the assessment district as laid out included lands lying east of the tunnel, and that such lands were not benefited. Another ground was that certain lands lying within the boundaries of the assessment district as finally fixed were excluded from assessment. The character of these lands does not appear from a reading of the printed decision, but respondents' counsel herein call attention to the fact that in the briefs of appellants filed with the Supreme Court in that case it is made to appear that the properties omitted from the assessment are, as in the case at bar, church properties. Be that as it may, the Larsen Case is authority for the rule that, under the language of the tunnel procedure ordinance, wherein the board of public works is directed to assess the total sum required for the improvements "upon the several lots of land benefited within the district or districts of assessment, so that each of the lots shall be assessed in accordance with its benefits caused by such tunnel construction," the necessary implication arises that no benefits shall be assessed against any parcel which the said board may find is not benefited. The case further holds that where as in the case at bar, the procedure outlined by the tunnel procedure ordinance has been strictly complied with, an opportunity for protests accorded, and a hearing had, and thereafter a final determination made by the board of supervisors as to the lands benefited or to be benefited by the proposed improvement, such determination is presumed to be correct. The burden of proof rests upon the objectors to show errors in the decision, except in so far as they are shown upon the face of the record. No appeal lying from the findings of the board of supervisors, their conclusion is final and conclusive, except as against attack on the ground of fraud or mistake.

In the Larsen Case the court said:

> "The board of supervisors is the ultimate authority which is empowered to finally determine what lands are benefited and what amount of benefits shall be assessed against the several parcels benefited by the construction of the

tunnel. This determination is made after a full hearing accorded to all persons interested to make such objection as they see fit. In such a case the court will not declare the assessment void unless it can plainly see from the face of the record, or from facts judicially known, that the assessment so finally confirmed is not proportional to the benefits, or that no benefits could accrue to the property assessed. * * * It must * * * be conceded that the determination of the supervisors is at least prima facie correct, and that it could not be set aside except upon evidence showing that the decision was not sustained by the facts existing. No evidence was offered or given to show that the particular lots not assessed for the improvement were in fact benefited thereby. In the absence of such evidence it is obvious that the decision of the supervisors could not be declared invalid."

In the instant case, plaintiffs' complaint as amended contains no allegations of fraud or mistake; the allegations challenging the board's failure to assess upon all benefited lands in accordance with benefits conferred being to the effect the board's action was arbitrary rather than fraudulent. We take it that, in the absence of a contest on the grounds of fraud or mistake, it might properly be held that no extrinsic evidence was admissible for the purpose of showing the assessment invalid and that the trial court was limited to an examination of the face of the record itself in order to determine whether or not the lands excluded from assessment were in fact benefited.

"By the face of the record" is meant the face of the record of the proceedings of the board of supervisors. This record, so far as it appears, shows a strict compliance with the terms of the ordinance, a full hearing had upon the grounds of contest set forth herein, and a final judicial determination by the board after full consideration and hearing had that certain lands would not be benefited, and that they should be excluded from assessment.

However, the trial court did admit extrinsic expert testimony as to whether or not the excluded lots would be benefited. City Engineer O'Shaughnessy, who prepared the report of the board of public works, testified that in his opinion the lots would not be benefited. James H. Humphreys, a consulting engineer, one of the plaintiffs herein, testified that in his opinion they would be benefited.

[7] The trial court found there would be no benefits. We believe this finding warranted from an examination of the face of the record showing that such conclusion was reached by the board of supervisors after due notice of protest and hearing, and, if competent and material, from the expert testimony admitted at the trial, the court being at liberty to adopt the views of either of the two experts.

[8] The conclusion is therefore reached that the board, in acting under the provisions of the ordinance, neither failed to follow its provisions regarding due process nor did violence to the rule by acting in a purely arbitrary manner, as contended by appellants.

[9] The facts pertinent to a discussion of appellants' third point, namely, that the assessments were not made by the same body which heard the protests, are these:

The board of supervisors consists of eighteen members; no ordinance or resolution can be lawfully adopted, unless finally passed by a majority of all the members; ten constitutes a majority.

The hearing of protests before the board of supervisors was held October 31, 1922, and on April 6, 1925, "at which time said hearing was resumed, finished and concluded." The resolution modifying and confirming the report of the board of public works was passed by the board of supervisors on April 13, 1925. Four of the members of the board which heard the protests on October 31, 1922, went out of office on January 7, 1924, and three of their successors, along with 13 members of the old board, participated in a confirmation of the report and the fixing of the assessments.

Appellants contend that, at the time the assessment was levied, the board was acting judicially; that the members who had not heard the evidence were disqualified from acting; and that the mere fact of their disqualification invalidated the proceeding. As authority, several English and sister state decisions are cited to the effect that a judgment participated in by one or more disqualified judges is without jurisdiction, and therefore void. It must be conceded that the board was acting, not in an administrative, executive, or legislative capacity, but judicially or quasi judicially. It is true, however, that the authorities of other states are more or less divided on the subject of the invalidity or voidability of a decision where one who has not participated in the hearing joins in the rendition of such decision. So far as we have been able to determine, there is no California decision on the subject.

The situation is clearly expressed in 33 Corpus Juris, at page 1023:

"Generally, the disqualification of a judge of a court composed of several judges renders him incapable of acting on the premises. It has been held that if a disqualified member of a court composed of several judges participates in the hearing and determination, it invalidates the decision, even though his presence was not required to constitute a quorum, and even though the ballot was such that the decision would have been the same had he not voted. However, there are cases holding that the mere presence of, and participation by, a judge disqualified to act in a particular case does not necessarily invalidate the proceeding, especially if his presence is not necessary to constitute a quorum, or his vote would not determine the result. Some cases have held that, where a disqualified member may sit with the court to make a quorum, if he does not participate in the decision it is valid."

Considering the fact that the resolution levying the assessment was passed by a board of supervisors (a continuing body) acting in a judicial or quasi judicial capacity, and not by a court clothed with full judicial powers, and considering further that three more than the necessary majority of the old board voted for the resolution levying the assessment, and that at least one hearing was had before the new board prior to its final action, and that the new members of the new board had more than a year for investigation and consideration before the final vote was cast, we believe the rule in this case should be that the assessment was not invalidated by the participation of the new members.

[10] The remaining point raised by appellants that the trial court erred in excluding certain evidence we believe is not well taken. Appellants offered to prove that, at the time the board was considering the proposition of constructing the tunnel in question, it also had under consideration the construction of another tunnel known as the Eureka Valley tunnel, the purpose of which was to connect approximately the same two sections of the city referred to herein by a different route and location. In that report, it was recommended that the lands east of the downtown section should meet a proportionate share of the expense. This project was not put through. Appellants also offered to prove that in the Twin Peaks tunnel proceedings down town property was assessed. The court refused to permit proof of these facts, and we believe properly so, as it must be clear that each project presents such a different set of facts that the recommendations or conclusions of one proceeding as to benefits are not conclusive or even persuasive in showing benefits or lack of benefits in another proceeding.

[11] Error is also assigned in the ruling of the court permitting two witnesses to testify over appellants' objection that the portions of Buena Vista Park and Duboce Park to be used for railroad purposes would in no way interfere with the use of these parks for the purposes for which they were dedicated. It may be that the questions call for conclusions of law, but the facts were before the court, and, if error at all, we can see no harm in the court having allowed these expressions of opinion.

[12] Appellants contend that, although the witness O'Shaughnessy was permitted to give his opinion as to whether the exempted lands would or would not be benefited to the same extent as lands upon which assessments had been levied, the same privilege was denied plaintiff's witness James H. Humphreys. It is true that the court made the ruling complained of, but it is also true that subsequently during the examination of the same witness the court allowed the following question and answer:

> "Q. Now, are the properties that were owned by the city and by the religious bodies—would they be benefited in the same way that the adjoining property would be benefited by this tunnel? * * * A. It would."

[13] Further error is assigned by reason of the court sustaining an objection to the following question asked the witness O'Shaughnessy on cross-examination:

> "If this property had been owned by a private individual which is now owned by the city, you would have assessed it, wouldn't you?"

The question is argumentative, and calls for speculation, and its answer either one way or the other would have no material bearing on the case, particularly in the absence of the full record as to what the board of supervisors actually took into consideration when they determined the property in question was not benefited.

[14] Neither do we believe the point well taken that the court erred in refusing to permit certain testimony in reference to the sale of church lands and city school lands. The fact that school lands were sold without the assessment district, if it be a fact, would have but a remote bearing upon the status of the school lands within the district, and as to the school lands within the district the record shows that a part thereof had been advertised for sale, although the witness testifying to this did not know whether or not sales had actually been consummated.

So far as the sale of church property is concerned, a similar situation exists. The court sustained an objection to testimony concerning the sale of church property in other parts of San Francisco, but allowed the question to be asked as to the sale of church properties within the district. It so happened, however, that the witness from whom it was sought to elicit such information was not advised as to whether or not any such sales had been made.

Judgment affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

92 Cal. App. 203

RUBIN v. PLATT MUSIC CO. (Civ. 5378.)★

District Court of Appeal, Second District, Division 2, California. May 26, 1928.

Hearing Denied by Supreme Court July 23, 1928.

1. Appeal and error 🔑852—Appellate court must treat apparent receipt, reciting terms of agreement, as written contract, where complaint alleges, and answer admits, such fact.

Where complaint alleges, and answer admits, that instrument reciting terms of agreement is written contract, the appellate court is bound to treat it as contract, though it appears to be no more than receipt, and evidence seems to establish oral contract.

2. Evidence 🔑413—Agent's contract being that of principal, evidence that agent acted for unnamed principal is admissible without contradicting written contract.

Agent's contract being that of principal, latter may sue or be sued thereon, though not named therein, and it may be shown that agent acted for principal, without thereby contradicting or varying written agreement by parol; such proof merely explaining transaction.

3. Evidence 🔑413—Evidence that buyer assumed he was dealing with corporation and paid it for piano, mentioned in instrument signed by corporation's branch manager only, held not inadmissible as varying written contract.

In buyer's action for breach of contract by failure to deliver piano bargained for, evidence that plaintiff assumed at all times that he was dealing with defendant corporation, and paid money and assigned his rights in contract to purchase realty to such company for piano mentioned in written instrument signed by defendant's branch manager only, *held* not inadmissible as tending to vary terms of written contract.

4. Trial 🔑395(6)—Finding that allegations of answer are false, so far as inconsistent with matters found true, is not good finding.

Finding that allegations of answer are false, in so far as they are inconsistent with matters found to be true, is not a good finding.

5. Appeal and error 🔑880(2)—Finding that allegations of corporation branch manager's answer were false, so far as inconsistent with matters found true, held not prejudicial to codefendant corporation.

Finding, in buyer's action against corporation and its branch manager for breach of contract by failure to deliver piano bargained for, that allegations of manager's answer are false so far as inconsistent with matters found to be true, *held* not prejudicial to corporation.

6. Judgment 🔑233—Trial 🔑388(1)—Court should have made findings and entered judgment as to both defendants, where case went to trial without dismissal of one.

Where complaint was laid against two defendants, and case went to trial without dismissal of one of them, court should have made findings and entered a judgment as to latter as well as his codefendant.

7. Appeal and error 🔑880(3)—Failure to enter judgment against agent held not prejudicial to codefendant principal.

Failure to enter judgment against agent, in action against both principal and agent, *held* not prejudicial to principal, with whom jury found that plaintiff contracted through agent.

8. Evidence 🔑42—It is common knowledge that strictness of pleading has been materially lessened.

It is a matter of common knowledge that the strictness of pleading has been lessened materially.

9. Trial 🔑396(3)—Finding that contract, alleged to be with corporation and its branch manager, was with corporation only, held not wholly different from cause of action averred.

Finding that contract, alleged to have been entered into by plaintiff with defendant corporation and its branch manager, who alone signed contract, was by and between plaintiff and defendant corporation as principal, *held* not wholly different from cause of action averred in complaint, nor foreign to any issue raised by pleadings.

10. Appeal and error 🔑880(2)—Variance between complaint, alleging contract with corporation and its branch manager, and finding of contract with corporation only, held not prejudicial to corporation.

Variance between complaint, alleging that contract signed by corporation's branch manager only was entered into by plaintiff with such corporation and manager, and finding that contract was between plaintiff and corporation alone as principal, *held* not prejudicial to corporation's rights, nor so material as to affect judgment.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by Henry Rubin against the Platt Music Company and another. From a judgment against named defendant, it appeals. Affirmed.

See, also, 79 Cal. App. 756, 251 P. 243.

Peyton H. Moore and Glen E. Huntsberger, both of Los Angeles, for appellant.

Harry Sherr, of Los Angeles, for respondent.

STEPHENS, Justice pro tem. This case arose out of a contract to purchase a piano. The action was tried by the court without a jury, and judgment went for plaintiff. Defendant appeals.

The facts present little conflict. The plaintiff, respondent here, after seeing an advertisement of defendant announcing "Platt's 19th Anniversary Sale," went to the latter's branch store, and engaged in conversation one B. Goodman, manager of the branch, relative to the purchase of a piano. An agreement was arrived at, whereupon cash in the sum of $150 was paid over, and an instrument on a blank piece of paper was written

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★Hearing denied by Supreme Court.

by Goodman and handed to respondent. The instrument read as follows:

> "October 16, 1924.
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> "Mrs. H. Rubin, 2756 Fairmont St.—Los Angeles, Calif. Acknowledge receipt of a check amount one hundred fifty dollars as initial payment on piano, small grand, Emerson; new, purchased from me.
>
> "Balance of payment should be upon delivery of the instrument, one hundred dollars cash and two lots which are located in Sunny Slope Acres near Alhambra, Calif., on Ivan St. No. 46 dimension of lots 100x190 on which you owe 937.50 payable monthly payment of 12.50 month on which I will assume payment if legally correct. B. Goodman."

Respondent and his wife held a contract to buy the real property described in the above instrument, and shortly after the writing passed both assigned their rights in such contract and delivered the instrument to Goodman. There is evidence to the effect that this assignment was in blank. The money paid was not turned in to the appellant corporation, and the blank for the name of the assignee of the lot contract was filled in with the name "B. Goodman" after the delivery of the contract. The piano was never delivered, although another was sent to respondent's house and left there for a time, when some one took it away. On numerous occasions over a period of several months respondent called at the branch store about getting the piano for which he bargained, but was only put off by Goodman with some story calculated to excuse the default.

[1] At the trial plaintiff offered testimony which strongly supported the idea that he at all times assumed he was dealing with Platt Music Company, and that he paid his money and assigned his lot contract rights to that company for the piano mentioned in the written instrument. To all of this defendant objected on the ground that it tended to vary the terms of a written contract. The instrument on its face does not appear to be more than a receipt, and the evidence adduced seems to compel the conclusion that the contract was oral. However that may be, the complaint alleges the instrument to be a written contract, and the answer admits it to be such.

The receipt recites the terms of the agreement, and, under the circumstances, we are bound to treat it as a contract.

[2, 3] Appellant cites the case of Bloom v. Coates, 190 Cal. 458, 213 P. 260, and argues that that case supports two points of law, viz.:

> "(1) That an undisclosed principal may sue or be sued, but not a disclosed principal, especially when he is present at the making of the contract; and (2) where a writing purports to be solely the agreement of the agent, and does not purport to bind the principal, or to be made in his behalf, and was not executed by him, he would not be liable."

In the proper consideration of the problems presented it will be useful to analyze a number of California cases.

Curran v. Holland, 141 Cal. 437, 75 P. 46. This action was based on a written agreement to recover a real estate loan commission. The agreement was signed by an agent of a principal undisclosed in the negotiations and in the written agreement, except that the latter signed as a witness. The action was against the principal, and oral evidence was received tending to prove that the witness to the agreement was the real principal. It is stated in the opinion that "* * * the evidence was clearly admissible." We quote further from the same case:

> "It is said in Reinhard an Agency (section 223): 'While extrinsic evidence, except in the instances heretofore pointed out, will not generally be received to vary or contradict the contents of a written instrument, such evidence is always admissible to charge with liability an undisclosed principal, *or one who though disclosed is not named in the instrument.*' [Italics in the text.] See, also, Reinhard on Agency, §§ 303, 328, and cases cited; Story on Agency, § 466a. The Supreme Court of the United States, in Ford v. Williams, 21 How. 289 [16 L. Ed. 36], said: 'The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction.'"

Other authorities are there cited to the same intent. It does not appear that the particular point italicized in the foregoing quotation, and which is the exact point in the instant case, was before the court, but it is pertinent as an expression from a foremost text-writer, and follows as logically from the reason presented as does the precise point decided. The case Estrella Vineyard Co. v. Butler, 125 Cal. 232, 237, 238, 57 P. 980, is to the same effect.

In Ferguson v. McBean, 91 Cal. 63, 27 P. 518, 14 L. R. A. 65, Mr. Justice Beatty says:

> "It is undoubtedly true that when the principal is undisclosed he may sue or be sued, but not when he is known, and especially not when he is present at the making of the contract."

He then proceeds to say that there is much authority both ways as to whether the principal can be sued where he is disclosed, and thinks the sound policy is that he cannot be, as this would violate "the general rule that a writing cannot be varied by parol." As to the invocation of this rule, it may be said in passing that there seems to be no better reason for varying the rule where the principal is unknown or undisclosed than where he is disclosed; further, that it would seem to require oral evidence in most cases to ascertain whether he was disclosed or undisclosed. The reason given in Ford v. Williams, supra, that it is not a case of varying a written contract, because of the rule of agency that the contract of the agent is the contract of the principal, would appear to be the sound one.

Mr. Justice Shaw, in Geary Street, etc., R. R. Co. v. Rolph, 189 Cal. 59, 207 P. 539, says:

> "We are also of the opinion that the better reason, as well as the weight of authority, is against the proposition that the mere fact that the principal is known to the third person at the time he contracts with the agent prevents such third person from holding the principal liable on the contract made in the name of the agent. We treat this point because upon a new trial it may appear that the agency was fully known to plaintiff. That the principal is not liable in such a case if the circumstances, or the terms of the contract, or the two combined, show an intent by the other party to take the agent as his debtor or obligor, in preference to the principal, is, as we have said, well established, and it is manifestly in accordance with reason and justice. In such a case the election takes place at the time of the making of the contract. But where no such election or intent appears, and there is nothing more than a contract made in the name of the agent, knowing him to be such and with knowledge of the identity of his principal, the case is, and should be, governed by the well-known principle that he who acts by another acts by himself, that the contract of the agent, within the scope of his authority, is in legal effect the contract of the principal. The Civil Code states that 'an agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights *and liabilities which would accrue to the agent* within such limit, if they had been entered on his own account, *accrue to the principal.*' Section 2330."

Further along in the case he quotes from Story on Agency to a like effect, and adds: "* * * And he extends this doctrine to written contracts." In the same case this eminent jurist, in referring to the quoted section from Ferguson v. McBean, supra, says that "the * * * statement was not necessary to the decision, nor was the decision based on it."

The next case to consider—and we are treating these cases chronologically—is Bloom v. Coates, 190 Cal. 458, 213 P. 260. The opinion in that case quotes extensively from Ferguson v. McBean on the point that "a writing cannot be varied by parol," and, basing the ruling explicitly upon this quotation, finds a certain instruction legally bad. The court says:

> "The effect of this instruction was to inform the jury that if they should find from the evidence that appellant had knowledge of said agreement prior to the exchange, and acquiesced therein, and received the benefits thereof, she would be liable upon the agreement made by Arnold in his own name, notwithstanding that she was the sole owner of the land and that the written agreement did not purport to refer to her as a party to be bound thereby, or at all."

But it is crystal clear that any instruction with this effect would be bad without any reference to the doctrine of parol evidence. All of these conditions would be evidence proper for the jury to weigh in deciding the point, but they would not be conclusive, as the instruction seems to have intended.

We come now to the late case of Marshall v. Bernheim, 64 Cal. App. 283, 221 P. 401. The facts of that case are very similar to the instant one. The owner, the owner's agent, and the purchaser of an automobile met, and the deal resulting was a written contract whereby, upon the face of the instrument, the purchaser agreed to buy the automobile from the agent. The owner was not mentioned. When difficulties arose, the purchaser was allowed to prove by oral evidence that the real principal in the contract was the owner though not mentioned in the writing. To quote from the opinion:

> "The theory of the Ferguson Case [Ferguson v. McBean, supra] was that to permit a party to change his written contract in order to hold a known but unnamed principal would violate the parol evidence rule. Though the rule is not accepted generally in other jurisdictions, it has been followed in this state until the recent case of Geary Street, etc., R. R. Co. v. Rolph, 189 Cal. 59 [207 P. 539], where the Supreme Court implied that it should be qualified to the extent that it must appear that the contracting party elected to hold the agent instead of the principal. The Geary Street Case involved an oral contract and the Supreme Court has left uncertain the application of the rule in a case involving a written contract. Unless the execution of the contract with the agent when the principal is known and present is in itself evidence of an election to hold the agent, we cannot imagine a case in which the election could be proved by other than parol evidence. * * * In the Geary Street Case the Supreme Court say: * * * 'That the principal is not liable in such a case if the circumstances, or the terms of the contract, or the two combined, show an intent by the other party to take the agent as his debtor or obligor, in preference to the principal, is, as we have said, well established, and it is manifestly in accordance with reason and justice. In such a case the election takes place at the time of the making of the contract.' From this we assume that if the trial court should find, upon substantial evidence, that the obligee, at the time the contract was made, elected to hold the agent rather than the principal, the appellate court would be bound by the finding, but where, as here, the trial court found that the obligee took both the agent and the principal, there was no election at the time the contract was made, and, of course, we are bound by that finding."

A hearing in the Supreme Court was denied December 27, 1923.

It seems to us that the basis of the doctrine hereinabove referred to from the Ferguson v. McBean Case, supra, was erroneous; that its doctrine was not necessary to the opinion; and that its doctrine was not necessary to the decision in Bloom v. Coates, supra. We think the doctrine in Ford v. Williams, supra, is sound; that the case of Marshall v. Bernheim, supra, is in accord therewith, and that the reason for the rule of the Geary v. Rolph Case, supra, supports the Marshall v. Bernheim Case, and should be applied in the instant case.

The foregoing covers assignments of error numbered I, II, III, and VI, leaving numbers IV, V, and VII undisposed of.

[4, 5] We are in agreement with appellant (assignment No. IV) that the finding to the effect that the allegations of the answer of B. Goodman are false, in so far as they are inconsistent with the matters found to be true, is not a good finding. Krug v. Lux Brewing Co., 129 Cal. 322, 61 P. 1125. We do not see where this has prejudiced any right of appellant.

[6, 7] We are also in agreement with appellant as to his assignment No. V. The case having been brought against appellant and B. Goodman, and having gone to trial without the dismissal of B. Goodman as a defendant, the court should have made findings and entered a judgment as to him. The complaint is laid against both defendants. The findings, however, are that appellant was the principal with whom respondent contracted. We do not see where the neglect or failure to enter a judgment against the agent is prejudicial to any rights of appellant. The case of McDevitt v. Corriea, 70 Cal. App. 245, 233 P. 381, is authority only for the point that, where suit is begun against the agent after discovery that he is the agent and not the principal, and not at all against the principal—that this constitutes an election as to the party sought to be held liable. That is not the point here.

[8-10] Assignment of error No. VII:

> "That there is a substantial and material variance between the findings of the court and the pleadings of the plaintiff, in that the complaint alleges a joint contract between the plaintiff and both defendants."

We have carefully read all of the cases cited by appellant in support of his contention under this assignment. They are all very early California cases, and it is, of course, common knowledge that the strictness of pleading has been lessened materially. However, we do not think even these early cases justify the strictness demanded by appellant. The latest case cited, Mondran v. Goux, 51 Cal. 151, contains the following, which appellant quotes with approval:

> "In other words, the cause of action, if any, established by the findings, is wholly different from that averred in the complaint, and is foreign to any issue raised by the pleadings. The rule is well settled that a plaintiff must recover, if at all, upon the cause of action set out in his complaint, and not upon some other which may be developed by the proofs."

Herein plaintiff (respondent) alleges that the contract was entered into by and between him and Platt Music Company and B. Goodman. A writing is set up as the contract, signed by B. Goodman alone. The court finds the contract was by and between plaintiff and Platt Music Company, and not B. Goodman—that Goodman was but an agent. Can it be said that these circumstances constitute a case where the finding "is wholly different from that averred in the complaint, and is foreign to any issue raised by the pleadings?" Because plaintiff alleges that both defendants are parties to this contract, and the proof shows that only one thereof is in truth and in fact a party, is it a finding upon another cause of action? It seems to us that both of these questions must be answered in the negative. The variation complained of did not prejudice the rights of appellant, and is not of such materiality as to affect the judgment. McNeil v. Kredo, 31 Cal. App. 76, 159 P. 818; Brooke v. Glide, 39 Cal. App. 534, 179 P. 546.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

SHANNON v. CITY OF LOS ANGELES et al.

(Civ. 5495.) ★

District Court of Appeal, Second District, Division 1, California. May 31, 1928.

Hearing Granted by Supreme Court July 26, 1928.

1. Mandamus 🔑3(8)—Former city employee, not filing application with civil service commission for investigation of grounds of discharge, held not entitled to mandamus for reinstatement (Los Angeles City Charter).

Municipal civil service employee, not filing with civil service commission a written application for investigation of grounds of his discharge, as authorized by Los Angeles City Charter, *held* not entitled to writ of mandamus to compel city and officer discharging him to restore him to position.

2. Mandamus 🔑154(2)—Petition for writ of mandamus must show want of plain, speedy, and adequate remedy in ordinary course of law.

Plaintiff cannot succeed in action for writ of mandamus without showing by petition that he has no plain, speedy, and adequate remedy in ordinary course of law.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by William A. Shannon for a writ of mandamus to the City of Los Angeles and another. Judgment for defendants, and plaintiff appeals. Affirmed.

G. F. Boreman and Anthony Jurich, both of Los Angeles, for appellant.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing granted by Supreme Court.

Jess E. Stephens and Herman Mohr, both of Los Angeles, for respondents.

WOOD, Justice pro tem. Plaintiff filed a petition for a writ of mandamus to compel defendants to permit him to resume his position as a civil service employee in the department of building and safety of the city of Los Angeles and to enter upon the discharge of his duties, to replace his name upon the pay roll of the city, and to allow and pay his salary during the period he was prevented from discharging his duties. Demurrers were filed by defendants and sustained by the court. Plaintiff declined to amend, and a judgment was entered against him, from which he prosecutes this appeal.

In the petition it is set forth that plaintiff was employed in the classified civil service of the city of Los Angeles as a general clerk in the electrical division of the department of building and safety, at a salary of $140 per month; that on February 8, 1926, he appeared for duty, but was prevented by defendant Backus, the head of the department, from performing his duties and was orally informed that he was discharged; that his name was removed from the pay roll of the city and his salary since that date has not been paid; that on February 13, 1926, defendant Backus presented to the board of civil service commissioners a notice to the effect that plaintiff was discharged for cause. Below the signature of Mr. Backus on the notice appears the following:

> "I hereby certify that a copy of the foregoing statement was mailed to last known address of W. A. Shannon on 13th day of February, 1926, at 11 o'clock a. m. [Signature] C. E. Gartman."

It is further alleged in the petition that the only place of residence of plaintiff was at a certain address on South Hill street, and that this address was shown on the records of the department where plaintiff was employed; that plaintiff was at this address daily and could have been found by the exercise of reasonable diligence on the part of any one seeking to serve a notice upon him; that no copy of the statement was served upon plaintiff personally or by leaving it at his said residence; that a copy of the statement referred to in the certificate was mailed by defendant Backus, "addressed to plaintiff at 307½ West Second street, Los Angeles, Cal."

[1] The charter of the city of Los Angeles contains the following provisions:

> "Any board or officer having the power of appointment of officers, members and employees in any department of the government of the city, shall have the power to remove, discharge or suspend any officer, member or employee of such department; but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended except for cause, which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the board of civil service commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended, personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing, such removal, discharge or suspension shall take effect. Within fifteen days after such statement shall have been filed the said board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person so removed, discharged or suspended to be reinstated or restored to duty."

[2] Plaintiff contends that he was not legally discharged from his position for the reason that he was not served with a copy of the statement filed with the civil service commission as provided by the city charter. Defendants contend that plaintiff had actual notice of the discharge and of the filing of the statement, and argue that actual notice is equivalent to the notice specifically required by the charter. There is much discussion in the briefs filed by counsel concerning these contentions. Under the view we take of the case, however, the judgment must be affirmed for the reason that the charter gave to plaintiff a remedy of which he had not availed himself. Although the charter provisions above quoted are not so worded as to bring about entire clarity, it is nevertheless apparent that it was the intention of the authors of the charter to provide a method whereby a discharged employee in the classified service could obtain a hearing before the commissioners upon his demand after notice to him of his discharge. The commissioners are given the right, at their option, to conduct an investigation concerning the discharge, but it becomes their duty to conduct such examination if a demand therefor be made by the employee. A period of five days is allowed the employee within which to make the demand, but this period does not begin to run until he has notice of the filing of the statement by the head of the department. No time limit is specified for the completion of the investigation. When he learned of the filing of the statement by Mr. Backus, plaintiff should have filed with the commission, if he so desired, a written application for an investigation of the grounds of his discharge. The date on which he received information concerning the filing of the statement does not appear from the

allegations contained in the petition. Manifestly he must have had this information at some time prior to the commencement of the action. It is well established that plaintiff cannot succeed in an action in which he seeks a writ of mandamus unless he can show by his petition that he has no plain, speedy, and adequate remedy in the ordinary course of law. The course was open to plaintiff to obtain any redress to which he may have been entitled by application to the civil service commissioners within five days from the day on which he had actual knowledge of the filing of the statement.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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92 Cal. App. 276

BROWN v. BROWN. (Civ. 3507.)

District Court of Appeal, Third District, California. May 29, 1928.

1. Divorce 🔑37(19)—Wife, leaving home with understanding with husband that she would be gone two weeks or two months, who stayed away over two years, "deserted" husband (Civ. Code §§ 95, 100).

Wife, who left home with understanding with husband that she would be gone some two weeks or two months, and who did not return for over two years, "deserted" husband within meaning of Civ. Code, § 95, by reason of section 100, providing that absence or separation, proper itself, becomes desertion whenever intent to desert is fixed during absence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Desert.]

2. Divorce 🔑37(8)—Husband held not obliged to request wife's return to procure divorce for desertion (Civ. Code, § 95).

Husband, whose wife left home with understanding that she would be gone for two weeks or two months, was under no legal obligation to request wife to return or to intimate to her that her absence was objectionable to him, where she continued to remain away for over two years, in order to procure divorce for desertion, as defined by Civ. Code, § 95.

3. Divorce 🔑184(10)—Court's finding as to physical condition of wife, supported by substantial evidence, held conclusive on appeal.

Finding as to physical condition of wife made by trial court, and supported by substantial evidence, *held* conclusive on appellate court in action for divorce.

4. Divorce 🔑150(2)—Finding of trial court that mother was improper person to have custody of minor children held ultimate finding of fact.

Finding that mother was not fit and proper person to have custody of minor children *held* ultimate finding of fact in which it was not necessary for trial court to have expressly found all probative facts, since, on appeal, finding must be construed liberally and given construction which will uphold judgment rather than defeat it.

5. Divorce 🔑150(2)—That court expressly found certain probative facts does not thereby operate to exclude all other probative facts in record supporting general finding.

Mere fact that court expressly found certain probative facts does not thereby operate to exclude all other probative facts appearing in record and tending to support general finding.

6. Divorce 🔑312—Court's finding that mother was improper person to have custody of minor children supported by substantial evidence, held conclusive on appeal.

Finding of trial court that mother was improper person to have custody of minor children, supported by substantial evidence, *held* conclusive on appellate court.

7. Divorce 🔑312—Court's determination, in divorce proceedings, of parent entitled to custody of children, will not be disturbed on appeal, in absence of abuse of discretion (Civ. Code, § 138).

Under Civ. Code, § 138, trial courts have very high discretion with respect to custody of children in divorce proceedings, and its determination will not be disturbed on appeal, unless record discloses clear abuse of that discretion.

Appeal from Superior Court, Riverside County; George R. Freeman, Judge.

Action by Minnie C. Brown against Rudolph J. Brown for divorce. Cross-complaint by the defendant. From an interlocutory decree granted the defendant on charge of desertion, plaintiff appeals. Affirmed.

Loyal C. Kelley, of Riverside, Marshall Stimson, of Los Angeles, and W. G. Irving, of Riverside, for appellant.

Dryer, Castle & Hartke, of Los Angeles, for respondent.

TUTTLE, Justice pro tem. The complaint in this action is based upon a charge of cruelty. The cross-complaint consists of two causes of action; the first being desertion, the second cruelty. The court found against the plaintiff and appellant as to all of her allegations of cruelty, and in favor of the defendant and respondent as to all of his allegations of cruelty, and in his favor on his charge of desertion against the plaintiff and appellant. The interlocutory decree of divorce was granted to the defendant and respondent specifically on the charge of desertion against the plaintiff and appellant.

The appeal is based entirely upon the ground of insufficiency of the evidence: First, on the ground that the evidence is insufficient to support the findings of the trial court as specified in paragraph 14 of the findings of fact that on or about February 2, 1922, the plaintiff and appellant, without cause, willfully deserted the defendant and respondent; and, secondly, that the evidence is insufficient to support the finding of the court, that the plaintiff and appellant is not a fit and proper person to have the custody of the minor children of plaintiff and defendant, as specified in appellant's opening brief.

The appellant and respondent were married on August 29, 1914. At the time of their marriage, and prior thereto, it was understood that they would live upon a ranch near Wildomar, in Riverside county, Cal. Appellant knew during the period of their courtship that the respondent was a rancher, and it was planned that they would live on the ranch above mentioned. Soon after their marriage the appellant became discontented and dissatisfied with her situation and life on the ranch, and began complaining about the conditions there, and her own condition, which dissatisfaction and complaints continued through the entire time that the parties resided together on the ranch at Wildomar, Cal.

Four children were born to the parties during their life together: Wilfred Brown, a son, born December 9, 1915; David Brown, a son, and Catherine Brown, a daughter, twins, born September 15, 1918; and Gerald Brown, a son, born October 6, 1921.

It is undisputed that the appellant left the home of the parties at Wildomar, Cal., on February 2, 1922, at a time when the youngest child was between three and four months old, and there is evidence to show that the appellant was not ill at the time she left, but, on the contrary, that there was nothing wrong with her at that time, and that she was perfectly normal; that, according to her own statement she had wired to her mother a few days previous thereto to come and get her, and that, after her mother arrived, they hurriedly decided to leave at once; that the appellant left early in the morning, at approximately 6 o'clock, and in inclement weather; and that at the time she left she or her mother had represented and stated to the respondent that she would return in two months, and, according to her own statements, that it was definitely understood that she was to be absent only for a period of two months with her mother, after which time she would return to the ranch.

On the morning of her departure, she made no effort to take the baby with her, which astounded and surprised the respondent and a Mrs. Soules, who had been brought in by appellant's mother to, as she thought, help get the children ready to go with their mother, the appellant, and the appellant at this time flatly refused to take the baby with her, even though the baby had not yet been weaned, and had up to that time been nourished by receiving milk from its mother's breast.

Appellant made no provisions for the care of the baby, which she had nursed up to that time, and left no instructions in reference to its care or comfort.

The appellant left the home of respondent on February 2, 1922, leaving the three youngest children in his care and custody, without any previous arrangement for their care, without any instructions as to their food or comfort, and without any questions as to how they would be taken care of.

According to her own testimony, she did not return to the ranch to see the children from February 2, 1922, until June, 1924, at which time she returned with her mother and her attorney without any intention of remaining at the ranch or taking up her duties as a mother of the children and wife of the respondent. She made no offer to return and stay on the ranch, or do anything that showed any intention to terminate the period of separation.

It is undisputed that she did not return to the ranch or make any effort on her own part to see the children during this entire period of more than two years and four months, after having left an unweaned baby in sole care of the respondent.

Various physicans testified as to their opinion to the effect that she was a hypochondriac or a psycho-neurotic of the sexually perverted type, inclined to dwell upon sex matters, and become centered upon matters having to do with various phases of sex questions, the result of which was to blunt the maternal instinct, and that such condition affected the care of the children. This conclusion, expressed in different forms by the various physicians, was arrived at as a result of their own personal experience in treating her, and also as a result of the other testimony and evidence presented during the trial and embodied in a hypothetical question to them. Some of them said that the influence of such a person over children was detrimental, and that the condition was progressive, and would continue to get worse instead of better; that such a person became self-centered and egotistical, and dealt upon sex questions, and often made a very scientific study and research of sex conditions and matters, as was evidenced by the letters written by the appellant. These letters, as stated before, contradict all of the accusations made by the appellant against the respondent in reference to his treatment of her, and which indulge in a detailed discourse and discussion of sex matters.

The appellant was examined at various times by physicians after her emphatic contentions that she was suffering to a great extent from the results of improper treatment by physicians, and upon each of such examinations the physicians found that she was normal.

During the period of her absence, although, according to respondent's testimony, she stated that she only intended to go to Los Angeles for a period of two weeks or two months, at which time she expected to return to the ranch, she nevertheless not only went to Los Angeles for a period of two weeks, but proceeded with her mother to Berkeley, San Francisco, Oakland, San Jose, and several other places, during part of which time she, according to her own testimony, walked about, did housework, and even engaged in certain occupations, such as canvassing and soliciting orders from university students at Berkeley for a period of time.

The trial of the action consumed some three weeks. Fifty witnesses were examined, and the record of the testimony is spread over some 2,000 pages.

[1, 2] As to the first point raised by appellant—the insufficiency of the evidence to support the finding on the ground of desertion—it is earnestly contended the judgment must be reversed because there is no testimony to the effect that appellant ever intended to desert respondent. Desertion is defined by section 95 of the Civil Code as follows:

> "Willful desertion is the voluntary separation of one of the married parties from the other with intent to desert."

Both parties admit that the original separation was by mutual consent. Respondent and appellant talked over her proposed visit to her mother in Los Angeles some time before appellant left the ranch. Appellant then stated that she intended to take Christian Science treatments while away, and it was understood that she would be gone some two weeks or two months. She left on February 2, 1922, and did not return to the ranch until June, 1924, at which time she did not indicate any intention of remaining, but simply made a brief visit of a few hours, in company with her attorney. Respondent contends that the evidence establishes a separation by mutual consent, and relies upon the case of Borden v. Borden, 166 Cal. 469, 137 P. 27, where it is held that, where separation is had by mutual consent of the parties, there can be no desertion, unless something thereafter transpired. In the instant case it will be observed that there is evidence that the separation agreed upon was not absolute, but was limited to a definite period of time. The remarks of the court in the Borden Case are predicated upon a state of facts which showed an absolute and unqualified understanding to separate without any limitation as to time. The cases of Keesey v. Keesey, 160 Cal. 727, 117 P. 1054, and Sargent v. Sargent, 106 Cal. 544 39 P. 931, are to the same effect as the Borden Case, and are not applicable to the instant case for the same reasons.

Section 100 of the Civil Code provides:

> "Absence or separation, proper in itself, becomes desertion whenever the intent to desert is fixed during such absence or separation."

[3] It follows therefrom that a separation, proper in itself, may become and constitute desertion as a ground for divorce, where the intent to desert thereafter becomes fixed. The question as to whether or not the intent thereafter became fixed depended upon all the facts and circumstances which transpired subsequently, and the statements, admissions, acts, and conduct of the party charged with such desertion. "It is for the court trying the case to determine from all the facts and circumstances appearing in the case whether or not there was an absence of that consent to living separate and apart which is essential to constitute a desertion." McMullin v. McMullin, 140 Cal. 112, 73 P. 808. There is also evidence of the persistent refusal of appellant to dwell in the same house with respondent, with no just cause for such refusal. This constitutes desertion. Civ. Code. § 96. Respondent was under no legal obligation to request his wife to return or intimate to her that her absence from home was objectionable to him. Morrison v. Morrison, 20 Cal. 431. The evidence, as we have stated, was to the effect that her absence was to continue for a definite period of time; the longest period testified to being two months. She remained absent for two years and four months, and this, with the other facts and circumstances in evidence, justified the court in finding that she deserted respondent. A very large portion of appellant's argument is taken up and consumed in an effort to persuade the court to interfere with findings of fact which are supported by substantial evidence. A fair illustration of such an instance is with reference to the physical condition of appellant. To excuse the said desertion of appellant, it is urged that she left her said home and remained absent because she was ill and in very poor health. There is considerable testimony to that effect. However, her husband, several neighbors, and a doctor testified that she was in normal health when she left the home, and that there was nothing wrong with her physically. In commenting upon a similar condition of the record, in the case of Baker v. Baker, 9 Cal. App. 746, 100 P. 897, this court said:

> "It * * * involves only a waste of time, to undertake to demonstrate to an appellate court in a case in which there exists at least a substantial conflict in the evidence that the testimony offered by the party against whom the findings have been made by the court below should be accepted in preference to that from which such findings have been deduced."

It would serve no useful purpose for us to further elaborate upon the testimony. We are satisfied, from a careful examination of the record, that the said finding of the trial court is based and founded upon substantial evidence, and under such circumstances we are powerless to disturb the same. 2 Cal. Jur. p. 921, § 543.

[4, 5] An attack is made upon the finding of the court that appellant is not a fit and proper person to have the custody of the

minor children of the parties. This finding is as follows:

> "That it is true that, by reason of the character and disposition of plaintiff, and evidenced by her actions and conduct as herein set forth, plaintiff is not a fit and proper person to have the custody of the minor children of plaintiff and defendant, or any of them."

It is contended by appellant that this finding is not one of ultimate facts, and that it can only receive support from the particular probative facts found by the court. In effect, she argues that, though there may be abundant proof in the record showing the mother to be an unfit and improper person to have the custody of said minors, nevertheless, unless the court included all these evidentiary facts in its findings, they cannot be considered in support thereof. This rule of construction is contrary to the well-established principle frequently announced by the appellate courts of this state that on appeal the findings must be construed liberally, and that uncertainties therein are to be given such a construction as will uphold, rather than defeat, the judgment. 2 Cal. Juris. p. 871, § 511. According to this finding, a liberal construction, it must be viewed in the light of one of ultimate facts, and it was not necessary for the trial court to have expressly found all the probative facts, as such finding includes a finding upon all probative facts necessary to sustain it. The mere fact that the court expressly found certain probative facts does not thereby operate to exclude all other probative facts appearing in the record and tending to support the general finding. The court found that appellant was not a fit and proper person to have the custody of said minors. This was a finding of the ultimate fact. The Supreme Court has held that in a guardianship proceeding, where the question of the competency of a person was in issue, a finding that said person was incompetent was one of the ultimate facts, and no further findings were required. Estate of Espinosa, 179 Cal. 189, 175 P. 896.

[6, 7] The evidence shows that appellant abandoned her four minor children suddenly and without making any provisions whatever for their care during her absence. Her baby, but three months of age, who was receiving nourishment from her mother's breast, was deserted with apparently no indications of those maternal instincts which are the normal and natural traits and characteristics of every mother. As one of the medical experts testified: "In my opinion, a normal mother would come back to her baby if she had to walk backwards, and on her hands and knees." She did not come back until over two years had elapsed. Aside from this evidence of abandonment, there is the testimony of numerous medical experts to the effect that appellant was selfish and self-centered; that she dwelt insistently upon imaginary ailments connected with her reproductive organs; that she was in such a psycho-neurotic condition that sex perversion resulted. We do not feel called upon to go into the evidence upon these questions in any further detail. Letters written by appellant were introduced in evidence. These, alone, in our opinion, would justify the conclusions of the trial court upon this issue. As we stated with reference to the question of desertion, it is idle to attempt to impose upon an appellate court the duties, prerogatives, and exclusive functions of the trial court in the matter of findings of fact. It must be patent and apparent that there is substantial evidence to support this finding. But, in addition to this, the matter under consideration was one in which the law commits to the trial court a very large measure of power. Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582. With respect to the custody of children in divorce proceedings, it is manifest that the Legislature, by section 138 of the Civil Code, intended to confide to the trial courts a very extensive discretion, with a view to the conservation of the highest and best interests of such minors, and the conclusion arrived at by such court in such cases will not be disturbed, unless the record discloses a clear abuse of that discretion. Nave v. Nave, 35 Cal. App. 27, 169 P. 253. No serious contention is made here that the trial court abused its discretion in making the order complained of, nor do any grounds for such contention appear.

We can see no merit in the questions raised, and, accordingly, the judgment is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

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92 Cal. App. 308

ALLEN v. DAILEY. (Civ. 6192.) ★

District Court of Appeal, First District, Division 1, California. May 31, 1928.

Rehearing Denied June 29, 1928. Hearing Denied by Supreme Court July 26, 1928.

1. Brokers ⟹65(4, 5)—Agent, authorized to sell property for fixed price net to owner, may purchase property on his own account or as another's agent.

Where owner authorizes sale of his property by an agent for a fixed price net to him, with the understanding that the agent shall be entitled to any excess as commission, agent may, without violating any trust relationship, purchase the property on his own account or act as the agent of others in acquiring the same, notwithstanding general rule that agent employed to obtain highest possible price for his principal beyond the fixed minimum may not become purchaser or act as agent for others.

2. Brokers ⟹65(4)—Broker, authorized to sell property, paying fixed net price to vendor was entitled to make purchase as agent for undisclosed principals.

Where broker was employed to sell property paying specified price net to vendor without

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★Rehearing denied. Hearing denied by Supreme Court.

designation as to who the purchaser might be, broker's purchase of property as agent or trustee for undisclosed principals did not constitute violation of any trust relationship with vendor.

3. Brokers 🔑99—Broker employed to sell property for fixed price net, who consummated transaction in his own name without disclosing identity of purchasers, was entitled to maintain specific performance suit against vendor (Code Civ. Proc. § 369).

Broker, authorized to sell property for fixed sum net to vendor, retaining any excess as commissions, after consummation of transaction in his own name without disclosing identity of parties for whom he was acting, was entitled to maintain action in his own name against vendor to require specific performance, under Code Civ. Proc. § 369, permitting suit by trustee of an express trust or person expressly authorized by statute, though broker was not the real party in interest.

4. Principal and agent 🔑144—Agent contracting for undisclosed principal or as principal may sue on contract in his own name (Code Civ. Proc. § 369).

Agent contracting in his own name for an undisclosed principal or contracting with another as principal may sue in his own name on the contract, under Code Civ. Proc. § 369, whether fact of agency was or was not known to the other contracting party.

5. Specific performance 🔑32(1)—Filing of suit for specific performance against vendor by broker as agent for undisclosed principals removed vendor's objection that contract lacked mutuality.

Broker authorized to sell property at fixed price net to vendor, who negotiated sale to undisclosed principals, was not precluded from maintaining specific performance suit on ground that the contract was lacking in mutuality, since contract, though unilateral at acceptance of offer, became mutual as far as remedies were concerned by filing of suit for specific performance.

6. Specific performance 🔑130—Imposition of liability for purchase price on broker was not error in broker's specific performance suit as agent of undisclosed purchasers.

Where broker authorized to sell property for fixed price net to vendor arranged purchase in behalf of persons whose identity was not disclosed, decree allowing broker specific performance of contract as against vendor, which imposed liability for purchase price on the broker and not on his principal, was not erroneous since the original contract did not limit purchasers, and it is a matter of general knowledge that the mortgage covering the land sold is the main thing relied on and the financial responsibility of the purchaser is of slight importance.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Suit by James H. Allen against Anna S. Dailey, as special administratrix of the estate of James S. Dailey, deceased. Decree for plaintiff, and defendant appeals. Affirmed.

Haas & Dunnigan, R. A. Dunnigan, and H. L. Dunnigan, all of Los Angeles, for appellant.

George P. Adams, Turnbull, Heffron & Kelley, and Samuel H. French, all of Los Angeles, for respondent.

KNIGHT, J. Plaintiff brought this suit to obtain and was granted a decree requiring specific performance of an alleged contract for the sale of real property situate on Western avenue, Los Angeles, from which decree defendant appeals.

The suit was instituted against James S. Dailey, the owner of the property, who was a resident of Chicago, but his death occurred prior to trial and thereupon his wife, having been appointed special administratrix, was substituted as party defendant. Plaintiff was a licensed realtor residing in Los Angeles, and maintained an office near the property in question. The negotiations for the sale of the property were carried on by means of telegrams and letters, and the trial court found therefrom that on or about February 17, 1923, Dailey agreed, in writing, to sell and Allen agreed to buy said property for the sum of $40,000 net to Dailey, and further found in effect, contrary to the claim of appellant, that said correspondence did not create an agency between the parties mentioned out of which fiduciary relations arose precluding Allen from purchasing the property on his account or as the agent of others. Appellant assails the foregoing findings upon the ground that the same are not supported by the evidence. The first question presented therefore relates to the legal construction which shall be placed upon said telegrams and letters.

The series of correspondence began on January 8, 1923, when Allen telegraphed Dailey, at Chicago, as follows:

> "Have customer for your lot North Western Avenue near Santa Monica Blvd. All cash. What will you take for it net, I must know by wire party is looking at other property. Answer my expense, 5502 Santa Monica Blvd."

Dailey replied by wire that the price was $40,000. Within a week thereafter Allen wrote Dailey, acknowledging receipt of the latter's telegram and stated:

> "We have a party who is figuring on this lot, and as you know deals of this kind take time to round up as they move slowly, we would like to have you give us an exclusive sale right on this lot for 60 days which will give us time to close our party up on this. We have priced the lot at $42,000 and are hoping to turn it at that figure within the 60 days."

Under date of January 18, 1923, Dailey replied as follows:

> "Your letter received with reference to giving option on my property for 60 days. I have

never done this and do not care to do it now. If this property is not sold within the next 30 days, the price will increase to $500 per front foot for the 85 feet on Western avenue. I have one or two other men who are communicating with me about the sale of this property and it does not make any difference with me who buys this property, but 30 days from date the price will increase."

On January 31st Allen again wrote Dailey and, after referring to Dailey's letter of the 18th instant and making certain inquiries as to the dimensions of the property, stated:

> "We did not ask if you would be willing to give any terms—now, if we can get a man who will pay down part, and 7 per cent. on the balance, would you consider such a proposition? If so, and you will write us at once and give us the best terms that you are willing to make under these conditions, it will aid us materially. I do not think our party would want to carry it very long. We would also be glad if you could give us a little more time on this, as you will realize that by the time your letter reaches us the time of your terms in the former letter will have almost expired."

There were no further negotiations until February 15, 1923, when Allen wired Dailey as follows:

> "Your letter January 18th. Have sold eighty-five by two hundred Western Avenue frontage for forty thousand eight hundred dollars less eight hundred dollars commission and title expenses. Five thousand dollars have been deposited in escrow today. Purchaser agrees to pay fifty-eight hundred dollars at close of escrow. Balance mortgage thirty thousand dollars payable ten thousand on or before one year twenty thousand on or before three years interest seven per cent. quarterly. Wire confirmation at once my expense."

The next day Dailey replied thereto by telegram as follows:

> "I explained in my letter that Western Ave property was Eighty five by one hundred fifty that Sierra Vista was fifty by one hundred eighty five. That price of Western Ave was forty thousand net to me. Purchaser to assume ten thousand mortgage will take ten thousand cash and mortgage for twenty thousand payable in three years seven per cent. cannot accept present offer."

On the day following, February 17th, Allen again wired:

> "Your wire sixteenth is accepted. Will send papers through escrow department for your signature."

And on February 19th Dailey wired:

> "Sorry to say that I sold property before receiving your message."

Supplementing the foregoing documentary evidence Allen testified that he was not acquiring the property on his own account, but that he had secured two purchasers named Kerr and Martz, who had agreed to pay $40,000 net to Dailey for the property and an additional $800 to him as a commission, and that no arrangement had been made for a subsequent transfer of the property to him by the purchasers. The evidence further shows that on February 15, 1923, in furtherance of such agreement, Kerr, as the agent of Dorothy Sadler, deposited $5,000 in escrow under instructions providing, among other things, that on or before 30 days thereafter in consummation of the conveyance of said property, she would deposit an additional $5,800, and in payment of the balance of the purchase price would execute and deliver to the owner a note secured by a mortgage on the property for $30,000, at 7 per cent., $10,000 of which would be made payable in 1 year and $20,000 in 3 years; that if she failed to pay the additional $5,800 as agreed Allen should be paid a commission of $800 out of the $5,000 then on deposit; but that she reserved the right to withdraw the deposit of $5,000 after noon of February 18, 1923, if the sale of the property was not confirmed by the owner, in which event no commission was to be paid. After the receipt of Dailey's telegram of February 16th, to wit, on February 20th, new escrow instructions were signed which were substantially the same as the first in providing for an additional payment of $5,800, but unlike the first instructions provided for the execution and delivery of a first mortgage of $10,000 to one Hancock and a second mortgage to Dailey of $20,000 in payment of the balance of the purchase price, instead of one note and mortgage to the owner for $30,000. This latter change in the escrow, providing for the execution of a mortgage to Hancock, was apparently made to conform to the terms of Dailey's telegram of February 16, 1923, to the effect that the purchaser should assume the existing $10,000 mortgage on the property. With reference to Dailey's final telegram of February 19, 1923, the record discloses that counsel for appellant admitted at the trial that contrary to the assertion made in said telegram Dailey had not sold the property prior to the receipt of Allen's telegram of acceptance.

Appellant endeavors to bring the case within the scope of an agency which prevents the agent, by reason of fiduciary relations arising out of the employment, from dealing with the property of his principal in his own right or as the agent of others. In this regard appellant claims:

> "That all the correspondence, acts, and circumstances surrounding this transaction upon which the action is founded conclusively establish that plaintiff was actually representing the defendant in procuring a purchaser or else the plaintiff falsely and deliberately created the impression by his correspondence that he was representing appellant, which constituted fraud of such a character as will defeat plaintiff's right to successfully maintain this action."

[1] It is doubtless true that if the agency be the ordinary one wherein the agent is em-

ployed to obtain for his principal the highest possible price for the property beyond a fixed minimum, for which service the agent is to be paid a commission on a percentage basis, fiduciary relations arise out of such employment which preclude the agent from becoming the purchaser of the property or acting for others and thus unduly profiting to the injury of his employer. But it appears to be well settled also that where, as here, an owner authorizes the sale of his property by an agent for a fixed price net to him, with the understanding that the agent selling the same shall be entitled to any excess thereover as a commission or shall look to the purchaser for the payment of the same, the agent may, without violating any trust relationship, purchase the property on his own account or act as the agent of others in acquiring the same. Hutton v. Sherrard, 183 Mich. 356, 150 N. W. 135, L. R. A. 1915E, 976; Synnott v. Shaughnessy, 2 Idaho (Hasb.) 122, 7 P. 82; Synnott v. Shaughnessy, 130 U. S. 572, 9 S. Ct. 609, 32 L. Ed. 1038; Wolverton v. Tuttle, 51 Or. 501, 94 P. 961; Beatty v. Russell, 41 Neb. 321, 59 N. W. 919; Warvelle on Vendors, p. 274. The two agencies mentioned differ widely from each other because in the former the contract fixes the minimum price and a percentage basis of compensation for the agent, as a result of which the principal profits by any price received for the property in excess of the minimum; whereas under the latter agency the principal profits nothing beyond the net price fixed, and consequently it becomes immaterial so far as the principal is concerned to whom the property is sold or for what price it is sold above the minimum. As stated in Warvelle on Vendors, at page 275:

> The agent will not "be allowed to purchase where he has a duty to perform which is inconsistent with the character of the purchaser, nor to speculate for his private gain with the subject matter committed to his care. This may be regarded as the true extent of the rule; and an agent placing himself beyond it may lawfully contract with his principal with relation to the property."

[2-4] The correspondence above set forth shows beyond question, we think, that the agency created thereby falls within the rule of the case above cited which allows the agent to deal with the property on his own account or as the agent or trustee for others, because Dailey's telegrams and letters expressly stated that all he wanted for the property was $40,000 net to himself and that it did not make any difference to him who the purchaser might be; and therefore, Allen having consummated the transaction in his own name without disclosing the identity of the parties for whom he was acting, it would seem clear that he was entitled to maintain an action in his own name to require specific performance by the vendor even though he was not the real party in interest. In this regard section 369 of the Code of Civil Procedure provides that an executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted; and that a person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section. And as held in the case of Allen v. Chatfield, 34 Cal. App. 785, 168 P. 1149, the reason for the exception established by said section readily reaches the case of an agent contracting in his own name for an undisclosed principal or group of principals, and that when an agent contracts with another as principal the law allows the agent treated as principal to sue in his own name on the contract, whether the fact of the agency was or was not known to the other contracting party. The decision in the case cited further declares that manifestly the Code section was intended to embrace not only formal trusts declared by deed, inter partes, but all cases in which a person, acting in behalf of a third party, enters into a written express contract with another, either in his individual name without description, or in his own name expressly in trust for or on behalf of or for the benefit of another, by whatever form or expression such trust may be declared; and it includes not only a person with whom, but one in whose name a contract is made for the benefit of another. Considerant v. Brisbane, 22 N. Y. 389. It furthermore holds that a person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust and is authorized to sue without joining with him the persons for whose benefit the action is prosecuted (Walker v. McCusker, 71 Cal. 594, 12 P. 723), and that while the real beneficiaries of the contract might in due time and in their names have proceeded to secure its benefits, the rights of the trustee remain unaffected (Horseshoe Pier Co., etc., v. Sibley, 157 Cal. 442, 108 P. 308).

In the present case, therefore, although as between the real purchasers and Allen the latter was acting merely as a trustee, such fact did not concern Dailey because he knew no one in the transaction but Allen, and consequently so far as Dailey was concerned Allen was the real party in interest and accordingly was entitled to enforce the contract in his own name. Walker v. McCusker, supra; Allen v. Chatfield, supra.

[5] Appellant further contends that even upon the assumption that Allen is the real party in interest the alleged contract sued upon is lacking in mutuality and therefore is unenforceable. In the case of Harper v. Goldschmidt, 156 Cal. 245, 104 P. 451, 28 L. R. A. (N. S.) 689, 134 Am. St. Rep. 124, it is held that:

> "In equitable theory the requirement of mutuality of remedy is satisfied when the nonsigning plaintiff enters suit, since by the very bringing of his action he binds himself to abide by the decree of the court in chancery and so empowers that court to decree specific performance against him."

Mr. Pomeroy in his work on Equity Jurisprudence (2d Ed.) vol. 5, § 2191, states the same rule more elaborately as follows:

> "So far as there is a principle of mutuality, it is a mutuality of remedy in equity at the time of filing the bill that is required, and not a mutuality in the terms of the contract when the contract is made. * * * Where a contract for the sale of lands is signed only by the defendant, it is clear that the plaintiff need never have performed his agreement. There was a clear lack of mutuality in the terms. Yet it was early held that the contract could be enforced against the party who had signed. The modern cases all agree upon the point. * * * The filing of the bill makes the remedy mutual. * * *"

And in the early case of Vassault v. Edwards, 43 Cal. 458, the same rule is adhered to, the court there saying:

> "The courts, however, in view of the uniform construction of the statute of frauds, that the agreement was valid and binding upon the party by whom it was signed, and in order to work out the requisite mutuality, held that in such cases it was sufficient if the *remedy* was mutual. It was accordingly held from an early day that when the action for a specific performance was instituted by the party who had not signed the agreement, the act of filing the bill made the remedy mutual" (citing numerous cases).

[6] It would seem clear, therefore, that under the authorities above quoted there is no merit in appellant's contention that the contract in question is fatally lacking in mutuality, for even though said contract was unilateral at the time Allen accepted Dailey's offer, Allen afterwards made the remedy mutual by filing suit for specific performance. True, the decree rendered requires as a condition precedent to the delivery of the vendor's deed that Allen, and not the real purchasers, pay the sum of $10,000 in cash, assume the existing mortgage of $10,000, and execute and deliver to appellant a promissory note and mortgage in the sum of $20,000 secured by the property conveyed. But the imposition of such requirements on Allen instead of the real purchasers is immaterial because as said in Montgomery v. De Picot, 153 Cal. 509, 96 P. 305, 126 Am. St. Rep. 84, which was an action for specific performance, it is a matter of general knowledge that upon sales of real estate a mortgage back for a portion of the purchase price is one of the most common methods of dealing in such transactions, and under such circumstances the mortgage covering the land sold is the main thing relied upon, and the financial responsibility of the vendee is a matter of very little importance to the vendor; and therefore, as in that case held, where, as here, the contract calls merely for a mortgage to secure a promissory note, without specifying a personal obligation, such provision will be construed as making the giving of the mortgage, and not the giving of the note, the material inducement to the contract. In the case before us Dailey declared, as already pointed out, that he did not care who the purchaser was, and it would follow therefrom that he neither required nor expected the personal obligation of any particular person to insure the payment of the balance of the purchase price, but was satisfied to accept a mortgage on the land.

The additional points made by appellant, including the alleged variance between the contract pleaded and the one proved and the asserted insufficiency of the escrow, do not in our opinion possess sufficient merit to require special notice.

After giving full consideration to all of appellant's contentions, it is our conclusion that the evidence is legally sufficient to sustain the findings and the judgment, and therefore the judgment is affirmed.

We concur: TYLER, P. J.; PARKER, Justice pro tem.

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92 Cal. App. 343

WILSON v. COFFEY et al. (Civ. 6279.)

District Court of Appeal, First District, Division 1, California. June 1, 1928.

1. Vendor and purchaser 🔑130(8)—Incumbrance which cannot be removed prevents delivery of good title.

Existence of incumbrance which cannot be removed prevents delivery of good title.

2. Vendor and purchaser 🔑133—Where vendor asserted reservations in patent were not incumbrances, title was determinable by escrow instructions which constituted contract.

Where vendor claimed that reservations in patent under which he held title were not incumbrances, in action for specific performance of contract embodied in escrow agreements, *held*, that character of title was determinable from escrow instructions which constituted contract of parties.

3. Vendor and purchaser 🔑133—Where escrow agreements provided that guaranty of title by insurer did not include action by governmental agency, "incumbrances" did not include government's right of way contained in vendor's patent (Civ. Code, § 1641).

In action for specific performance of contract to purchase land, where escrow instructions of parties contained provision that guaranty of title by insurer did not include action by governmental agency in restricting or controlling occupancy or use of land described, *held* that, under Civ. Code, § 1641, providing

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whole contract is to be taken together, "incumbrances" as used in agreements did not include government's right of way for water, ditches, and canals contained in patents of vendor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Incumber—Incumbrance.]

4. Contracts 🔑147(1)—Purpose of construction of contract is to ascertain intent of parties, and, when this is ascertained, it must take precedence over literal sense.

Purpose of construction of contract is to ascertain intent of parties, and, when this intent is ascertained, it must take precedence over literal sense of terms.

5. Contracts 🔑162—Conflicting parts of contract should be reconciled to ascertain intent of parties at time agreement was entered (Civ. Code, § 1643).

Conflicting parts of contract should be reconciled, if possible, to ascertain what parties intended at time agreement was entered into, making it capable of being carried into effect, if it can be done without violation of intention of parties under Civ. Code, § 1643.

6. Vendor and purchaser 🔑133—Vendee, signing escrow instructions, which provided that title insurer did not guarantee against action by governmental agency, had at least constructive notice that incumbrances did not include rights of government.

In action for specific performance contract to purchase land, where escrow agreements providing that title insurer did not guarantee against action by governmental agency in restricting or controlling occupancy, were signed by parties, *held* that vendee had actual or at least constructive notice that incumbrances meant to exclude rights of government, since person was presumed to have knowledge of contents of instrument executed by him or in his possession, and with facts concerning which recitals in instrument would put prudent man on inquiry.

7. Specific performance 🔑131—Failure to mention specific performance in judgment was immaterial, where only issue was disposition of deposit which had been made with escrow holder, to which vendor was entitled on vendee's default.

In action for specific performance of contract to purchase land, where vendor and vendee had given written instructions to escrow holder concerning transfer of certain realty, and vendee defaulted after having made deposit with escrow holder, *held*, that mention of specific performance in judgment was irrelevant, since point in issue was disposition of sum deposited, to which vendor was entitled on vendee's default.

8. Escrows 🔑8(1)—Escrow holder held agent for each party, where escrow agreement between vendor and purchaser was completed.

In action for specific performance of contract to purchase realty, where deposit had been made with escrow holder, and vendor offered to deliver certificate or guarantee of title containing reservations mentioned in escrow instructions, escrow holder became agent for each party with respect to those things placed in escrow to which each thus became entitled, and not agent for both.

9. Specific performance 🔑121(11)—Objection to finding that vendor was ready and able to perform contract as not being sustained by evidence held not well taken under facts.

In action for specific performance of contract to purchase realty, where vendee contended that evidence was insufficient to support finding that vendor was ready and able to comply with terms of contract, *held* that objection was not well taken, since vendee had conceded that conclusion was correct, if on legal interpretation put on escrow instructions it was determined that reservation by government in patents was not incumbrance.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by Alden C. Wilson against Charles H. Coffey and another for specific performance of contract to purchase land. From a judgment rendered following an order granting a motion made by plaintiff under Code Civ. Proc. § 633, whereby original judgment was vacated and different judgment entered, named defendant appeals. Affirmed.

Page, Nolan, Rohe & Freston and Ralph E. Lewis, all of Los Angeles, for appellant.

Newby & Palmer and Nathan Newby, Jr., all of Los Angeles, for respondent.

CAMPBELL, Justice pro tem. The appellant has appealed from a judgment rendered following an order granting a motion made by respondent under section 633 of the Code of Civil Procedure, whereby the original judgment was vacated and a different judgment entered. The action is for specific performance of a contract to purchase land; the appellant being the vendee, and the respondent the vendor, thereof. In the original judgment specific performance of the contract was denied; the respondent was denied damages; and a fund of $5,000, which had been deposited with the clerk of the court, was ordered to be handed back to appellant. The latter judgment entered does not mention specific performance or damages, but awards to plaintiff judgment, and directs the clerk of the court, into whose hands the $5,000 had been paid, to deliver the same to plaintiff (respondent herein). It is this latter judgment from which the appeal is taken, and it is the deposition of this $5,000 which is mainly involved in the question before the court.

Appellant's grounds of appeal are:

"(1) That the evidence is insufficient, and in fact there is no evidence to support the finding of the court designated as conclusion of law No. 1 as amended to the effect that plaintiff was at all times ready and able to comply with the terms of the contract, but that, on the contrary,

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the evidence and the findings of fact show that said conclusion of law is erroneous, and that the proper conclusion should be that plaintiff was not able and ready to comply with the terms of his contract, but that he was at all times unable to deliver good title to the land in question and that his title was incurably defective. (2) That the evidence and findings of fact do not support the conclusions of law designated I, III, V, and VI, under which the court finds that the plaintiff was ready and willing to perform his part of the contract, and directs that plaintiff have judgment for the sum of $5,000, but that, on the contrary, said findings and evidence justify only the conclusion that plaintiff was not entitled to any judgment whatsoever, and that said $5,000 should have been refunded to the appellant herein."

The case resolves itself into an interpretation of the escrow instructions—the contract of the parties. On October 5, 1923, the vendor and vendee in the contemplated sale and purchase of the property in question delivered to Title Insurance & Trust Company separate escrow instructions. The escrow instructions of the vendor, in so far as they affect the question here presented, are:

> "I will hand you a deed executed by Alden C. Wilson and Florence A. Wilson, husband and wife, to Charles H. Coffey and Dorathea F. Coffey, husband and wife (description of land), which you are authorized to deliver to grantees, or their representatives upon payment to you by 11/5/23 days from date hereof for account of the parties executing said interest the sum of ——— dollars 15,000.00 payable by check of the Title Insurance & Trust Company, from which you may deduct your escrow charges, 30.00, and your 2 New or Cont. Guarantee with your liability thereunder not to exceed W. ½ of sec. 25000.00, S. E. ¼ of section 10000.00 as charged and from which you may also pay all incumbrances on said property except all taxes for 1923–24. * * * As a part of the consideration for said deed, you will also procure note executed by Charles H. Coffey and Dorathea F. Coffey, husband and wife, in favor of Alden C. Wilson and Florence A. Wilson, husband and wife, as J. T. for $20,000.00 due on or before 3 yrs. after 11/1/23 with int. at 7% per annum payable semiannually at Los Angeles, Cal., secured by mortgage your form on said premises which by your guarantee shall show subject only to taxes for the fiscal year 1923-1924. * * * (Please take note that the guarantee issued in connection herewith will contain the following provision: 'This guarantee does not include examination of, or report on, action by any governmental or public agency for the purpose of regulating, restricting or controlling the occupancy or use of the land herein described, or any building thereon.')"

The escrow instructions of the vendee to the title company, in so far as they affect the question presented, are:

> "I hand you herewith a check for $5,000.00 and will hand you 10,000.00 additional together with funds sufficient to cover my portion of your charges. I will also hand you a note and mortgage for 20,000.00 as set out below, all of which you are authorized to use in connection with your order No. 705303 when you can issue in your usual form, your 2 new or cont. guarantee T. G. & T. Co. of L. A. with your liability thereunder not to exceed W. ½ $25,000.00 S. E. ¼ 10,000.00 (description of land) which will show record title to said property vested in Charles H. Coffey and Dorathea F. Coffey, husband and wife as joint tenants free from incumbrances except all taxes for the fiscal year 1923 and 1924. (Please take notice that the guarantee issued in connection herewith will contain the following provision: 'This guarantee does not include examination of, or report on, action by any governmental or public agency for the purpose of regulating, restricting or controlling the occupancy or use of the land herein described or any building thereon.')"

[1-6] Appellant contends that the existence of an incumbrance which cannot be removed is a default by the vendor under a contract to deliver a good title; that, if the contract fails through default of the vendor, the vendee is entitled to recover back any deposit made upon the purchase price, and that a reservation to the United States government of a right to construct canals and ditches upon the land is such an incumbrance as constitutes a default by the vendor under a contract to deliver a good title. The reservation in the patents which plaintiff claims is such an incumbrance as to prevent the vendor from transferring a good title is the following, which appears in each patent:

> "And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States."

We do not question the principle announced in the authorities cited that the existence of an incumbrance which cannot be removed would prevent the delivery of a good title, but here a different aspect is presented. It is apparent from a reading of the escrow instructions that the title the vendor contracted to deliver, and which the vendee contracted to receive, was an insurance by the Title Insurance & Trust Company, insuring one of the tracts described for $25,000 and the other for $10,000, and showing the record title vested in Charles H. Coffey and Dorathea F. Coffey as joint tenants free from incumbrances, excepting taxes for the fiscal year 1923 and 1924, and qualified further by the following paragraph which appears in the escrow instructions signed by the vendor and the vendee:

> "That the guarantee does not include examination of, report on, action by, any governmental or public agency for the purpose of regulating, restricting, or controlling the occupancy or use of the land herein described or any building thereon. It is understood that the guarantee to be issued will be in your usual form, containing in addition to the above the printed exceptions usual in such guarantees."

Appellant contends that respondent must prove that the reservations in the patent under which respondent holds title are not incumbrances, and assumes the very fact in issue, i. e., the nature of the title contracted by the parties to be bought and sold, whereas the type and character of the title is determined by the escrow instructions which under the law constitute the contract of the parties. Tuso v. Green, 194 Cal. 574, 229 P. 327; Frost v. Alward, 176 Cal. 691, 169 P. 379; Flinn & Treacy v. Mowry, 131 Cal. 481, 63 P. 724, 1006.

It is clear that appellant contracted to purchase the land of respondent, if the Title Insurance & Trust Company would issue an insurance certificate insuring the title to be in the names of the grantees of the deed upon its being recorded, subject only to the incumbrance of the lien for taxes for the fiscal year of 1923–1924, as shown by the records of Los Angeles county, which respondent could produce, and that he waived as to good title any reservation by the government of regulating or controlling the occupancy or use of the land or any building thereon. To hold otherwise, a construction would have to be placed upon the contract without reference to what the parties intended, and would entail a forfeiture of the contract, and, besides, would be giving effect to only a part of the agreement. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Civ. Code, § 1641. The purpose of construction is to ascertain the intent of the parties, and, when this intent is ascertained, it must take precedence over the literal sense of terms. Conflicting parts should be reconciled, if possible, to ascertain what the parties intended at the time the agreement was entered into (Retsloff v. Smith, 79 Cal. App. 443, 249 P. 886), and make it capable of being carried into effect, if it can be done without violating the intention of the parties (Civ. Code, § 1643). Appellant had actual notice of the contents of the contract he signed, but, even if he did not, in any event he had constructive notice when he signed the escrow instructions, which provided that the guaranty of title by the title company, upon which guaranty the transfer of title entirely depended, expressly excepted from the title it was to guarantee exceptions and rights reserved by the government. A person is presumed to have knowledge of the contents of an instrument executed by him or in his possession (McCreery v. Charlton, 185 Cal. 37, 195 P. 670), and of the facts concerning which the recitals in the instrument would put a prudent man upon inquiry (Union Trust, etc., Bank v. Ishkanian, 45 Cal. App. 347, 187 P. 757). The word "incumbrances" appearing in the contract must be taken to mean those incumbrances which, as the parties specified, they had in mind. It must be taken that, when the parties said in their contract that the title was to be free of incumbrances, they meant to exclude as an incumbrance the right of way for water, ditches, and canals contained in the patents. Retsloff v. Smith, supra.

[7] As to appellant's complaint that in the present judgment there is no mention of specific performance of the contract while in the former judgment there was, it may be said that the prayer for specific performance is irrelevant to the point at issue—the deposition of the $5,000. In Tuso v. Green, 194 Cal. 574, 229 P. 327, the vendor and vendee of realty had given written instructions to an escrow holder concerning the transfer of certain realty. These instructions matched one another as to subject-matter of the sale, parties, and terms. Each one was signed only by the party making it, as in the present case. The buyer defaulted, having previously made a deposit of $1,000. The court held that the separately executed writings formed a contract for the transfer of the land, and that therefore, on the default of the buyer, the seller was entitled to the amount deposited by the buyer. See, also, Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17.

It is true that Cosby v. Danziger, 38 Cal. App. 204, 175 P. 809, cited by appellant, holds that, where the vendor agreed to give the vendee an abstract of title showing the title to the premises free and clear of any and all incumbrances, he would not be fulfilling his contract, in the absence of information charging the vendee with notice, in tendering a title in which the patent from the government contained the reservation:

> "And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by authority of the United States."

Here, however, the vendee not only had notice, but the escrow instructions, signed by him, in his contract specially provided that the guaranty of good title to be issued by the Title Insurance & Trust Company, and upon the issuance of which the transfer was to be completed, would not include "examination of, or report on, action by any governmental or public agency for the purpose of regulating, restricting or controlling the occupancy or use of the land herein described or any building thereon."

[8] Appellant contends that the money was held by the escrow holder either as the agent of both parties or as the agent of, or trustee for, appellant, and that in either event the fund is not such a fund as is contemplated under the general rule holding that the vendor is entitled to retain money paid upon the purchase price, and cites us to Shreeves v. Pearson, 194 Cal. 699, 230 P. 448, in which the court says:

> "It is conceded to be the correct rule of law that when papers, moneys, or other articles are by the agreement of parties to a transaction delivered to an escrow holder to be held by him in

that capacity and to be distributed by him to the respective parties or to other persons upon the performance of the terms of the escrow he is, prior to the performance of the conditions of the escrow, the agent of both parties thereto (Cannon v. Handley, 72 Cal. 133, 13 P. 315; McDonald v. Huff, 77 Cal. 279, 19 P. 499), and that it is equally sound law that whenever the conditions attending the escrow have been so far performed that the transaction which has called the escrow into being becomes complete the nature of this dual agency changes to an agency not for both, but for each of the parties to said transaction in respect to those things placed in escrow to which each has thus become completely entitled."

If the transaction had not been completed as contended for by appellant, the case cited would be authority that the Title Insurance & Trust Company was the agent of both parties, but, under the view we have taken that the offer to deliver the certificate or guaranty of title containing the reservations mentioned completed the escrow, the title company then became the agent of each party.

[9] Appellant's objections that the evidence is insufficient to support the finding to the effect that plaintiff was ready and able to comply with the terms of the contract, and that the evidence and findings of fact show that such conclusion of law is erroneous in our opinion, are not well taken. Appellant quotes from the record the following finding, which he urges is supported by the evidence, and which he contends renders the judgment erroneous:

> "The plaintiff was, at said time and on said date, willing to furnish the certificate of title showing good title, as required by the provisions of said escrow instructions, and at said time, and ever since said time, has been, and now is, willing to perform all of the terms of the contract on his part to be performed, but he was not, either on the 5th day of October, 1923, or at any time since then, nor is he now, ready or able to furnish said certificate of title, or ready or able to perform all of the terms of said contract on his part to be performed, in this—that there existed on the 5th day of October, 1923, and at all times since that date, and do now exist, certain incumbrances against said land, which said incumbrances consist in reservations from the said land in favor of the United States of America, and reserved by the terms of the patents by which said land was conveyed to plaintiff's predecessors in interest, of rights of way thereon for all ditches or canals constructed by the authority of the United States, and which said reservations were not, and could not by the plaintiff have been, removed."

Appellant in his brief submits the following as the controlling issue on this appeal:

> "The evidence at the trial is all in support of this finding of fact. The original patents issued to plaintiff's predecessors in interest were introduced in evidence and appear in the transcript (pages and folios). These two patents both contain the following reservations: 'And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.' There is in the evidence or findings not a particle of proof, nor was it even contended, that the above-mentioned reservations have been removed by the plaintiff. In the nature of things, such a reservation could not be removed, and it is so stated by the court in its findings of fact hereinbefore mentioned. In its essence the determination of this question rests upon the legal interpretation put upon this evidence. If that reservation of the United States government constitutes an incumbrance, then conclusion of law No. 1 is erroneous. If said reservation is not such an incumbrance, the appellant herein is wrong, and the conclusion of law and the judgment rendered are correct."

Conclusion of law No. 1, which appellant concedes to be correct, if upon the legal interpretation put upon the escrow instructions or contract it be determined that the reservation by the government in the patents is not an incumbrance such as the terms of the contract required to be removed, is:

> "That the plaintiff was, on October 5, 1923, and at all times thereafter, until the filing of complaint herein, ready, able, and willing to comply with the terms of the contract hereinbefore set forth."

As we have said, the escrow instructions signed by appellant specifically excepted from the title to be guaranteed reservations by the government, and therefore such reservation was not, at the time of entering into the contract by the parties, contemplated to be an incumbrance of such a character as would void the contract.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

92 Cal. App. 318

NATIONAL BRASS WORKS v. WEEKS et al. (Civ. 6271.)

District Court of Appeal, First District, Division 1, California. May 31, 1928.

1. Reference ⇨99(2)—Under reference to ascertain fact necessary to enable court to determine action, referee's report is not binding on court as under reference to try all issues (Code Civ. Proc. § 638, subds. 1, 2, and § 644).

If order of reference be made pursuant to Code Civ. Proc. § 638, subd. 1, to try all issues and report finding and judgment thereon, referee's findings are controlling on the court under section 644, but, if made pursuant to section 638, subd. 2, to ascertain fact necessary to enable court to determine action, referee's report has no binding effect on court, whose findings and conclusions in such case serve as basis for judgment.

2. Reference 🔑48—Reference held merely to ascertain certain disputed facts to aid court in rendering decision on merits (Code Civ. Proc. § 638, subds. 1, 2).

Order of reference including clause, "to ascertain the facts necessary to enable the court to determine this cause," and omitting authorization to try all issues, "whether of fact or of law," *held* intended merely to authorize referee to ascertain certain disputed facts to aid court in rendering decision on merits, pursuant to Code Civ. Proc. § 638, subd. 2, rather than subdivision 1, especially in view of referee's report and defendants' motion before entry of judgment to set aside referee's findings.

3. Judgment 🔑279—Court's order confirming or modifying findings of referee to ascertain fact necessary to enable court to determine action need not be made part of judgment roll (Code Civ. Proc. § 638, subds. 1, 2, and §§ 644, 670).

Where order of reference is made, and referee's finding filed, pursuant to Code Civ. Proc. § 638, subd. 2, authorizing reference to ascertain fact necessary to enable court to determine action, court's order confirming or modifying referee's findings need not be made part of judgment roll, as required by section 670, where judgment is entered under section 644 on referee's findings, filed pursuant to order of reference under section 638, subd. 1, to try all issues.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by the National Brass Works against W. S. Weeks, W. E. Stradley, and another, in which defendants Stradley and another filed cross-complaints. Judgment for plaintiff, and cross-complainants appeal. Affirmed.

Edgar L. Martin and James MacIntosh, both of Los Angeles, for appellants.

Fred E. Peterson and H. E. Gleason, both of Los Angeles, for respondent.

KNIGHT, J. Defendants and cross-complainants appeal from a judgment rendered against them as sureties, in an action to recover on a bond given to secure the faithful performance of a building contract entered into between plaintiff as owner and the defendant Weeks as contractor.

The complaint alleged, in substance, that plaintiff complied with all the terms of said contract, but that Weeks failed to construct or complete the building as agreed in that he used materials different from and of a grade inferior to those called for by the contract, plans, and specifications, and that he omitted to perform the work and labor according to the terms of the contract or in a good and workmanlike manner; that on account of the alleged breach plaintiff sustained damages for which judgment was prayed in the sum of $7,750.

Answering, the defendant Weeks denied the allegations of plaintiff's complaint and alleged that the changes and alterations in the construction of the building of which plaintiff complained were made at plaintiff's request. Appellants Stradley and Newton filed a joint answer wherein, besides denying the allegations of the complaint as to nonperformance by Weeks, it was alleged that at the time said contract was entered into Weeks assigned to Stradley all moneys agreed to be paid to Weeks thereunder and that plaintiff assented to the assignment; that during the progress of the work plaintiff requested Weeks to furnish certain materials and perform certain labor in the construction of said building not called for by the terms of the contract, for which plaintiff agreed to pay the reasonable value in addition to the contract price; and that the reasonable value thereof was $3,236.71. Appellants further alleged that the changes above mentioned were made without a written agreement or memorandum to that effect having been entered into and signed by the owner and the contractor as required by the terms of said contract, and were made without the knowledge, consent, or approval of appellants, and therefore constituted material modifications of the contract and of the bond herein sued upon, amounting to a breach thereof. It was further alleged that a balance of $8,394.38 was still due under the original contract and also $3,236.75 for the extra work and materials. Appellant Stradley, separately, filed a cross-complaint containing two causes of action, to recover upon the two items of indebtedness set forth in the joint answer, and prayed for judgment in the total sum of $11,631.11. Plaintiff answered the cross-complaint by denying substantially all of the allegations thereof.

When the cause came on for trial, the court, upon stipulation of all parties, made an order of reference and appointed a referee "to try any and all of the issues of fact and to report a finding thereon and to ascertain the facts necessary to enable the court to determine this action"; and pursuant thereto the referee heard the evidence and made and filed his report thereon, to which written objections were filed by defendants. In April, 1925, plaintiff served notice that at the time and place specified in said notice it would move the court for an order confirming, ratifying, and adopting said report as filed. Subsequently, and on October 5, 1925, the court rendered and filed its decision in said cause containing full and complete findings of fact and conclusions of law, and judgment was on the same date entered thereon, adjudging that plaintiff do have and recover from the defendants the sum of $6,487.64 and costs.

This appeal is taken upon the judgment roll alone, and appellants contend as grounds for reversal that, under the order of reference, the findings of the referee constituted the only findings in the cause which the court was bound to either confirm or reject without modification, and was without legal authority to make findings of its own; and that since the judgment roll contains no order showing that the referee's findings were approved by the court, the judgment is not supported by any findings whatever. It is further contended that if it be assumed that the referee's findings were approved by the court said findings were insufficient to sustain the judgment in plaintiff's favor.

Section 638 of the Code of Civil Procedure, under the authority of which the order of reference herein was made, reads as follows:

> "A reference may be ordered upon the agreement of the parties filed with the clerk, or entered in the minutes: 1. To try any or all of the issues in an action or proceeding, whether of fact or of law, and to report a finding and judgment thereon; 2. To ascertain a fact necessary to enable the court to determine an action or proceeding."

[1] If an order of reference be made pursuant to subdivision 1 of said section, the referee's findings are doubtless controlling upon the court because section 644 of the same Code provides that:

> "The finding of the referee or commissioner upon the whole issue must stand as the finding of the court, and upon filing of the finding with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court."

And in construing said subdivision 1 it has been held that an order of reference made pursuant thereto operates as a submission of the controversy to a tribunal of the parties' own selection to make a definitive disposition of the issue and the action (Fredendall v. Shrader, 45 Cal. App. 719; 188 P. 580); and that the findings of the referee upon the whole issue must stand as the finding of the court, and judgment follows immediately, entry being made by the clerk as a matter of course (Faulkner v. Hendy, 103 Cal. 15, 36 P. 1021; Thompson v. Patterson, 54 Cal. 542; Weavering v, Schneider, 52 Cal. App. 181, 198 P. 418; Bowie v. Borland, 68 Cal. 233, 9 P. 79).

But if the order of reference be made pursuant to and is based upon subdivision 2 of said section 638, then the report of the referee has no such binding effect upon the court, further proceedings by the court being essential to a complete determination of the cause. Clark v. Millsap, 197 Cal. 765, 242 P. 918. In such case the court ultimately determines the facts and the law by rendering its decision containing its findings of fact and conclusion of law which serves as the basis for the judgment which shall be entered; and the judgment thus entered is in no wise dependent upon the report of the referee for support, but is grounded on the decision of the court. Clark v. Millsap, supra.

[2] The order of reference in the present case, by the inclusion therein of the additional clause, "And to ascertain the facts necessary to enable the court to determine this cause," and by the omission to declare therein that the referee was authorized to try all issues "whether of fact or of law," clearly shows that it was intended that the cause should not be taken from the court and committed to the referee for decision, but that in the interest of time the referee was appointed merely to ascertain certain disputed facts relating to the details of the actual work done and materials furnished in the performance of the contract, and thus aid the court in the rendition of its decision upon the merits of the entire controversy. That being so, the trial court's decision containing its findings of fact and conclusions of law, and not the referee's report, is determinative of the action; and therefore we are not here concerned with the sufficiency or the effect of the report of the referee.

Furthermore, the contents of the referee's report sustains this view because it purports to be merely an ascertainment of certain facts relating to the construction of the building, particularly as to the alleged departure by the contractor from the plans and specifications, and it contains no conclusions of law, as would have been the case if the reference had been made pursuant to the first subdivision of said section 638. 13 Cal. Jur. 696. Moreover, the attitude of appellants in moving the trial court, after the report had been filed and before the entry of judgment, "that the findings of the referee on file herein be set aside and vacated," strongly indicates that they considered that the court at all times retained the power to determine the case upon the merits.

[3] Appellants further contend that the judgment is fatally defective in that the judgment roll does not contain an order confirming or modifying the referee's findings. There is no merit in the point. Where the order of reference is made and the referee's findings are filed pursuant to the first subdivision of section 638, and judgment is entered thereon in accordance with section 644 of said Code, then, under the express provisions of section 670 of said Code, the findings of the referee constitute part of the judgment roll, because in that state of the record the judgment in the action is based entirely upon the referee's findings; but where, as here, the order of reference is made and the referee's findings are reported pursuant to the second subdivision of said section 638 there is no legal requirement that the order of the court confirming or modifying such findings be made part of the judgment roll. It would ap-

pear from the trial court's decision herein that the report of the referee was in fact confirmed and approved, but since as stated there is no provision of law requiring such order to be made part of the judgment roll, its absence therefrom does not affect the validity of the judgment.

The judgment is affirmed.

We concur: TYLER, P. J.; PARKER, Justice pro tem.

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92 Cal. App. 355

SOUTHERN CALIFORNIA EDISON CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 5934.)

District Court of Appeal, Second District, Division 1, California. June 1, 1928.
Hearing Denied by Supreme Court July 30, 1928.

1. Parent and child 🔑3(1)—Minor child has absolute right to support by parents, who cannot shift responsibility by any act, conduct, contract, or alteration of domestic status.

Minor child has absolute, inalienable right to be supported by parents, who cannot shift responsibility by any act, conduct, contract, or alteration of their domestic status.

2. Master and servant 🔑388—That minor child was living with and largely supported by, stepfather, did not defeat his right to compensation for father's death (Workmen's Compensation, Insurance and Safety Act, § 14[a]).

That minor child was member of household of his stepfather, who was liable for his support and was actually supporting him in large part at time of his father's death, did not deprive him of right to compensation as dependent of father, in view of conclusive presumption of total dependency for support on deceased employee, under Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831) § 14(a).

Proceeding under the Workmen's Compensation Act by Daniel McKendrick, a minor, by F. R. Grother, his guardian ad litem, for compensation for the death of Claude S. McKendrick, employee, opposed by the Southern California Edison Company, employer. To review an award of compensation by the Industrial Accident Commission, the employer brings certiorari. Award affirmed.

Roy V. Reppy, E. W. Cunningham and Maurice Jones, Jr., all of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

Myrick & Deering and Scott, of San Francisco, for respondent Grother.

HOUSER, J. It appears that some time during the year 1917, in the state of Idaho, one Claude S. McKendrick, who at that time was a resident of this state, was divorced by his wife. By the decree of divorce the custody of Daniel McKendrick, a minor son of the parties, was awarded to the mother, although no provision for alimony to her, nor support by the father for the son, was contained in the decree. A few months after the decree of divorce was granted, the mother of the boy was married to a man named Rodgers. On June 23, 1923, in the course of his industrial employment, the father of the boy met with an accident which resulted in his death; and thereafter, in pursuance of an application to the respondent commission for adjustment of compensation, an order of award was made in favor of the minor son as a dependent of the deceased. Upon such basic facts petitioner seeks a review of the proceedings had before the respondent commission.

An examination of the record herein develops further material facts as follows: At the time when the divorce was granted, the son, Daniel, was a small boy. Thereafter, up to about a year preceding the death of his father, he lived with his grandparents in a small town in the state of Idaho and there attended school, following which, for a period of about one year, he lived in said state with his mother and his stepfather on a ranch—during all of which time the father sent to his son various amounts of cash, aggregating approximately $50 per year, besides miscellaneous items of clothing. However, the boy was not wholly dependent upon his father for support. When money was received by him, if not immediately needed for the purpose of purchasing necessary clothing, etc., it was placed in a savings bank account which, at the time of the hearing before the commission, showed a credit of approximately $185, which included $100 received from the sale of two Liberty bonds of the face value of $50 each, one of which had been given to the boy by his father and the other by his mother. While it appeared that, with the exception of an interest in an unsettled estate of the value of $1,000 owned by the stepfather, neither he nor the mother of the boy was possessed of any means or property of any sort, nevertheless they were willing to provide for the boy's support and give him such care and maintenance as lay within their power; but that "at the present time" they were financially unable to provide for his education. "His father said he would look out for his education, and for that he was dependent upon his father—for an education." The stepfather was "just working" on his father's ranch, had no charge "of the selling or income of the ranch," and received no salary. As testified by him, "Dad does all that. * * * I get all I want to eat, clothing and a home—ought to be satisfied these days with that much." On the other hand, at the time the decree of divorce was granted to the mother of the boy, the father agreed to help take care of his son. Regarding that matter, in part the mother testified:

> "A. He (the father) asked that Dan—he always wanted to do something to help Dan—and when Mr. Rodgers and I were married he asked his mother not to have Dan adopted, that he wanted to be able to provide and help to educate Dan, and he thought that if he were not adopted that he would have a better opportunity. He asked for him not to be adopted, and he never has been. * * * He (the father) was willing to help take care of Dan—that is, to help when he could— * * * because he said he would rather leave the alimony out and rather help, to do things to help and not have it in the decree; * * * that he would help to take care of him (the son), but he didn't want the alimony part put in the decree."

As stated by the petitioner:

> "The ultimate question of law is whether a father, a resident of this state, is under a legal obligation to support his minor child, residing at all times in another state, and in the legal custody of its mother by virtue of a decree of divorce given to the mother by the courts of the state in which she and the child reside, which decree makes no provision whatsoever for alimony, or for support of the minor by the father, the minor having been supported almost entirely by his stepfather, of whose family he is a member."

[1] Whatever may be said of earlier decisions, it now seems to be the settled rule of law in this state that by no act, conduct, or arrangement of whatever sort may a parent shift from his shoulders the legal responsibility and moral duty to support his minor child. It is an absolute, inalienable right enjoyed by the child, which no form of contract between the parents, nor alteration of the domestic status of either of them, may affect. Were the rule to the contrary, it is readily conceivable how a minor child of a rich father (by reason of the divorce of its parents and the subsequent marriage of the mother to a possibly shiftless and impecunious man, who, under the law, on taking the child into his household, might become legally liable for the maintenance of the child) might be deprived of an education and the bare necessities of life, or even reach such a state of destitution as to become a public charge. Substantially the authorities dealing with such a situation are reviewed in the case of Federal Mutual Liability Insurance Co. v. Industrial Accident Commission, 195 Cal. 283, 233 P. 335. It is there held that a father, from whom his wife has secured a decree of divorce, may not, by reason of any contractual arrangement between the parties, escape his legal, bounden duty to support the minor child of the marriage. Although authorities other than those there considered might be cited, at most it would be but a work of supererogation to herein set forth the facts and the law pertaining to each of such cases. It may suffice to attract attention to some of them by citation only. See Continental Casualty Co. v. Pillsbury, 181 Cal. 389, 184 P. 658, 8 A. L. R. 1110; Sherer & Co. v. Industrial Acc. Com., 182 Cal. 488, 188 P. 798; Pacific Gold Dredging Co. v. Industrial Acc. Com., 184 Cal. 462, 194 P. 1, 13 A. L. R. 725; Svoboda v. Superior Court, 190 Cal. 727, 214 P. 440; Llewellyn Iron Works v. Industrial Acc. Com., 191 Cal. 28, 214 P. 846.

[2] Specifically, the point is advanced by petitioner that, because in the instant case the child was a member of the household of his stepfather, who, under the law, was liable for the support, and who in fact at the time of the death of the father of the child in large part was supporting the child, a case of dependency for support on the father of the child was not presented; and in connection therewith it is contended that at the same instant of time the child could not be legally dependent upon each of two (quasi) fathers for support.

Section 14(a) of the Workmen's Compensation, Insurance and Safety Act (Stats. 1917, p. 831) provides in part that it shall be conclusively presumed that a child under the age of 18 years is "wholly dependent for support upon a deceased employee." In principle, the point to which attention has been directed is ruled in Federal Mutual Liability Ins. Co. v. Industrial Accident Commission, 187 Cal. 469, 202 P. 664. The case is elaborately considered, and it is there held that a minor child was entitled to compensation as a dependent of a man with whom her mother was living as his wife without ever having been married to him, notwithstanding the fact that the father of the child was living, but who contributed nothing to the support of the child. A part of the syllabus of the case is to the effect that "the right of a minor to compensation as a dependent member of the family of an employee is not affected by the fact that the father of the minor is legally liable for its support. * * *"

The facts in the case of Federal Mutual Liability Insurance Co. v. Industrial Accident Commission, 195 Cal. 283, 233 P. 335, resemble those in the instant case. Therein it appeared that the father and the mother of the minor child were divorced and the custody of the child was awarded to the mother. The mother remarried and removed to Mexico, where she thereafter resided—the child being left in this state with its uncle and aunt. It appeared that the cost of providing necessaries for the child was approximately $75 per month, of which amount the father contributed $35 or $40 per month. Relying upon the conclusive presumption of total dependency under the terms of section 14(a) of the Workmen's Compensation, Insurance and Safety Act (Stats. 1917, p. 831), it was ruled that the Industrial Accident Commission was justified in making an award to the child on account of the accidental death of the father.

In accord with the principle of law as announced in the foregoing authorities, it is ordered that the award be and it is affirmed.

We concur: CONREY, P. J.; YORK, J.

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92 Cal. App. 323

PEOPLE v. PALMER. (Cr. 1465.)

District Court of Appeal, First District, Division 2, California. May 31, 1928.

1. Larceny ⟹27—State held required to prove, not that defendant co-operated with codefendant snatching purse, but that act was probable result of agreed wrongful act (Pen. Code, §§ 484, 487, subd. 1, as amended by St. 1927, pp. 1046, 1047, §§ 1, 4).

In prosecution for grand theft, in violation of Pen. Code, §§ 484, 487, subd. 1, as amended by St. 1927, pp. 1046, 1047, §§ 1, 4, in which case presented by state was one in which the two defendants were concerned in common design to commit crime of theft it was necessary for state to prove, not that defendant actually co-operated with codefendant in snatching of purse, but that his act was probable result of wrongful act agreed upon by them, and was not fresh and independent product of mind of one of confederates outside of or foreign to common design.

2. Criminal law ⟹1188—Order granting accused new trial, based on misconception of law, will be reversed, with directions to enter judgment on verdict.

Order granting accused new trial will be reversed, with directions to enter judgment on the verdict, where it is based on a misconception of the rules of law applicable to the evidence.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Bert Palmer was convicted of grand theft, and, from an order granting a motion for a new trial, the State appeals. Reversed, with directions.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

Frank J. Egan, Public Defender, and Charles R. Boden, Asst. Public Defender, both of San Francisco, for respondent.

NOURSE, J. The defendant and Robert Arter were jointly charged with the crime of grand theft. They were tried before a jury, and a verdict against both defendants was returned, but the trial court, on motion, granted this defendant a new trial. From this order the state has appealed on a typewritten transcript.

We take the facts of the case substantially as stated in appellant's brief, as they are not controverted by respondent. These facts stand in the record undisputed, inasmuch as neither the defendant nor his associate took the stand at the trial, and no evidence was offered on behalf of either of them except an ineffectual attempt to prove an alibi in behalf of Arter. This evidence shows that Arter approached the complaining witness on the deck of the steamer on which the latter had just arrived in San Francisco and engaged him in conversation about the weather and the trip upon the boat, giving to the complaining witness the impression that he also had arrived on the same steamer. Arter then suggested that he was not acquainted with San Francisco, and would like to see some of the places of interest, particularly Chinatown. As the conversation proceeded, it was agreed that the two parties would go ashore, and that the complaining witness would direct Arter to places of interest in and about that portion of San Francisco. These two accordingly walked from the dock up California street until they had passed Kearny street, where respondent Palmer approached them and inquired as to the location of a certain hotel, the name of which was unknown to both of them. Palmer then related an experience of the night before with a girl whom he claimed had taken $20 from him and had given this hotel as her address. Arter then suggested to Palmer that he should match the girl for the $20, and Palmer immediately expressed complete ignorance of the meaning of the expression "match," and thereupon pulled out a large roll of greenbacks which he showed to Arter and the complaining witness. The latter advised him to put the money in a bank, as it was unsafe to carry it on his person, but Palmer replied that he had ten thousand more on his belt. He then stated that both Arter and the complaining witness seemed to be such good fellows that he would like to show his appreciation of their company and buy them a drink or a cigar. The complaining witness stated that he did not drink, and the conversation then returned to the mysteries of the game of matching, and Palmer again asked Arter to explain how it was played. Arter then took two coins from his pocket and handed one to the complaining witness and showed Palmer how to match. Palmer and Arter then matched for cigars and continued in the game until they were matching for ten or twenty dollars at a time, continually urging the complaining witness to join with them. While this game was going on, all three parties walked down Washington street until they reached a point about the corner of Washington and Sansome streets, where Arter explained that he had lost all his money in matching with Palmer and owed the latter $10. Palmer insisted that Arter was shy $10 and he must pay him, to which Arter replied that he had no more money. Palmer then said, "That makes no difference; you know I have been paying all my bets; you must pay your bets." Arter then asked the complaining witness to lend him $10 until they returned to the boat. As the complaining witness took his wallet from his pocket and opened it to procure the $10, Arter shoved him from the sidewalk, seized his wallet, and ran away with it. The complaining witness followed Arter, but was unable to overtake him, and in the excitement lost sight of Palmer. A short time thereafter the complaining witness identified both Palmer and Arter at the city prison by placing his hand upon the shoulder of each. On this occasion, however, neither of the two made any response to the implied accusation of the complaining witness. They stood mute then, and have sustained that position ever since.

[1, 2] Upon this appeal, the appellant insists that there was an abuse of discretion on the part of the trial judge in granting a new trial to Palmer, as there is no question of a conflict of the evidence and no question of the sufficiency of the evidence to sustain the verdict. The respondent relies upon the rule of People v. Canfield, 173 Cal. 309, 159 P. 1046, that an order granting a new trial to the defendant in a criminal case should not be disturbed on appeal except in a case of a clear and unmistakable abuse of discretion. The appellant does not question the rule as thus stated, but insists that in this case the order should be reversed because it was based upon a misconception of the rules of law applicable to the evidence and not upon the legal sufficiency of the evidence to sustain the verdict. The case differs from People v. Canfield and other cases cited by respondent of similar import, in that here the whole evidence stands without conflict by either testimony or inference, and that evidence unmistakably shows that the respondent joined with Arter in an unlawful common purpose to obtain the property of the complaining witness, and that, from the time Arter and the complaining witness met Palmer down to the time Arter escaped with the purse, Arter and Palmer were acting in concert to effect this purpose. This view was entertained by the trial court when the motion for a new trial was heard. In explaining the order about to be made the trial judge said:

> "And I have a conviction myself—here is a case where I have an absolute conviction. I am satisfied * * * that this man is a bunco man. I feel satisfied he co-operated with Arter. * * *"

And again:

> "Of course the charge is grand theft, and the evidence went a great way to show a co-operation or co-ordination between the two defendants. Apparently they were endeavoring to obtain money by either trick or device or false pretenses; but, when the final act came, the act was the snatching of a purse."

The amendment to section 484 of the Penal Code in 1927 (St. 1927, p. 1046, § 1), defining the crime of theft, was designed to eliminate the distinctions between the crimes of obtaining the property of another by false pretenses and by trick and device. The amendment includes in the definition of theft the taking of the property of another or appropriating it by any false or fraudulent pretense. It is also provided that—

> "For the purposes of this section, any false and fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as result thereof."

It is apparent that the trial court treated the case as one of robbery from the person of the complaining witness, which is one of the circumstances constituting grand theft as included in section 487 of the Penal Code as amended in 1927 (St. 1927, p. 1047, § 4). However, the offense became one of grand theft because of the first subdivision of section 487; the proof being that $500 in currency was taken from the complaining witness. The case presented by the state was therefore one in which the two defendants were concerned in a common design to commit the crime of theft, and it was necessary for the state to prove, not that Palmer actually cooperated with his codefendant in the snatching of the purse, but that this act was the probable result of the wrongful act agreed upon by them, and was not "a fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design." People v. Kauffman, 152 Cal. 331, 334, 92 P. 861. Thus on a trial of five persons charged with murder committed by one of them while the parties were attempting to commit a burglary pursuant to a common design for that purpose, it was said:

> "All who participated in any such understanding or conspiracy are equally guilty of any crime which is the natural and probable consequence of such an enterprise whether he personally commits the act or whether its commission is done by any one of his associates in carrying out the common purpose." People v. Wheaton, 64 Cal. App. 58, 68, 220 P. 451, 455, citing cases.

On the part of respondent, it is argued that the district attorney was guilty of misconduct in his attempt to introduce evidence of other offenses on the part of Palmer. The purpose of the evidence was to show the combination between Arter and Palmer in the commission of other offenses and thus permit the jury to draw the inference from the facts proved in this case that the crime here was a part of their common design. We need not determine whether the evidence was admissible, because the trial court refused to permit the district attorney to bring it before the jury, and fully instructed the jury that they were to disregard the statements made by the district attorney in support of the admissibility of the testimony. There is no error in the record in this respect, but to our minds the trial court misconstrued the rules of law applicable to the case in granting the defendant Palmer a new trial. See People v. Tomsky, 20 Cal. App. 672, 686, 130 P. 184; People v. Cavala, 35 Cal. App. 154, 162, 169 P. 420.

The order is reversed, with directions to the trial court to enter judgment upon the verdict.

We concur: KOFORD, P. J.; STURTEVANT, J.

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92 Cal. App. 376

PEOPLE v. LARSON. (Cr. 1611.) ★

District Court of Appeal, Second District, Division 1, California. June 2, 1928.

Hearing Denied by Supreme Court July 30, 1928.

1. Embezzlement 🔑11(1)—Embezzlement of money is not completed until checks are converted into cash or have been deposited and cleared.

Act of embezzlement of money is not completed until checks given are converted into cash, or deposited and cleared, so as to enable defendant to obtain the money in person or by check.

2. Embezzlement 🔑5, 47—Time of completion of alleged embezzlement depends on intent of person charged, and question of fraudulent intent is for jury (Pen. Code, § 508).

Intent of person charged is important factor in determining when the act of embezzlement under Pen. Code, § 508, is completed, and question of existence of defendant's fraudulent intent is one for determination by jury under all facts and circumstances in the case.

3. Criminal law 🔑678(1)—State, charging embezzlement of money in bank, was not required to elect between transactions by which money was withdrawn by checks given defendant, where evidence showed appropriation after entire amount had been received.

Where indictment charged embezzlement of a sum of money in bank, which was withdrawn by several checks made payable to defendant, state was not required to elect as to one of the several transactions represented by the separate checks, where there was evidence that the defendant appropriated the money after having received and banked all of the checks.

4. Criminal law 🔑1168(2)—Failure to require election between separate transactions, in prosecution for embezzlement of money in bank, held not prejudicial, where manner of obtaining and depositing checks was identical.

In prosecution for embezzlement of specified sum of money on deposit in bank, refusal of trial court to grant motion to require prosecution to elect between various transactions involving separate checks made payable to defendant was not prejudicial, where it appeared without contradiction that each of the checks was obtained in the same way and that all were deposited in defendant's account.

5. Embezzlement 🔑44(1)—Evidence held sufficient to sustain conviction for embezzlement (Pen. Code, § 508).

In prosecution under Pen. Code, § 508, for embezzlement of funds which defendant placed to her own account through checks obtained from prosecuting witness and subsequently appropriated by checking them out, evidence *held* to sustain conviction.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Hattie V. Larson was convicted of embezzlement, and she appeals. Affirmed.

E. R. Simon, of Los Angeles, for appellant.
U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem. The defendant was charged by an indictment filed by the grand jury of Los Angeles county, in one count with the crime of grand larceny, specifying the theft of $35,000; in count 2 with the crime of obtaining property under false pretenses, relating to the conveyance of real property of the alleged value of $100,000; in count 3 with the crime of embezzlement; and in count 4 with the crime of grand larceny. Counts 3 and 4 relate to the sum of $3,100 belonging to the complaining witness, which was on deposit in the Western Savings Bank of Long Beach.

The jury returned a verdict of not guilty as to counts 2 and 4, and guilty as to counts 1 and 3. The court granted defendant's motion for a new trial as to count 1, but denied her motion for a new trial as to count 3. From the judgment and order denying a new trial as to count 3 charging embezzlement this appeal is prosecuted.

The four grounds urged by appellant for a reversal of the judgment are stated as follows: (1) The court erred in denying defendant's motion to elect; (2) the court erred in refusing to give an instruction advising the jury to acquit the defendant under count 3 of the indictment as requested by defendant; (3) the testimony is insufficient to sustain the verdict of the jury; (4) the court erred in denying defendant's motion for a new trial.

The record fairly supports the following recital as constituting the circumstances and events bearing upon the charge now under review:

The complaining witness was a Swedish woman, 87 years of age, afflicted with deafness, and unable to either speak, write, un-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

derstand, or read the English language. Estranged from her children, she lived alone in a frugal manner in her home on Pine street in the city of Long Beach, which property, by reason of the business character of its location, had attained a value of about $100,000. She also had on deposit in the Western Savings Bank of Long Beach in excess of $3,100.

Early in 1924 the complaining witness became involved in a lawsuit, and requested of the defendant, who spoke and understood the Swedish as well as the English language, her advice and aid in securing the services of an attorney. Apparently the complaining witness was not very well acquainted with defendant, but had known her mother for some time. Shortly after her appeal to the defendant for this advice and aid, it appears that the defendant was given a general power of attorney by the complaining witness. In September of the same year the defendant secured from the old lady a deed of conveyance for her property on Pine street. This deed contained a provision which obligated the defendant as grantee to support the grantor during her lifetime. Two months later the complaining witness executed a grant deed for the same property to the defendant, evidently for the purpose of removing the condition providing for support as contained in the first deed. In January, one month after the second deed was executed, the defendant mortgaged the property for $35,000, of which sum $10,000 was used to pay an incumbrance on the property, while the remaining $25,000 was retained by defendant. Within two or three months afterward $12,000 in addition was obtained by the defendant on this property by the execution of two trust deeds. During the latter part of 1925 the indebtedness on the property was refunded by the defendant with a new trust deed for the principal sum of $45,000. This last trust deed was, early in 1926, foreclosed, by reason of default in the payment of interest on the mortgage indebtedness, and also by reason of the fact that the taxes were allowed to become delinquent.

Between the 8th of August and September 20, 1924, defendant secured all of the money the complaining witness had on deposit in the Western Savings Bank, amounting to the sum of $3,138.40. This was obtained upon five checks, two for $1,000 each, two for $500 each, and one for $138.40, being the balance of the account. Three of the checks were signed "Magdalena Nelson," one signed "Magdalena Nelson, per H. V. L.," and one signed "Magdalena Nelson, per Hattie V. Larson." All five checks were made payable to Hattie V. Larson, and were indorsed by her, and, upon presentation by defendant at the Western Savings Bank, all except the last one for $138.40 were paid by the bank with cashier's checks. These cashier's checks were in turn deposited by the defendant in her own personal account in another bank, which account the evidence shows was some months later closed out.

It clearly appears that, in connection with the execution of the various documents affecting the Pine street property, as also the execution of the old lady's will, the defendant was active in procuring the services of attorneys and of notaries. Hers was the directing mind in the drafting and execution of the various documents. While the testimony relating to the execution of the checks is rather meager, the inference might fairly be drawn that the defendant was equally as active in directing the drafting and signing of the checks which depleted the old lady's deposit in the Western Savings Bank.

The complaining witness' testimony, due to her deafness, her lack of knowledge of the English language, and other infirmities of old age, presents a more or less erratic and disconnected story of her relations with the defendant, and her knowledge and understanding of the various documents and events which affected her property. She testified that she had a recollection of signing one paper at home at the request of the defendant, but denied any recollection of having signed any deeds, and denied she signed any of the checks in question. She repeatedly insisted that she had no intention either to convey her Pine street property to the defendant, or to give the defendant possession of all of her money on deposit in the Western Savings Bank. The only thing, according to her testimony, that she authorized the defendant to do affecting her money was to pay the taxes upon her Pine street property and pay her attorneys for services rendered. She further testified that she did not know that the defendant had obtained title to her real estate on Pine street, or had obtained possession of all of her money in the bank until some months after the deeds had been recorded and the checks cashed.

The evidence would readily support the conclusion that the complaining witness never received $1 from the defendant for the deed of conveyance to her Pine street property, or from the proceeds of the money secured by the defendant from the loans placed on the property, or from the money on deposit in the Western Savings Bank.

There is in addition testimony of other witnesses as to statements made by the defendant at different times concerning the fact that she had obtained property and money from the complaining witness and what she had done with it, or intended to do with it. There is also testimony as to the defendant's demeanor and conduct when she was interrogated by those investigating the old lady's affairs. All of this testimony presented pertinent matters which might well have formed a basis from which the jury would have been justified in drawing inferences that served to corroborate the testimony of the complaining witness.

The first point urged by appellant arises from the court's denial of defendant's motion "to require the prosecution to elect upon what particular transaction, in the embezzlement of which particular sum of money the prosecution will ask for a conviction under count 3 in the indictment."

Count 3 charged the embezzlement of $3,100, which was in rouna numbers the total amount which the complaining witness had on deposit in the Western Savings Bank. This money was obtained at different times during a period of five weeks. It is appellant's theory that, if she was at all guilty of embezzlement by reason of the misuse of any of the money secured from the complaining witness' savings bank account, each time she obtained money on a check a separate offense of embezzlement was committed. Upon this theory appellant contends that she was entitled to have the district attorney select one of the checks as constituting the offense for which she was to answer, and that the court committed prejudicial error in refusing to grant her motion to require the district attorney to so elect.

In the case of People v. Bartnett, 15 Cal. App. 89, 113 P. 879, cited by appellant in support of her contention, the defendant was charged by indictment with the offense of embezzling a long list of securities. It appeared from the indictment that these securities were misappropriated on different dates, covering a period of about two years. It was there held that the taking of each parcel of securities constituted a separate offense, and that the district attorney should have elected one of the specified acts of misappropriation of securities upon which to base the charge.

[1-3] This case is not in point, for the reason that in the instant case the defendant is not charged with embezzling the checks, but with embezzling a sum of money which constituted the entire sum on deposit in the complaining witness' account. People v. Whalen, 154 Cal. 472, 98 P. 194. The act of embezzling the money was not completed until the checks were converted into cash, or so deposited and cleared as to enable the defendant to obtain the money in person or by check. People v. Whalen, supra; People v. Crane, 34 Cal. App. 599, 168 P. 377.

There is no evidence in the record to show at what particular time the money as represented by the checks was actually obtained by the defendant or when it was available for payment upon her check. It does appear, however, that the money on deposit in defendant's personal account in which the cashier's checks were deposited was all drawn out and the account closed.

Another factor important in determining when the act of embezzlement is completed is the intent of the person charged. It may well be in the instant case that the defendant did not intend to misappropriate these funds until she had obtained possession of the entire amount of the complaining witness' money on deposit. There is evidence that the defendant made investments after she had received and banked all of the checks, which, in addition to evidence of her admissions, would justify the inference that the misappropriation of the money was accomplished after she had acquired the entire bank deposit of the complaining witness. The question of intent was one for the jury to decide from all the facts and circumstances shown by the evidence.

In the case of People v. Ledbetter (Cal. App.) 259 P. 982, defendant obtained an automobile from the complaining witness upon the promise that he would sell it for $1,050 and invest for her the proceeds. Instead he sold the car for $300 cash and a Ford coupé. Some time later he sold the Ford coupé for $350. He retained the money he received from the sale of both cars. The information charged him with embezzling $1,050. Upon appeal the several legal objections made to the variance between the information and the evidence were swept aside and the judgment of conviction affirmed.

[4] But conceding for the sake of argument that the defendant was entitled to have the district attorney elect which one of the checks was to be relied upon as furnishing the foundation for the charge of embezzlement, we cannot see how the defendant was prejudiced by the court's ruling in refusing to grant her motion. It appears without contradiction that each of the checks was obtained by the defendant in apparently the same way; that each was presented to the Western Savings Bank by the defendant, and a cashier's check was delivered to the defendant payable to her for all but the last check. These cashier's checks were all in like manner deposited by the defendant in her own personal account. If, then, the evidence relating to one check was sufficient to justify the jury's verdict, the same would have been true of the evidence as to all of the four checks; the net result of charging the defendant with the embezzlement of $3,100 instead of the embezzlement of money obtained upon each separate check, is that she stands convicted of but one count of embezzlement, while under her theory, if guilty at all, she would be guilty of four offenses of embezzlement.

[5] In urging her second point, that the evidence is insufficient to support the verdict, appellant asserts that there is no evidence to show that the checks were received by her upon any trust relation, and, further, that there is no testimony to show what was the purpose for which the checks were signed and delivered by Magdalena Nelson to the defendant. Section 508 of the Penal Code of California reads as follows:

> "Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to

appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement."

It will be noted that under this section of the Code three requisites are essential to support the charge of embezzlement: First, that there existed between the complaining witness and the defendant the relation of clerk, agent, or servant; second, that while such relation existed there came into the possession of the defendant property belonging to the complaining witness; and, third, that, while such property was in the possession or under the control of the defendant, the defendant fraudulently appropriated it to her own use, or secreted it with a fraudulent intent to so appropriate it to her own use.

As to the first requisite, the evidence here clearly shows that, during the period that the checks were issued, the defendant was acting as the agent and employee of Magdalena Nelson. The defendant had a general power of attorney from the complaining witness, and during a period of several months apparently was attending to her business affairs. It further appears that in the case of two of the five checks the signatures of Magdalena Nelson were written by the defendant herself.

As to the second, that the defendant came into the possession of all the money which the complaining witness had on deposit in the bank, is not disputed.

The only conflict in the evidence is as to the third element; namely, the fraudulent appropriation of the money by the defendant. It must be conceded that the testimony of Magdalena Nelson, the complaining witness, is conflicting and far from satisfactory. If the verdict was dependent alone upon the old lady's testimony, appellant's contention would have to be sustained. There is the complaining witness' testimony that she told the defendant to pay her taxes and her attorney's fees; also that she had not authorized the defendant to use her funds for any other purpose. The inference may fairly be drawn from the old lady's testimony that she had no intention of giving the defendant any of this money. In addition, there is testimony of statements and admissions made by the defendant prior to her arrest that she had the money of the complaining witness and had invested the same in stocks and other securities. Without conflict it appears that when she obtained the checks in question the defendant immediately secured cashier's checks for the same and deposited these in her own personal account in another bank, and that subsequently this money was checked out by the defendant and her account closed.

Appellant cites the case of People v. Wyman, 102 Cal. 552, 36 P. 932, and People v. Royce, 106 Cal. 173, 37 P. 630, 39 P. 524, and People v. Page, 116 Cal. 386, 48 P. 326, in support of her contention that the mere deposit of the funds in her personal account and withdrawing them afterward is not sufficient to show a conversion of the funds. These cases, in our opinion, do not conflict in the views there expressed with the jury's verdict here. The fraudulent intent is always an important element in cases of this character, and it is for the jury to determine from all of the evidence whether or not the defendant acted with fraudulent intent in depositing the money of the complaining witness in her own personal bank account.

In the light of all of the circumstances as shown by the evidence, we are of the opinion that there was sufficient evidence to justify the jury in concluding that the defendant was actuated by a fraudulent intent when she deposited the funds in her own account and afterwards checked them out. Commonwealth v. Smith, 129 Mass. 104; People v. Schroeder, 43 Cal. App. 623, 185 P. 507; People v. McLean, 135 Cal. 306, 67 P. 770.

As we find no reversible errors in the record, the judgment and order denying motion for a new trial are affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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92 Cal. App. 384

Ex parte CHAUS. (Cr. 1646.)

District Court of Appeal, Second District, Division 2, California. June 2, 1928.

1. Habeas corpus ⚷94—Court may, in certain cases, look beyond judgment in habeas corpus proceedings to determine jurisdictional questions (Pen. Code, § 1207).

Generally, habeas corpus proceedings do not permit inquiry beyond the face of the judgment under Pen. Code, § 1207, but in certain cases, especially with regard to judgments of police and justices' courts in which appeals have been taken and new trials denied, review of entire record will be made, where judgment is founded upon extraneous facts and proceedings which alone demonstrate want of jurisdiction.

2. Habeas corpus ⚷94—Where municipal court judgments, affirmed on appeal, merely adjudged petitioner's violations of Wright Act on same date, court on habeas corpus could examine record to determine trial court's jurisdiction (Wright Act; Pen. Code, § 1207).

Where two judgments entered in municipal court and affirmed on appeal in superior court merely adjudicated that petitioner was guilty of violations of Wright Act (St. 1921, p. 79) on same date, court in habeas corpus proceedings could look beyond the judgments and view the entire record as in case of certiorari, in order to determine whether one or more offenses were in fact committed and whether municipal court

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

exceeded its jurisdiction in attempting to enforce second judgment; consideration not being limited to judgment roll under Pen. Code, § 1207.

3. Criminal law ⟹979(2)—Where defendant's confederate, after transporting liquor, placed it in trunk, jurisdiction to sentence defendant for possession was not exhausted by sentence for transporting (Wright Act).

Where evidence in prosecutions under Wright Act (St. 1921, p. 79) for transporting liquor and for possession of liquor showed that defendant and confederate had driven automobile in which liquor was loaded and that confederate had unloaded the liquor and placed it in a trunk, court was not without jurisdiction to sentence defendant for possession on ground that possession involved same offense as transportation, for which defendant had previously been convicted and sentenced.

Application by Louis Chaus for writ of habeas corpus to be directed to the Chief of Police of the City of Los Angeles to secure petitioner's release from custody after conviction in the municipal court for violation of the Wright Act. Writ discharged, and petitioner remanded.

Le Roy Reames and James R. Jaffray, both of Los Angeles, for petitioner.

E. J. Lickley, City Pros., and Joe W. Matherly and F. W. Fellows, Deputy City Prosecutors, all of Los Angeles, for respondent.

CRAIG, J. The petitioner herein asks by habeas corpus to obtain his release from confinement in the city jail of the city of Los Angeles after sentence by the municipal court upon conviction of a violation of the Wright Act (St. 1921, p. 79).

It appears from the record before us that on or about May 23, 1927, petitioner drove an automobile to a point in the vicinity of Tenth street and Western avenue, in the city of Los Angeles, where he received and placed in the machine five gallons of grain alcohol; that he then drove to a café or lunch wagon on Tenth street, where one Carl W. Bell, alias Jack Moore, joined him, and the two men drove around for a short time, finally proceeding to a residence on Fountain avenue, where Chaus alighted, entering the house, and Bell drove into the garage. Two police officers, who had received advance information of the men's intentions, immediately proceeded to the premises, one of whom entered the house, and the other the garage, and placed Chaus and Bell under arrest. Before his arrest, Bell removed the alcohol from the car and placed it in a trunk, but apparently it was removed therefrom and set on the trunk; Chaus was led to the garage and questioned about it, whereupon he denied that the can contained alcohol, but later admitted that it did, and stated that he owned it.

Petitioner and Bell were each charged with unlawful transportation and unlawful possession of intoxicating liquor, to both of which charges Bell pleaded guilty. Chaus pleaded guilty to having transported the liquor, and was sentenced to a term of three months in the city jail. To the charge of illegal possession he pleaded not guilty, was tried and convicted, and received for this latter offense a sentence of one year in the city jail. Upon appeals to the superior court by Chaus both judgments were affirmed.

It is contended by the petitioner that he was twice sentenced for the same offense, in that the possession and transportation consisted of but one act, and that, having already served three months for transporting the liquor, it is now attempted by the municipal court to confine him for a period of one year for having had possession of the same liquor at the same time. It is insisted by the respondent (1) that this proceeding is in the nature of a collateral attack upon the judgment, and that we should not go behind the judgment to ascertain whether or not the petitioner is entitled to relief; (2) that unlawful possession of intoxicating liquor, and unlawful transportation of the same are separate and distinct offenses, for each of which a penalty may be assessed; and (3) that, if resort be had to the facts, the record below will show the commission of separate and distinct offenses, although perpetrated on the same date.

Each of the judgments upon which petitioner was sentenced merely recites that the defendant be imprisoned in the city jail for a violation of the Wright Act, and are based upon complaints which allege, respectively, that Louis Chaus unlawfully transported over and upon Fountain avenue and St. Andrews street, and that he unlawfully had in possession at Fountain avenue and St. Andrews street, in said city of Los Angeles, certain alcoholic intoxicating liquors.

In Re Todd, 44 Cal. App. 496, 186 P. 790, the rules both in the state and federal courts are discussed, and the point first urged by respondent apparently finds support. The court there said:

> "A proceeding in habeas corpus involves a collateral attack upon the judgment in a criminal case, where the prisoner thus seeks his release from personal restraint after judgment of conviction and sentence, and the single question reviewable and determinable therein is one of jurisdiction. Therefore, in the determination in such case of the question whether a judicial tribunal was without jurisdiction of the subject-matter of the proceeding thus sought to be reviewed or of the person of the party whose liberty is under restraint by virtue of such proceeding, or whether such tribunal, once having it, had for any legal reason lost jurisdiction to hear the proceeding or to pass judgment therein, the court to which the application is addressed is, generally speaking, limited solely to the consideration of the judgment roll, or, as

our Code defines it (Pen. Code, § 1207), 'the record of the action.'"

[1] Other cases holding it to be the uniform rule that, generally speaking, proceedings in habeas corpus do not permit of inquiry beyond the face of the judgment, are In re Gutierrez, 46 Cal. App. 94, 188 P. 1004; In re Drew, 188 Cal. 717, 207 P. 249, and authorities therein cited. It is also true, however, that there are exceptions to this rule, and that in such cases, if a judgment, although formal and apparently valid, is nevertheless founded upon facts and proceedings from which alone it may be made to appear that the court was without, or exceeded its jurisdiction, a review of the entire record will be made, as in certiorari. And this is particularly true as to judgments of the police and justices' courts from which appeals have been taken and new trials denied. In re Gottschalk, 47 Cal. App. 260, 190 P. 649; In re Drew, supra; In re Lake, 65 Cal. App. 420, 224 P. 126. In the case last cited it was said:

> "The scope of the inquiry which the court can make upon either habeas corpus or certiorari is precisely the same. Ex parte Drew, 188 Cal. 717, 207 P. 249, 250; Commercial Bank, etc., v. Superior Court, 192 Cal. 395, 220 P. 422, 423. While neither writ is one of error, both extend to the entire record of the court below and to the evidence itself when necessary to determine jurisdiction. Hotaling v. Superior Court, 191 Cal. 501, 217 P. 73, 75, 29 A. L. R. 127. This inquiry, of course, cannot go beyond the question of jurisdiction, and the review of the evidence is limited to the sole purpose of determining, first, whether jurisdiction existed; and, second, whether jurisdiction was exceeded."

[2] We think the instant proceeding is one falling within the exception rather than the general rule. As we have observed, both judgments here involved merely adjudge the petitioner guilty of having violated the Wright Act on the same date. Hence it obviously is necessary that we look beyond the judgments and view the entire record in order that we may ascertain whether one or more offenses were in fact committed, and, as a result of such inquiry, determine whether or not the municipal court exceeded its jurisdiction in attempting to enforce the second judgment.

The penal provisions of the Volstead Act (27 USCA) were incorporated into the law of this state, and it is expressly made an offense by said act either to "transport * * * or possess any intoxicating liquor except as authorized by this act." Both state and federal tribunals have repeatedly held that the several inhibitions of the Volstead Act are separate and distinct. To manufacture, to own, possess, transport, barter, or sell intoxicating liquor, while separate and distinct as a violation of the act of Congress, and hence an infraction of the Wright Act, and punishable as such, may, nevertheless, before it can be proven, require evidence tending to establish one or more of the other forbidden acts mentioned. In People v. Mehra, 73 Cal. App. 162, 238 P. 802, after an exhaustive review of many state and federal cases, it was held that unlawful possession of intoxicating liquor in a building was not sufficient evidence with which to convict the occupant of the offense of maintaining such establishment as a public nuisance for the sale and dispensing of intoxicants, although proof of the latter would warrant a conviction upon both charges of maintaining a public nuisance and unlawful possession. It is therein further held that each act forbidden by the Wright Act, through adoption of the Volstead Act, constitutes a separate, distinct, and punishable offense, and the court in its opinion, which our Supreme Court declined to review, quotes with approval from Page v. United States (C. C. A. 9th Circuit) 278 F. 41 as follows: "The offense of unlawfully possessing liquor is a distinct offense from that of unlawful transportation of liquor." Evidence merely of unlawful possession is not proof of transportation. A person, once having taken possession of liquor unlawfully, completes a distinct offense forbidden by the statute. We are not unmindful of those decisions upon the principle of which petitioner seeks to rely, holding that the bare apprehension of one driving a vehicle containing alcoholic liquor may not be punished both for possession and transportation, since the former is then a part of, and necessary to, the latter. Brown v. United States (C. C. A.) 16 F.(2d) 682. Also, a person whose only possession consists of loading the liquor into a vehicle with which he thereafter tranports it, is not legally punishable for such possession, as it "was necessary and incidental to the act of transportation." Schroeder v. United States, 7 F.(2d) 60, 65, citing Miller v. United States (C. C. A.) 300 F. 529, 534; Morgan v. United States (C. C. A.) 294 F. 82; Rossman v. United States (C. C. A.) 280 F. 950; and Reynolds v. United States (C. C. A.) 280 F. 1. Yet, in Schroeder v. United States, supra, it was said that possession and transportation may be, and commonly are, distinct offenses; that "possession for a substantial time, and followed by transportation, might constitute two distinct offenses, just as possession for a substantial time, followed by a sale, might amount to two distinct offenses." As stated in Bell v. United States (C. C. A.) 285 F. 145:

> "A person may be in unlawful possession of intoxicating liquor for beverage purposes, and never transport or sell it, as where he has it in possession in an unlawful place. That, having it in possession unlawfully, he should afterwards transport it, unlawfully, involves the commission of two unlawful acts, each violative of the National Prohibition Act, and the court on an accusation, both for unlawful possession and unlawful transportation, in separate counts, could properly impose punishment on each count

on a verdict finding the defendant guilty upon each. Massey v. U. S. (C. C. A.) 281 F. 295."

Again, in Hadley v. United States (C. C. A.) 18 F.(2d) 507, 509, quoting from Albrecht v. United States, 273 U. S. 1, 47 S. Ct. 250, 71 L. Ed. 505, it was said:

> "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction."

And the Supreme Court of the United States there specifically applied the rule to violations of the Volstead Act in the following language:

> "The precise question does not appear to have been discussed in either this or a lower federal court in connection with the National Prohibition Act; but the general principle is well established. Compare Burton v. United States, 202 U. S. 344, 377, 26 S. Ct. 688, 50 L. Ed. 1057, 1069, 6 Ann. Cas. 362; Gavieres v. United States, 220 U. S. 338, 31 S. Ct. 421, 55 L. Ed. 489; Morgan v. Devine, 237 U. S. 632, 35 S. Ct. 712, 59 L. Ed. 1153."

[3] The meager portion presented of the record below does not disclose that Chaus or Bell resided in the vicinity of Tenth street and Western avenue, nor that either of them had had possession of the liquor in question prior to the time that petitioner loaded it into the automobile at that point. It does appear, however, that the evidence before the trial court tended to show that Chaus first obtained the alcohol, drove to the café for Bell, both then proceeding to the Fountain avenue house, which Chaus entered and was telephoning while Bell drove to the garage, unloaded the liquor, which he placed in a trunk; that Bell pleaded guilty to both possession and transportation of the contraband which admittedly was the property of the petitioner. It is apparent, therefore, that both defendants were guilty of having transported the liquor, and each pleaded guilty to that offense. What disposition they intended to make of it we are not informed. However, since it lies within the legislative powers of Congress to denounce as a separate and distinct offense any substantial possession prior to transportation, which is not incidental to and a necessary part of that offense, and it has so ordained by valid enactment, we see no difference in principle between such a case and one wherein it is shown that the defendants first transported the liquor to some secret cache, and there stored it for future disposition. It further appears from the record that the petitioner was engaged in the illicit sale of intoxicating liquor, and that he contemplated the selling his "route" to Bell. The logical assumption follows that they did not transport the liquor to the Fountain avenue address for their own personal consumption, and as to how long they intended that it should remain in the trunk we are not advised, nor do we deem it material. That they had it in their joint possession, and that such possession of the alcohol after being supposedly hidden away for their undisclosed purposes was not necessary nor incidental to the transportation, is self-evident.

Voluminous briefs and a great many authorities have been presented by each of the parties, but we think those to which we have made reference in this opinion announce the established rules in such cases. A careful perusal of the briefs and of other decisions than those to which our attention is called fails to disclose any which are distinguishable in principle when applied to similar conditions to those before us.

The writ is discharged, and the petitioner is remanded.

We concur: WORKS, P. J.; THOMPSON, J.

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92 Cal. App. 443

GRISINGER v. GOLDEN STATE BANK OF LONG BEACH. (Civ. 5136.)

District Court of Appeal, Second District, Division 1, California. June 7, 1928.

Banks and banking 🔑139—Bank paying check on which payment was stopped held liable to drawer.

Where bank, after payment was stopped on check, indorsed check "Payment stopped," but, notwithstanding such indorsement, paid check from funds in its possession belonging to drawer, it cannot escape liability to drawer for such payment on the ground that stopping payment of check was merely an act of courtesy.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by E. A. Grisinger against the Golden State Bank of Long Beach. Judgment for defendant, and plaintiff appeals. Reversed.

Roscoe S. Wilkey and Nowland M. Reid, both of Long Beach, for appellant.

Underwood, Burke & Cree, of Long Beach, for respondent.

HOUSER, J. The question involved in this appeal relates to the liability of a bank to one of its depositors who, by a "stop-payment notice" to the bank, ordered the nonpayment of a check theretofore drawn on his funds deposited in said bank—notwithstanding the fact that, by a statement contained in such "stop-payment notice," the bank purportedly was relieved "from any liability in case of payment" of such check.

The facts appear to be that plaintiff had entered into an agreement with a finance company to the effect that, if within a fixed time it should secure a loan of $50,000 for him, he would pay to such finance company the sum of $1,500 as commission in compensation of its services in that regard. It was also agreed between such parties that plaintiff would deposit with the finance company his post-dated check in the sum of $1,500—apparently to be cashed on the consummation of the loan. However, before agreeing to deposit his check, plaintiff had a conversation with certain of the officers of the defendant bank, who assured plaintiff that, if for any reason he should desire to stop payment on his $1,500 check, he might do so by giving to the bank a notice to that effect. Several days before the time limit had expired, within which (according to the agreement) the finance company was to secure the loan of $50,000 for plaintiff, it became evident to plaintiff that the loan would not be consummated. Thereupon he went to the representative officers of the bank upon which his $1,500 check had been drawn, and told them that, in accordance with previous conversations between them and him, he wished to stop payment on his $1,500 check, "and then and there directed said defendant bank not to pay said check, and that said defendant bank then and there presented to plaintiff for his signature the following order in words and figures as follows, to wit:

> "Golden State Bank of Long Beach, Long Beach, Calif.: Stop payment of check drawn by E. A. Grisinger, No. ——— dated September 8th for $1,500.00. Favor of ———. Date stopped 9/8/23. Time 10 a. m. I ask this as an act of courtesy only and hereby release you from any liability in case of payment or nonpayment."

Plaintiff signed said notice. Thereafter, on presentation for payment of said check to said defendant bank, it caused to be stamped upon the face of said check the indorsement "Payment stopped, Sep. 11, 1923,"—notwithstanding which, on the same day, the defendant bank paid said check from funds in its possession belonging to plaintiff.

In the premises, a judgment for defendant was the result of an action brought by plaintiff against the defendant, and plaintiff appeals therefrom.

The case of Hiroshima v. Bank of Italy, 78 Cal. App. 362, 248 P. 947, is directly in point. In principle, it is there held that, in circumstances such as are herein stated, the bank should not be permitted to pay the check and thereafter escape liability to its drawer on the ground that stopping payment of the check was merely "an act of courtesy." In the Hiroshima Case the statutes and authorities are reviewed, and the reasons for the conclusion by the court are exhaustively stated. To here repeat the able argument there presented would serve no useful purpose. Suffice it to say that this court is in harmony with the conclusion there reached.

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

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92 Cal. App. 353

In re TROY'S ESTATE.

HANKS v. DORN et al.

(Civ. 6396.)

District Court of Appeal, First District, Division 2, California. June 1, 1928.

1. Executors and administrators 🔑400—Order requiring attorney of executrix to pay proceeds of sale of realty into court held proper, notwithstanding attachment against executrix personally (Code Civ. Proc. § 1461).

In proceeding, under Code Civ. Proc. § 1461, for an accounting, where attorneys for executrix refused to pay proceeds of sale of realty belonging to estate because of attachments levied in actions pending against executrix personally, order directing attorneys to pay proceeds to court *held* proper, since, none of proceeds having been distributed to executrix, it was still property of estate, subject to inquiry provided by statute.

2. Executors and administrators 🔑315(4)—Attorneys ordered to pay estate moneys into court could not assert right of creditors of executrix to object to vacation of decree of distribution (Code Civ. Proc. § 1461).

In proceeding pursuant to Code Civ. Proc. § 1461, where attorneys, ordered to pay moneys belonging to estate into court, asserted that order setting aside decree of distribution prejudiced creditors of executrix, *held*, that fact that attaching creditors may have had right to object to vacation of decree was not matter which attorneys could raise, as they were not representatives of such creditors.

3. Executors and administrators 🔑315(4)—Where decree of distribution was set aside before distribution, court could order payment of moneys constituting part of estate into court (Code Civ. Proc. § 1461).

In proceeding pursuant to Code Civ. Proc. § 1461, where attorneys ordered to pay moneys belonging to estate into court, contended that accounting involved determination of title claimed by third parties, matter over which probate court had no jurisdiction, *held* that, since decree of distribution was set aside before any of moneys were distributed to legatees, there was no dispute of title between creditors and legatees, but moneys were clearly property of estate, for which attorneys were bound to account to estate.

4. Executors and administrators 🔑315(4)—Ordering attorneys to pay moneys belonging to estate into court after decree of distribution was vacated held proper as against contention that accounting had been made (Code Civ. Proc. § 1461).

In proceeding pursuant to Code Civ. Proc. § 1461, order requiring attorneys holding moneys belonging to estate to pay same into court *held* proper, where decree of distribution was vacated as against contention that an accounting had been made, and that court was without authority to do anything further under statute, since party obtaining property of estate by virtue of decree which has been set aside holds under court's error, and is not third party claiming title personally to estate.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Proceeding in the matter of the estate of John H. Troy, also known as J. H. Troy, J. H. Troy, Jr., and John H. Troy, Jr., deceased, by Beatrice H. Hanks, against Walter E. Dorn and another. From an order directing payment into court of money found belonging to the estate, defendants appeal. Affirmed.

Walter H. Robinson, of San Francisco, for appellants.

Booth B. Goodman, of Oakland, for respondent.

NOURSE, J. The appellants have appealed from an order of the probate court directing them to pay into court moneys found to belong to the estate of Troy, deceased, of which respondent Hanks is the executrix. The moneys are proceeds of the sale of real property belonging to the estate which came into the possession of the appellants in their capacity as attorneys for the executrix. They make no claim of title, but insist that they are excused from complying with the order because of certain attachments which have been levied in actions pending against the executrix personally. Of the sums ordered to be paid, $8,000 is on deposit in a local bank to the joint account of Palmer and Dorn, while the remaining $779.58 is held by Dorn alone. Palmer has endeavored to meet the terms of the order, and does not join in the appeal.

[1] The order was made pursuant to a citation and hearing under section 1461 of the Code of Civil Procedure, wherein it appeared that certain real property belonging to the estate had been sold under order of court; that the entire proceeds had been received by appellant Dorn; that he paid from these moneys claims against the estate and legacies included in the decree of distribution; that he paid nothing to the executrix, who was one of the legatees, but deposited the sums in suit to meet the claims of her creditors. None of the money having been distributed to the respondent, it was still the property of the estate subject to the inquiry provided for in the section cited.

[2] It is argued that the court was without power to set aside the decree of distribution to the prejudice of the attaching creditors of the distributee. The point does not arise. No appeal was taken from the order setting aside the decree of distribution. There are many cases under which such a decree may be set aside, and, when this is done, it is not subject to collateral attack. The fact that attaching creditors may have had the right to object to the vacation of the decree is not a matter which the appellants can raise here, as they are not representatives of those creditors.

[3] It is argued that the accounting involved the determination of title claimed by third parties—a matter over which the probate court had no jurisdiction. The decree of distribution having been set aside before any of these moneys were distributed to the legatee, there was no dispute of title between the creditors and the legatee. The moneys were clearly the property of the estate for which the attorneys were bound to account to the estate.

[4] Finally it is argued that the order requiring the payment of the moneys into court is a nullity because section 1461 of the Code of Civil Procedure merely provides for an accounting, and that, "an accounting having been made, the court was without authority to do anything further thereunder." The point is merely stated without argument and without citation of authority. Heydenfeldt v. Superior Court of City & County of San Francisco, 117 Cal. 348, 49 P. 210, is authority adverse to appellants' contention. There an order was made, after hearing upon a citation issued under section 1461 of the Code of Civil Procedure, requiring a legatee to restore to the executors property which she had received by virtue of a decree of distribution which was later reversed on appeal. The Supreme Court affirmed the order upon the ground that, the property having been acquired through the error of the probate court, that court had the inherent power to right the injury caused by its own error. There is no essential difference between the reversal of a decree of distribution on appeal and a vacation of the decree by the court which entered it. Where a party has obtained property of an estate by virtue of a decree which has been set aside, he holds under the court's error, and is not a third party claiming title adversely to the estate, as was the case in Ex parte Casey, 71 Cal. 269, 12 P. 118.

We concur: KOFORD, P. J.; STURTEVANT, J.

92 Cal. App. 337

McNABB et ux. v. BYRNES, Sheriff, et al.★
(Civ. 3426.)

District Court of Appeal, Third District, California. May 31, 1928.

Hearing Denied by Supreme Court July 30, 1928.

1. **Homestead ⟹57(1)—Plaintiff suing for unlawful attachment of crop upon homestead was required to show valid homestead existed (Civ. Code, § 1265).**

In action based on unlawful attachment of crop of potatoes on homestead claimed to be exempt from levy, under Civ. Code, § 1265, plaintiff was required to show that a valid homestead existed.

2. **Attachment ⟹373—Complaint for damages for wrongful attachment of crop, alleging that lands constituted homestead and setting forth declaration of homestead, and alleging that homestead had not been abandoned, held sufficient (Civ. Code, §§ 1262–1265, especially § 1265).**

In action for damages for unlawful attachment of crop of potatoes on plaintiff's homestead, under Civ. Code, § 1265, complaint alleging that the lands constituted homestead and setting out declaration of homestead containing all statements required under sections 1262–1265, together with allegation that homestead had not been abandoned, *held* sufficient as against general demurrer.

3. **Homestead ⟹5, 30—Provisions of homestead law are liberally construed except provision as to residence at time of filing declaration (Civ. Code, §§ 1262–1265).**

Laws creating homestead, Civ. Code, §§ 1262–1265, are liberally construed except as to provision relating to residence at time declaration is filed, which is strictly construed.

4. **Pleading ⟹67—Existence of prior homestead held matter of defense not required to be anticipated or negatived in complaint for unlawful attachment of crop upon property claimed as homestead (Civ. Code, §§ 1262–1265, especially § 1265).**

In action for unlawful attachment of crop of potatoes upon homestead claimed to be exempt from levy, under Civ. Code, § 1265, in which complaint set forth declaration of homestead under sections 1262–1265, existence of prior homestead was matter of defense which plaintiffs were not required to anticipate or negative in their complaint.

5. **Homestead ⟹30—Amendment relative to declaration of homestead held not to affect declaration made and recorded before amendment was passed (Civ. Code, § 1263, as amended by St. 1927, p. 828, by adding subdivision 5).**

Civ. Code, § 1263, as amended by St. 1927, p. 828, by adding subdivision 5, relative to additional statements in declaration of homestead, which was claimed to require allegation in complaint for unlawful attachment of crops on homestead that no former declaration had been made, *held* not retroactive so as to affect declaration of homestead made and recorded before amendment was enacted.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by John D. McNabb and wife against R. R. Byrnes, as Sheriff of Mendocino County, and another. Judgment for defendants, and plaintiffs appeal. Reversed with direction.

L. D. Mooney, of Ft. Bragg, and A. L. Wessels, of Ukiah, for appellants.

Peirsol & Stone, of Ft. Bragg, and Chas. Kasch and Hale McCowen, Jr., both of Ukiah, for respondents.

HUGHES, Justice pro tem. This is an action brought by plaintiffs and appellants herein, who are husband and wife, against R. R. Byrnes, as sheriff of Mendocino county, and W. F. Kemppe, to recover $2,275 as actual damages and $2,500 exemplary damages, alleged to have been sustained by appellants by reason of the alleged wrongful and illegal levy of a certain writ of attachment issued out of the superior court of Mendocino county on October 24, 1924, in an action entitled W. F. Kemppe v. J. D. McNabb and J. C. McNabb, and the seizure and detention under said writ of a certain growing crop of potatoes in and upon the land claimed as a homestead by appellants. By reason of such alleged homestead, it is asserted that the said crop was and is exempt from such levy, seizure, and detention. A second amended complaint was filed on October 3, 1925. The defendant Kemppe interposed a general and special demurrer thereto, while the defendant Brynes filed only a general demurrer. Each of the demurrers was sustained by the court by its order of October 30, 1925, and notice thereof waived in open court, plaintiffs being granted ten days in which to amend, if so advised. Plaintiffs, failing to file an amended complaint within the time allotted, counsel for each defendant on November 13, 1925, made written demand on the clerk that he enter judgment in favor of defendants. Immediately thereafter the clerk signed and on November 17, 1925, entered judgment, ordering and adjudging that plaintiffs recover nothing from said defendants, or either of them.

The action of the court in sustaining the demurrers is questioned, and for that reason it is necessary to state somewhat fully the allegations of the second amended complaint. There is set forth therein the official character of the defendant Byrnes; that the plaintiffs are husband and wife and the owners and in possession of certain lands therein described, situated in Mendocino county; that plaintiffs, with intent to acquiring a home and claiming a homestead, and while they were actually residing thereon, did, by John D. McNabb, on July 11, 1922, make, execute, and acknowledge, and on July 15, 1922, re-

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

cord a declaration of homestead covering the lands described in the complaint. It is further alleged: That said homestead has not been abandoned. That in 1924 plaintiffs planted 15 acres of said land to potatoes. That on October 24, 1924, W. F. Kemppe commenced an action in the superior court of Mendocino county wherein the defendants were the said J. D. McNabb and J. C. McNabb, and that in said action a writ of attachment was issued, directed to the sheriff, R. R. Byrnes, defendant herein, to levy upon and seize such crop of potatoes then growing upon said alleged homestead lands. Thereafter Byrnes, at the direction of Kemppe, served said writ on plaintiffs, and caused the same to be recorded in Book 4 of Attachments, p. 15, of Mendocino County Records. That immediately after the levy of said attachment, plaintiffs notified said Kemppe and Byrnes that the lands constituted a homestead and that the crop of potatoes was exempt, and on November 25, 1924, served written notice on them to the same effect, and that, nevertheless, with malice, they refused to release said crop or said attachment or to permit plaintiffs to dig said potatoes. That at the time of said levy said potatoes were good and merchantable and about ready to be harvested. That on November 15 the winter rains set in and plaintiffs notified the defendants to dig and save said crop, and that on November 27, 1924, plaintiffs were advised by their attorneys that they had a right to dig said crop and to save as much thereof as possible. That thereafter they did dig 9 tons of said crop. That thereafter on May 25, 1925, plaintiffs made a motion, which was served and filed, wherein they sought an order of said superior court to discharge said attachment, which motion was subsequently denied. That the acts of the defendants, and each of them, were malicious and without probable cause, and were done in reckless disregard of the rights of plaintiffs and each of them, injuring plaintiffs in the respects above set forth.

Plaintiffs prepared and served and on November 17, 1925, filed with the clerk of said superior court a notice of motion for an order of said court to set aside and vacate the order theretofore made and entered on October 30, 1925, sustaining defendants' demurrers to plaintiffs' second amended complaint and to grant a rehearing on defendants' said demurrers, which motion was made on November 27, 1925, and was by the court denied. On November 28, 1925, plaintiffs prepared, served and filed a notice of motion for an order to cancel, set aside, and vacate the judgment heretofore mentioned, made, and entered by the clerk, and to vacate and set aside the order of court made on October 30, 1925, sustaining defendants' said demurrers, and to grant a rehearing on said demurrers. Said motions were argued and submitted on December 3, 1925, and on December 5, 1925, the court denied the same. Thereafter, on December 5, 1925, the court vacated its previous orders and ordered the matter to be further heard. On December 11, 1925, the court ordered that its previous orders of December 5, 1925, denying plaintiffs' motions, be restored, and its subsequent order made on the same day be vacated and set aside. The plaintiffs have appealed from the judgment made on November 13, and entered on November 17, 1925, by the clerk and from the several orders of the court as above narrated.

We shall first consider the correctness of the court's order sustaining the general and special demurrers of the defendants. The facts as alleged in the complaint have been fully recited, so as to illustrate the points involved in the demurrers.

[1-3] This action is based on the unlawful attachment of the crop of potatoes upon the homestead, which crop is claimed to be exempt from levy. Section 1265, Civ. Code. It is necessary, therefore, to show that a valid homestead existed on the land. The complaint alleged that the lands constitute the homestead of plaintiffs, and plead in extenso the declaration of homestead made by plaintiff John D. McNabb. Said declaration contains all the statements required for such an instrument by the provisions of title 5, part 4, division 2, of the Civil Code, which furnish the law governing homesteads, and was in all respects sufficient in form and substance. It was, of itself, a sufficient statement of facts, showing that a homestead existed in favor of plaintiffs. In addition thereto, paragraph V of the complaint contains the following allegations:

> "That the said plaintiffs, or either of them, have not abandoned said homestead, or any part thereof, by a declaration of abandonment, or by grant thereof, or in any other manner or at all; that said homestead claim, ever since the said 15th day of July, 1922, has been and now is in full force, effect, and virtue."

While these allegations consisted partly of conclusions of law, they nevertheless are sufficient to withstand the attack of a general demurrer. The special demurrer was directed entirely to other points. City of Santa Barbara v. Eldred, 108 Cal. 294, 41 P. 410; San Christina Investment Co. v. City and County of San Francisco, 167 Cal. 762, 141 P. 384, 52 L. R. A. (N. S.) 676; Thompson v. Hamilton Motor Co., 170 Cal. 737, 151 P. 122, Ann. Cas. 1917A, 677.

The laws creating a homestead are generally to be liberally construed, except that provision as to residence at the time the declaration is filed, and, as to that, it is strictly construed. Bullis v. Staniford, 178 Cal. 40, 171 P. 1064; Johnston v. De Bock, 198 Cal. 177, 244 P. 330.

[4] The allegation as to residence is direct, positive, and sufficient. Since nothing ap

pears in said declaration or anywhere in said complaint that plaintiffs have not previously selected a homestead, or that they did not have a valid, subsisting homestead at the time of making such declaration, it is asserted by respondents that for these reasons the complaint is insufficient. It is contended that if such prior homestead existed, the declaration set forth in the complaint would not impress the lands embraced therein with homestead rights; in other words, a party cannot have two homesteads, and, if he attempts to acquire a second while the first is in force, the second is void. In support of this contention, respondents rely upon the case of Waggle v. Worthy, 74 Cal. 266, 15 P. 831, 5 Am. St. Rep. 440. This case unquestionably holds that a person cannot have two homesteads; that if one exists, the attempt to acquire a second is void. But the existence of a prior homestead is a matter of defense, and it has often been held that it is not necessary for the plaintiff to anticipate the defense, or to negative the same. Nickel v. State, 179 Cal. 126, 175 P. 641; Neeley v. Neeley, 179 Cal. 232, 176 P. 163; Jacobson v. Oakland Meat Co., 161 Cal. 425, 119 P. 653, Ann. Cas. 1913B, 1194.

[5] Respondents cite section 1263 of the Civil Code, as amended in 1927 (St. 1927, p. 828), as affecting the necessity of an allegation in the complaint that no former declaration has been made, or if made, that it has been abandoned. Subdivision 5 of said section is permissive as to what a declaration of homestead may contain, and the effect to be given such statement made in accordance with its provisions. That it is not mandatory to make such further statement is plainly evidenced by the language thereof, wherein it provides that, "* * * If it contains such further statement," etc., it shall be prima facie evidence of the facts therein stated. It is sufficient to say that subdivision 5 was added in 1927, after the declaration homestead in question was made and recorded, and that it is not retroactive in its effect.

The special demurrer of the defendant Kemppe is predicated on the contention that the complaint is uncertain, ambiguous, and unintelligible in certain particulars. Without discussing in detail the several assignments, it is sufficient to say that we have examined the complaint in the light of these objections, and are convinced that it is sufficient, and not amenable to the same.

For the reasons above stated, we therefore conclude that the demurrers were improperly sustained.

In view of the conclusions we have reached, it is unnecessary to consider the other points raised on this appeal.

The judgment is reversed, with direction to the trial court to overrule the demurrers and to permit the defendants to answer if so advised.

We concur: FINCH, P. J.; PLUMMER, J.

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92 Cal. App. 285

SWARTZ v. FEDDERSHON.

SWARTZ et al. v. SAME.

(Civ. 5808, 5809.)

District Court of Appeal, Second District, Division 1, California. May 29, 1928.

1. Automobiles 🔑171(4)—Automobilist must yield right of way to automobilist who would first enter highway intersection from right if respective rates of speed are maintained.

It is duty of automobilist approaching highway intersection, which automobilist approaching from right would enter first if their respective rates of speed are maintained, to yield right of way and veer to right side of highway.

2. Automobiles 🔑245(80)—Automobilist held not contributorily negligent, as matter of law, as having proceeded heedlessly into known danger of collision with automobile approaching highway intersection from left.

Plaintiff who was between 29 and 50 feet from edge of highway intersection when he first saw automobile approaching from left over 200 feet away at such speed that plaintiff would enter intersection first if their respective rates of speed were maintained *held* not contributorily negligent, as matter of law, as having proceeded blindly and heedlessly into known danger of collision due to other driver's failure to yield right of way and veer to right side of highway, though he failed to look further to left after seeing such automobile.

3. Automobiles 🔑206—Assumption that one is not exposed to danger from another's violation of law or duty is not negligence, in absence of reasonable ground to think otherwise.

The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and, in absence of reasonable ground to think otherwise, it is not negligence to assume that one is not exposed to danger arising only from violation of law or duty by another.

4. Automobiles 🔑245(80)—Automobilist held not contributorily negligent, as matter of law, in not again looking to left after seeing automobile which would have entered highway intersection after him had respective rates of speed been maintained.

Automobilist slowing down to 15 miles an hour before reaching highway crossing and looking out for vehicles approaching from opposite direction and from his right, in which latter direction only fleeting view of highway could be had before reaching it, *held* not contributorily negligent, as matter of law, in failing to look again to left after seeing another automobile at such distance away that he would enter intersection first if their respective rates of speed were maintained.

5. Appeal and error 🔑996—Jury's finding that plaintiff was not contributorily negligent cannot be disturbed on appeal, where reasonable minds could not differ.

Where reasonable minds could not differ on question of plaintiff's contributory negligence, jury's finding for plaintiff thereon cannot be set aside on appeal.

6. Automobiles 🔑245(88)—Whether automobile driver's wife, not warning him of approach of automobile from left, used ordinary care, held for jury.

Whether wife, riding in automobile driven by husband, whom she failed to warn of approach of automobile from left at such distance that husband's car would enter intersection first if respective rates of speed were maintained, used ordinary care under circumstances, *held* for jury in action for injuries to her in collision with such car.

7. Appeal and error 🔑757(4)—Refusal of correct instruction cannot be considered, where record is typewritten, and instructions given are not printed in appellant's brief.

Where record is in typewritten form, and appellant has not printed in his brief any of instructions given, refusal of correct instruction requested by him cannot be considered by appellate court, which is unable to determine whether such instruction was included in those given.

8. Evidence 🔑254—Foundation of time, place, and persons present held unnecessary before introducing evidence of defendant's admissions immediately after automobile collision.

No foundation as to time, place, and persons present was necessary before evidence of defendant's admissions, immediately after collision between his automobile and that in which plaintiffs were riding, could be introduced in action for injuries sustained by latter.

9. Appeal and error 🔑237(2)—Defendant, not moving to strike testimony, cannot complain thereof on appeal.

Defendant, not moving to strike out plaintiff's testimony on cross-examination, indicating that she did not know that admission was made by defendant as she testified on direct examination, cannot avail himself of such objection on appeal.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Actions, tried together, by Guy O. Swartz and by Jennie J. Swartz and husband, against Phillip Feddershon. Judgments for plaintiffs, and defendant appeals. Affirmed.

Hardy, Elliott & Eberle, of Los Angeles, for appellant.

Ida May Adams, of Los Angeles, for respondents.

SHAW, Justice pro tem. These cases were tried together in the superior court, and in each case judgment was rendered against the defendant, from which he appeals. Both appeals are submitted to us on the same record and the same briefs. The cases arose out of a collision between two automobiles, one driven by the defendant, and the other driven by the plaintiff Guy O. Swartz, in which his wife, the plaintiff Jennie J. Swartz, was riding. In one of the cases Guy O. Swartz sued alone as plaintiff for damages caused by personal injuries suffered by him in this collision, for damages caused to him by injuries to his wife, and for damages to his automobile. In the other case both plaintiffs sued for personal injuries received by the plaintiff Jennie J. Swartz.

The points made in support of both appeals are the same. The defendant contends that the evidence established contributory negligence of both plaintiffs as a matter of law, and hence that his motion for a nonsuit should have been granted or the verdict should have been in his favor; that the evidence does not support the verdict; and that the court erred in refusing to give certain instructions requested by him and in overruling his objection to certain evidence offered by the plaintiff. All of these points, except those relating to instructions and rulings on evidence, may be considered together.

The evidence herein was conflicting in many respects. From the verdict we must conclude that the jury took the view of it most favorable to the plaintiffs. Taking such a view and resolving all doubts and inconsistencies for the plaintiffs, they were warranted in finding the following facts. In discussing these facts we shall, except as otherwise indicated, refer to the plaintiff Guy O. Swartz, who was driving his automobile, simply as "plaintiff":

The collision occurred in the forenoon at the intersection of Sunset boulevard, on which the plaintiff was driving in a northerly direction, and Temple avenue, on which defendant was driving in an easterly direction. Both of these highways were in a rural community; Sunset boulevard was paved and Temple avenue was unpaved, but was graded and graveled. Each of them was 60 feet wide between property lines. In the angle at the southwest corner of the two highways, across which the plaintiff and defendant must have looked to see each other as they approached the intersection, and within 100 feet of each highway, were some trees which partly obstructed the view of one highway from the other, but did not entirely obscure. West of the trees was a house, the nearest side of which was 105 feet west of the west line of Sunset boulevard. As the plaintiff, driving north along Sunset boulevard, neared Temple avenue, his view to the east was cut off by structures situated at the southeast corner. Plaintiff was driving at a speed of about

25 miles an hour, but as he reached a point 135 to 140 feet from the intersection he slowed down to 20 miles an hour. When he was 100 feet from the intersection he slowed down to 15 miles an hour and as he entered and traversed the intersection he was going between 10 and 12 miles an hour. Plaintiff was at all times traveling on the right side of Sunset boulevard. When the defendant reached a point a little over 200 feet west of the intersection he was going 40 or 45 miles an hour and traveling on the left side of Temple avenue, and he continued at that rate of speed and on the left side of the highway until he entered the intersection. Upon entering the intersection he did not look in either direction and he did not see the plaintiff's automobile until just before the collision. The plaintiff entered the intersection first and his front wheels had just crossed the center line of Temple avenue when defendant entered the intersection. Plaintiff's automobile was struck on the left front corner by the right front corner of defendant's machine, turned completely over, and was practically demolished. Defendant's machine remained upright. When the plaintiff reached a point variously stated as 59 or 80 feet from the center line of Temple avenue, he heard a loud noise as of an approaching machine, looked to the west, saw the defendant approaching and observed that he was then a little over 200 feet west of the intersection, going 40 to 45 miles an hour and traveling on the left side of the road. Plaintiff did not at that time anticipate a collision and he then looked to the right or east on Temple avenue to see if any one was coming that way, and continued to do so until he could see along Temple avenue. He testified that he did not again look to the left because he believed defendant would stop before he reached the intersection. Plaintiff did not look a second time toward defendant until plaintiff's machine was crossing the center line of Temple avenue and defendant's machine was entering the intersection. Seeing the defendant, the plaintiff then put on his brakes and locked his wheels in an attempt to stop, causing them to slide 2 or 3 feet before the collision occurred.

From the facts above stated on which the jury may have based their verdict, it appears that the defendant was guilty of two violations of the Motor Vehicle Act (St. 1923, p. 517), each of which constituted negligence and proximately contributed to the accident: (1) He failed to yield to plaintiff the right of way to which the latter was entitled under section 131 of the Motor Vehicle Act as it stood at the time of the accident by virtue of having first entered the intersection at a lawful rate of speed; (2) he was traveling on the left side of the highway although the other side was passable.

[1-3] The defendant contends, however, that conceding that he was negligent, the evidence shows without conflict that the plaintiffs were both guilty of contributory negligence as a matter of law, in that they proceeded blindly and heedlessly into a known danger. We do not think the facts fully warrant this argument. When the plaintiff first saw the defendant's automobile, plaintiff was somewhere between 29 and 50 feet from the nearest edge of the intersection, while the defendant was over 200 feet therefrom, and their respective rates of speed were such that, if they were maintained, the plaintiff would enter the intersection first and for that reason have the right of way. It would therefore become the defendant's legal duty to yield the right of way. He was also legally required to veer to the right side of the highway. If he had done either of these things, the collision would probably not have occurred, and both of them could easily have been done in the 200 feet available to the defendant when the plaintiff first saw him. The plaintiff upon his first view of the situation may have come to such a conclusion and failed to look further to the left because of his belief that no danger was to be expected from that direction. Under these circumstances it may not be said as a matter of law that the plaintiff was bound to expect that the defendant would fail in the due performance of either of the duties above mentioned.

> "The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person." Harris v. Johnson, 174 Cal. 55, 161 P. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560.

To the plaintiff, therefore, the defendant's visible approach more than 200 feet away did not necessarily constitute a known danger, nor do we think the plaintiff was bound to watch the defendant continuously to discover the first sign of any intention on his part to violate the law. If at any time it had become apparent to the plaintiff from his observation that the defendant could not or would not conform to the law, then the plaintiff would perhaps have been required to regard defendant's approach as a known danger and take steps to guard against it.

[4, 5] Under the facts above stated the defendant's argument really amounts to a contention, not that the plaintiff proceeded into a known danger, but that he negligently failed to inform himself of the danger. His conduct in this respect must be considered in connection with the further fact that during the interval between his two views of the defendant there were other duties resting upon him which were at least as imperative as that of observing the defendant's further actions.

The plaintiff was required to slow down to 15 miles an hour before reaching the crossing, to look out for possible vehicles approaching from the north, and especially to look to the east, from which direction danger was to be expected because a vehicle coming from that direction at a lawful speed, and entering the intersection before plaintiff, would have the right of way. The evidence shows that as the plaintiff approached the intersection a fleeting view of the highway to the east could be had between two of the obstructions, through which he looked for that purpose, and that the next view to the east was possible only on coming to Temple avenue. It may be that, if the jury had found the plaintiff negligent in failing to look again to the west before entering the intersection, their conclusion would find support in the evidence; but we do not think that such a conclusion is necessarily required by the evidence or that reasonable minds could not differ on the subject, and hence we hold that their finding in favor of plaintiff on this issue cannot be set aside on appeal.

[6] The situation as to the plaintiff Jennie J. Swartz is not materially different. She was not driving the machine in which she was riding and the only negligence charged against her is her failure to warn her husband of the defendant's approach. She made substantially the same observations as did her husband and there is no reason to hold her to the exercise of any greater diligence as a result thereof than is imposed on him. As to her, also, the question whether she used ordinary care under the circumstances was one of fact for the jury. Our conclusion as to both plaintiffs is fully supported by the following decisions: Oberholzer v. Hubbell, 36 Cal. App. 16, 171 P. 436; Carbaugh v. White Bus Line, 51 Cal. App. 1, 195 P. 1066; Commonwealth Ins. Co. v. Cement Co., 69 Cal. App. 165, 230 P. 995; Bauman v. Edgar, 72 Cal. App. 448, 236 P. 943; Simonsen v. Christopher Co., 186 Cal. 786, 200 P. 615.

[7] The defendant further complains of the action of the trial court in refusing certain instructions requested by him, which he says are not fully covered by the instructions given. One of these instructions appears to be a correct statement of the law. The record in this case is in typewritten form, having been prepared under the so-called alternative method, and the defendant has not printed in his brief any of the instructions which were given. We are therefore unable to determine therefrom whether or not the one correct instruction which was requested was included in those which were given.

> "It is not a sufficient predicate for a claim of error that instructions which properly state the law have been rejected. The assignment must go further and point out wherein the subject of the instruction was not in fact covered by those actually given." Estate of McDonald, 191 Cal. 161, 171, 215 P. 545.

[8, 9] Defendant complains of the following ruling made while the plaintiff Jennie J. Swartz was on the stand:

> "Q. By Miss. Adams: Did you hear anything said by—did you hear anything said by Mr. Feddershon?
>
> "Mr. Aberle: Just a minute, if the court please, I would like to have the foundation laid, if Mr. Feddershon was there.
>
> "The Court: Overruled. Answer the question. A. Yes; I did.
>
> "Q. By Miss Adams: What did you hear him say? A. I heard him say, 'Oh, my God! my God! are they all killed and it was all my fault!' Just yelling at the top of his voice."

The only ground of objection stated was the want of a foundation for the question. Under the circumstances here appearing no further foundation was necessary. Feddersohn was the defendant and no foundation as to time, place, and persons present was necessary before evidence of his admissions could be introduced. Diller v. Northern Cal. Power Co., 162 Cal. 531, 123 P. 359, Ann. Cas. 1913D, 908. After this testimony was given the witness gave some further testimony on cross-examination which possibly indicated that the witness did not know that the statement above quoted was made by Feddersohn, but defendant then made no motion to strike out the testimony complained of, and, since this objection was not presented by him to the lower court, he cannot now avail himself of it.

The judgments appealed from are affirmed.

We concur: CONREY, P. J.; YORK, J.

92 Cal. App. 411

FETTERLEY v. RANDALL et al.

(Civ. 5156.)

District Court of Appeal, Second District, Division 2, California. June 4, 1928.

1. Insane persons 🔑26—Summary proceeding before judge with advisory assistance of two physicians to determine mental condition is not conclusive judicial determination of sanity or insanity (Pol. Code, § 2168 et seq.).

Proceeding before judge with advisory assistance of two physicians, under provisions of Pol. Code, § 2168 et seq., is a summary proceeding for purpose of determining mental condition of person charged with being insane, and does not constitute a conclusive judicial determination of sanity or insanity.

2. Bills and notes 🔑516—Finding as to drawer's insanity at time of execution held unsupported by evidence (Pol. Code, §§ 2168–2170).

Finding that draft was void because at time of execution drawer was insane with no legal capacity to make contracts of any kind *held* unsupported by evidence consisting only of showing commitment to state hospital for insane pursuant to proceeding before a superior judge with two physicians present, in accordance with Pol. Code, §§ 2168–2170.

3. Bills and notes 🔑101—To recover sum collected on draft on ground of insanity when executing it, drawer must have lacked understanding and failed to comprehend meaning of act.

Drawer suing to recover sum collected on draft on ground that at time of execution he was without mental capacity to make a contract had burden of alleging and proving at time of execution and delivery he was lacking in understanding and did not comprehend meaning of his acts.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Oliver Fetterley against Helen M. Randall and the First Savings Bank of Vallejo, wherein defendant last named filed a cross-action. Judgment for plaintiff against defendant first named, and such defendant appeals. Reversed.

See, also, 264 P. 1117.

Walter J. Little, of Los Angeles, for appellant.

STEPHENS, Justice pro tem. The parties to this cause are Oliver Fetterley, plaintiff, cross defendant, and respondent; Helen M. Randall, defendant, cross defendant, and appellant; and First Savings Bank of Vallejo, Cal., defendant and cross-complainant. On the 13th of March, 1922, and after a proceeding authorized by sections 2168, 2169, and 2170 of the Political Code, viz. a hearing before a superior judge with two physicians present, sometimes referred to as the "lunacy commission," respondent was ordered committed to the state hospital for the insane. Before his trial thereon before a court and jury, which he had demanded, respondent made and delivered to appellant a bank draft upon the First Savings Bank of Vallejo, Cal., for the sum of $500, payment as attorney's fee to appellant. Respondent had contracted for the services of appellant long before the institution of the proceedings above mentioned. This draft appellant cashed. Respondent demands the return of this sum, on the ground that he was legally incapacitated to enter into a contract at the time he employed appellant. Appellant contends that respondent was legally competent to make the contract and to draw the check or draft, and also that even if he were not competent the services were for necessities, and appellant is entitled to the sum mentioned in the draft on the quantum meruit. It was stipulated below that such sum is a reasonable payment for the services. The trial judge gave judgment that appellant, in effect, return the $500, on the ground that respondent had been adjudged insane and was insane when he delivered the check to appellant. This appeal is from that judgment.

As to appellant's contention that attorney's fees are necessaries of life, we shall express no opinion, as we shall decide the case upon the other point.

A careful perusal of the complaint fails to reveal any allegation that respondent was insane when he made and delivered the bank draft. The bill of exceptions shows that no evidence whatever was received by the court that respondent was insane. In fact, all such evidence offered, except evidence of the referred to proceeding, was rejected by the court. Notwithstanding this, the court found:

> "That said draft was void for the reason that at the time said draft was executed plaintiff was insane and had no capacity to make contracts of any kind or character."

The court also found:

> "That * * * it is true that said plaintiff was adjudged insane at a regular hearing of said [superior] court on the 13th day of March, 1922."

It is apparent that the trial court viewed the proceedings of March 13, 1922, as legally determinative of the fact that respondent was insane, and that he was incapable of entering into a contract. Upon this point we are unable to agree with the learned trial judge.

[1] The proceedings before the judge, with the advisory assistance of two physicians, under the provisions of section 2168 et seq. of the Political Code, is a summary proceeding for the purpose of determining whether or not the person charged with being insane is in fact in such a mental condition as to justify the state in depriving him of his personal

liberty and affording to him, if it is found needed, the benefit of proper care and remedial aid. It is not a conclusive judicial determination of sanity or insanity. In the case of People v. Willard, 150 Cal. 543, 89 P. 124, the defendant was being tried for murder. There was an objection to the introduction of certain documents used in a proceeding similar to the proceeding in the instant case, in which the defendant had been committed to the state hospital for the insane. The court said:

> "As to the other documents which appellant insists should have been admitted—the affidavit, report of examining physicians, their certificates, etc.—the court was clearly right in rejecting them. The certificates were purely hearsay evidence and were not admissible for any purpose. It is contended by appellant that all these proceedings constituted a judgment roll. There is nothing in this contention. In a proceeding such as is in question here, there is no judgment roll, in the sense that it determines conclusively anything. The statute provides for a commission in each county in the state, consisting of at least two physicians and a judge of the superior court of the county, whose duties in the examination of one alleged to be insane are limited and confined to the specific purpose, viz., to ascertain whether such alleged insane person is a proper subject to be admitted for care and treatment to the insane asylums of the state. This commission is purely a creature of the statute. It is not intended as, and is not, a tribunal in which the status of the alleged insane person is fixed, but simply a commission which determines whether the mental condition of the person it has examined is such as warrants his detention in the asylum for treatment. From these considerations we are satisfied that the ruling of the court, as far as it went, was correct."

In the case of Kellogg v. Cochran, 87 Cal. 192, at p. 198, 25 P. 677, 679, the plaintiff had been committed to the state hospital for insane under a like proceeding. He claimed fraud, and sued for damages for malicious prosecution. Defendant demurred to the complaint, claiming plaintiff had been declared insane and, therefore, was without legal capacity to sue. The demurrer was sustained, but the Supreme Court ordered the demurrer overruled. We quote from the opinion:

> "It would seem, therefore, not only that the power to discharge an inmate of the asylum is vested solely in the officers of the asylum, but that such power is to be exercised upon one of only two grounds: 1. That the insane inmate has recovered; and 2. that he had been improperly committed. I think the effect of a discharge on either ground, if no guardian had been appointed, under the Act of March 9, 1885 (Pol. Code, p. 342), would be to restore the person discharged to legal capacity to sue. A discharge on the first ground is an adjudication, by competent authority, that the person had recovered from insanity; and a discharge on the second ground, by like authority, overrules or nullifies the order of commitment, and leaves the person committed in the same status, as to capacity to sue, that he was in before he was committed. Civ. Code, § 40. Besides, I think the order of commitment is not conclusive evidence against the plaintiff in this action of his insanity at any time, or of probable cause for the prosecution of which he complains."

And, again, in People v. Prosser, 56 Cal. App. 454, at pp. 458, 459, 205 P. 869, 871, the court says:

> "The court committed no error in refusing to give the following instruction: 'You are instructed that if you find that defendant was committed to a state hospital in California as insane by the superior court of any county of California that the law presumes that defendant continues insane until such time as he was lawfully discharged from the state hospital or was legally adjudicated sane.' This instruction proceeds upon the mistaken assumption that such adjudication is conclusive evidence that the party was insane; whereas, it was only evidence to be weighed by the jury, and the effect of which was to be determined by them, but they were not in anywise concluded by the opinion of the medical examiners or by the judgment which declared appellant insane. People v. Willard, supra. In the Willard Case the defendant, just a few minutes after he had been examined and found insane and ordered committed to the asylum, killed the sheriff of Mendocino county, before he had left the judge's chambers where the examination was held, but his conviction for murder of the first degree was sustained by the Supreme Court, said commitment being regarded as merely evidence of insanity to be overcome by other evidence that he was sane."

We think the above quotations demonstrate the incorrectness of the court's finding in the instant case "that said plaintiff [respondent here] was adjudged insane at a regular hearing of said court on the 13th day of March, 1922," and that it does not follow as a matter of law that after such proceeding the respondent was incapable of contracting.

[2] We now take up for consideration finding No. IV, above referred to, which is as follows:

> "That said draft was void for the reason that at the time said draft was executed plaintiff was insane and had no legal capacity to make contracts of any kind."

As heretofore stated, the complaint does not specifically allege that the plaintiff named therein was ever insane. It appears to premise the right to relief upon the commitment heretofore referred to, and we are of the opinion that, under the authorities above quoted from, this finding also stands unsupported by the evidence. For a pertinent discussion of variance between allegation and proof on the exact point here under discussion, see Maionchi v. Nicholini, 1 Cal. App. 690, 82 P. 1052. For the sake of argument and for clarity, however, we shall assume that the question of sanity at the time the draft was executed was properly raised by the pleadings. This brings us to the question of void and voidable contracts.

Section 38 of the Civil Code reads as follows:

> "A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family."

Section 39 of the Civil Code is as follows:

> "A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission of this Code."

Section 40 of the same Code reads, in part:

> "After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right until his restoration to capacity."

The court below treated the proceedings of March 13, 1922, as though they had established respondent's status as defined by sections 38 and 40 of the Civil Code. See People v. Willard and Maionchi v. Nicholini, supra.

[3] In order for respondent to recover the sum collected on the draft, it would be necessary for him to allege and prove that, when he executed and delivered the draft, he was lacking in understanding and that he did not comprehend the meaning of his acts. Ripperdan v. Weldy, 149 Cal. 667, 87 P. 276. "It would seem, therefore, that a person may be insane in the general acceptation of the term, and yet his insanity may be of such a character as not to deprive him entirely of the power of knowing and understanding the nature of ordinary business transactions, and that such form of insanity, or rather unsoundness of mind, will not render a person legally incapable of entering into a valid contract. Motley v. Head, 43 Vt. 631 [633]; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; S. F. C. Clearing House v. MacDonald, 18 Cal. App. 212, 218 [122 P. 964]." The only evidence introduced was the fact of the proceeding before the judge and the two physicians and the judgment therein. It is plain that this evidence did not support the finding under consideration. For an interesting discussion upon the subject-matter here being considered, see 14 Cal. Jur. 341, where many authorities are also cited.

The only other evidence offered was not allowed, and, we may say, was properly disallowed, under the view taken by the court, but improperly disallowed if the pleadings had been broad enough to take in evidence of respondent's capacity of understanding. People v. Harris, 169 Cal. 63, 145 P. 520, and Estate of Arnold, 147 Cal. 583, 82 P. 252. No evidence at all was introduced to sustain the allegation that there was fraud or duress. It should also be kept in mind that here there were no proceedings under the guardianship laws under which the ward would be legally incapacitated to contract.

A general demurrer to the complaint was interposed and overruled. It should have been sustained.

The judgment is reversed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

92 Cal. App. 446

BURT v. HELLMAN. (Civ. 5805.)

District Court of Appeal, Second District, Division One, California. June 7, 1928.

Covenants ⚷79(3)—Landowner held not entitled to enforce restrictions in deeds of other land in same tract.

In absence of anything in deeds to defendant or her predecessors in title indicating that restrictions therein were intended for benefit of whole tract, owner of other land therein could not maintain action to enjoin maintenance and require removal of building erected on defendant's property, in violation of such restrictions.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Grace K. Burt against Florence M. Hellman. Judgment for plaintiff, and defendant appeals. Reversed.

Page, Nolan, Rohe & Hurt, of Los Angeles, for appellant.

Hunsaker, Britt & Cosgrove, of Los Angeles, for respondent.

YORK, J. This is an action brought by the owner of land in the immediate vicinity of the defendant's property whereon, it is claimed, certain "violations of the restrictions as to use had occurred." The trial court by its judgment declared certain building restrictions upon the property of the appellant to be covenants running with the land for the benefit of respondent's property, and imposed thereby a permanent injunction against the appellant from maintaining a "certain second residence or dwelling house," and ordered the immediate removal of such building from such property.

The property in question is situated in Beverly Hills, an exclusive residential district west of the city of Los Angeles. Appellant and respondent both own homesites along one of the streets of the tract, known as Hartford way. Appellant's property lies upon one side of this street, and respondent's is approximately opposite on the other side of the street. There is no dispute in the evidence as to the form of the deeds under which the predecessors in interest of both appellant and respondent derived their title.

As we view the dispute between the parties, it is almost identical with the dispute in the case of Werner v. Graham, 181 Cal. 174, 183 P. 945, relied upon by both parties herein, as the same was later explained and defined in the case of McBride v. Freeman, 191 Cal. 152, 215 P. 678.

There is *nothing* in *any* of the *deeds* that directly provides that the restrictions as to use are for the benefit of any of the adjoining or other property owners in the tract. There is, as there was in the case of McBride v. Freeman, reference to other lots in the tract and as to how they might be used. As a matter of fact, appellant obtained permission from the Rodeo Company, the original parties who platted the land and made the conveyances to the predecessors of both respondent and appellant, to build the identical building which was objected to by the respondent herein, before the building of the same was started.

As to whether or not the particular building erected (to wit, a living quarters for a watchman, placed adjacent to the main gateway of the appellant's property, which property was surrounded by a strong and substantial wall, and which building is called by the appellant a gatelodge and by the respondent a second residence or dwelling house other than a first-class residence), would be an actual violation of the restriction as between the appellant and the original owners of the land of appellant, the finding thereon by the trial court, answering this question in the affirmative, is supported by the evidence.

Therefore, in reaching a determination of the controversy, this court will determine it only upon the question as to whether or not the plaintiff was entitled to maintain her action against the defendant. It is the opinion of this court that, under the evidence introduced, and under the pleadings, there was nothing in the deeds themselves to the defendant or any of her grantors that provided or contained language indicating that the restrictions contained therein were intended to be for the benefit of the whole tract. It is said by the Supreme Court in the case of McBride v. Freeman, 191 Cal., at page 154, 215 P. 678, 679, as follows:

> "The question thus presented is stated by appellants as follows: 'Does one grantee who buys his property with the understanding that it is restricted, and in reliance upon the existence of a general plan of improvement for the whole tract of which his lot forms a part, have a right in equity to enforce the restriction against another grantee who takes with full knowledge and notice of the restriction, the covenants being a part of each and every deed to lots in the tract and the deeds showing that a uniform plan must have been in existence?' This precise question was answered adversely to appellants' contentions in the case of Werner v. Graham, 181 Cal. 174, 183 P. 945. Appellants contend that what was there said upon this subject was dictum, for the reason that the restrictions there under consideration were cast in the form of a condition, and that what was there decided should be held inapplicable to restrictions, as in the instant case, which are cast in the form of covenants. This contention cannot be sustained. Viewing the restrictions under consideration in the Werner Case as conditions, no substantial question was presented by that appeal. The court disposed of that question in the following words: 'If the provisions are in fact conditions and not covenants, the defendants are not entitled to enforce them against the plaintiff, for the reversion clause runs in favor of Marshall (the common grantor), his heirs and assigns and does not include the defendants, since by "assigns" must be meant in this state assignees of the reversion or right of re-entry.' It is well settled that 'in the construction of a conveyance, ordinarily, to avoid forfeiture, conditions will be construed as covenants, when this can reasonably be done.' 9 Cal. Jur. p. 336, and cases cited. In recognition of this rule the court then proceeded to consider and decide that case upon the assumption that the restrictions therein, though in form of conditions, were, in fact, covenants, and what was there decided, in that view of the case, can in no sense be regarded as dictum.
>
> "Appellants suggest, in effect, that Werner v. Graham should be overruled, and assert that it is contrary to the great weight of authority from other states. The latter may be conceded, but presents in itself no sufficient reason for a departure at this time from the rules there enunciated. After a careful reconsideration of the questions there involved, we are satisfied with the validity of the conclusions there stated, and with the soundness of the reasoning by which they were reached. The rules there enunciated are rules of property and have stood unchallenged and unquestioned for more than three years. That case has since been cited as authority by this court in Los Angeles, etc., Co. v. Marr, 187 Cal. 126, 200 P. 1051, and Mapel v. Canady, 189 Cal. 373, 208 P. 280, and the conclusions there reached were clearly forecasted by previous decisions of this court over a long period of years. In Los Angeles, etc., Co. v. Muir, 136 Cal. 36, 50, 68 P. 308, 313, the court said: 'In the absence of any words *in the deed* to this effect, or any *reference to a plan* showing a general scheme of improvement, the grantees took their estate without any notice, express or constructive, that the restriction was intended for the benefit of the adjoining estate.'"

In the instant case the only parties who could enforce the restriction as to use have acquiesced in the construction of the building complained of. They may or may not have considered the same as one of the outbuildings referred to in the deed to the appellant, but it does not concern this court. The only question we can determine is whether or not the respondent was entitled under the evidence to the judgment referred to herein, and, under the authority of the cases herein cited, we are of the opinion that the respondent was not entitled to such judgment, or to maintain this action.

The judgment is therefore reversed.

We concur: CONREY, P. J.; HOUSER, J.

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92 Cal. App. 334

CHAIN v. EHRMAN et al. (Civ. 5479.) ★

District Court of Appeal, Second District, Division 1, California. May 31, 1928.

Rehearing Denied June 26, 1928.

1. Principal and agent ⟹173(3)—Finding that tenants accepted new lease, thereby ratifying their agent's execution thereof, held justified.

Defendants' knowledge of date of expiration of their lease and option to renew it and their general manager's payment of three months rent in advance on new lease *held* to justify trial court's implied finding, in action for rent under new lease, that defendants accepted it, occupied premises thereunder, and thereby ratified their agent's action in executing it, though their direct knowledge of all facts concerning lease was not proved; circumstances being such as to put them on inquiry as reasonable men.

2. Estoppel ⟹107—Allegation that defendants took possession in accordance with terms of lease sufficiently pleaded estoppel to deny validity thereof.

Allegation of complaint, in action for rent, that "thereupon, and in accordance with the terms of said lease, said defendants entered into possession of said premises," sufficiently pleaded estoppel to deny validity of lease.

3. Pleading ⟹428(3)—Judgment will not be reversed for failure to plead estoppel, in absence of objection to evidence thereof on ground of defect in pleadings.

Judgment for plaintiff, in action for rent, will not be reversed for failure to plead estoppel to deny validity of lease, where defendants made no objection to evidence of estoppel on ground of defect in pleadings, and case was tried on theory that such question was at issue and sufficiently pleaded.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Resul Chain against Alexis Ehrman and another, copartners doing business under the name and style of Bakersfield Tobacco Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Joseph C. Meyerstein, of San Francisco, and W. B. Beaizley, of Bakersfield, for appellants.

Wiley & Harvey, of Bakersfield, and John W. Heard, Jr., of Berkeley, for respondent.

WOOD, Justice pro tem. Plaintiff recovered a judgment in the sum of $710.50, which he alleged was due as rent for certain premises in the city of Bakersfield. From this judgment defendants appeal. The Bakersfield Tobacco Company occupied the premises in question in the first instance under a lease executed on January 22, 1922, for a period of two years from February 15, 1922. This lease, which was signed by Gustave J. McGregor, then a partner of the Ehrmans in the company, contained a provision giving the lessee an option of renewal. The defendants Ehrman became successors to the interest of McGregor in the affairs of the Bakersfield Tobacco Company, which was a copartnership having its principal place of business in the city of San Francisco. On January 9, 1924, a new lease was executed by plaintiff's assignor as lessor and the Bakersfield Tobacco Company as lessee, for a period of two years from February 15, 1924, at a monthly rental of $100 per month, with option of renewal on the part of the lessees. This lease provided that $300 should be paid at once for the first three months, and receipt of this sum was acknowledged in the lease. The instrument was signed "Bakersfield Tobacco Co. by H. J. Freyschlag." It was established that Freyschlag was general manager of the company at Bakersfield, and that he reported to defendants the payment of the advance rent of $300 by a monthly trial balance. Defendants continued in the occupation of the premises after the expiration of the term fixed in the lease executed January 22, 1922, and until about November 15, 1924, at which time they removed therefrom. The judgment recovered by plaintiff is for rent due after November 15, 1924, under the lease dated January 9, 1924.

[1] Defendants denied that they had executed the lease, claiming that Freyschlag was not authorized to sign for the company. They relied upon subdivision 5 of section 1624 of the Civil Code, which provides that an agreement for the leasing of real estate for a period longer than one year must be in writing, and, if a written agreement be signed by an agent, the authority of the agent must be in writing. Since it was not established that Freyschlag was authorized in writing, defendants contend that they were tenants at sufferance. Plaintiff claims that defendants occupied the premises under the new lease, and made payments in accordance with its terms and with knowledge thereof. It is contended that defendants thereby ratified the lease, and are estopped from denying liability thereunder. The implied finding of the trial court is in conformity with plaintiff's contention, and is supported by the evidence. Defendants knew the date of the expiration of

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied.

the first lease; that they had an option to renew it; and that, in February, 1924, their general manager paid three months' rent in advance on the new lease. Under these circumstances the trial court was justified in holding that defendants accepted the lease, occupied the premises thereunder, and thereby ratified the action of their agent. In Castro v. Gaffey, 96 Cal. 421, the court said:

> "A lease signed by the lessor and *accepted* by the lessee has the same force and effect as it would have if signed by the lessee. * * * We do not doubt that if they had accepted the lease as it is, and had occupied the premises under it, the law would imply a promise to pay the rent reserved, although neither of the lessees had signed the lease."

In Heffernan v. Davis, 24 Cal. App. 295, 140 P. 716, it is said:

> "It seems to us, however, that if, as was sought to be shown, defendant entered into possession of the land and held that possession under the lease, he is estopped to aver its invalidity and that, as he cannot be heard to challenge its validity, the action may be maintained upon it." Crescent City Wharf and Lighter Co. v. Simpson, 77 Cal. 286, 19 P. 426; Dodd v. Pasch, 5 Cal. App. 686, 91 P. 166.

Defendants cannot escape liability under the claim that plaintiffs did not prove direct knowledge on their part of all the facts concerning the lease. The circumstances were such as to put them on inquiry as reasonable men. In Ballard v. Nye, 138 Cal. 588, 72 P. 156, the court used this language:

> "Where the situation naturally and reasonably suggests that some inquiry or investigation should be made, and none is made, the person failing to make it will be deemed in law possessed of such facts as the inquiry would have disclosed." Mechem on Agency, § 148; Phillips v. Phillips, 163 Cal. 530, 127 P. 346; Hutchinson v. Gould, 180 Cal. 356, 181 P. 651; Ford v. Lou Kum Shu, 26 Cal. App. 204, 146 P. 199.

[2, 3] It is further contended by defendants that, if plaintiff intended to claim that they were estopped from denying the invalidity of the lease, allegations to that effect should have been made in the pleadings. Plaintiff answers this contention by pointing out that it is alleged in the complaint that "thereupon and in accordance with the terms of said lease, said defendants entered into possession of said premises." A further answer to the contention of the defendants is found in their failure to make objection at the trial on the ground of defect in the pleadings to evidence tending to show estoppel. The case was tried on the theory that the question of estoppel was at issue and sufficiently pleaded. In Carpy v. Dowdell, 115 Cal. 677, 47 P. 695, the court said:

> "Respondent makes some contention * * * that estoppel cannot be relied on by appellants because it was not pleaded in the answer. * * * Moreover, there was no objection at the trial to evidence of the facts on the score of defective pleading; and the rule is well established that such a course is a waiver of a defect in pleading." Beardsley v. Clem, 137 Cal. 328, 70 P. 175.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

92 Cal. App. 405

PEOPLE v. LANDO. (Cr. 1600.) ★

District Court of Appeal, Second District, Division 1, California. June 4, 1928.

Hearing Denied by Supreme Court Aug. 2, 1928.

1. Homicide 🔑250—Evidence held sufficient to support conviction for murder.

In prosecution for murder, in which defense was that killing was done in self-defense, evidence *held* sufficient to support conviction.

2. Witnesses 🔑350—Where record regarding witness' conviction of offense is easily obtainable, court should insist on inspection of record, and, if it shows conviction was for misdemeanor, further inquiry should be peremptorily shut off (Code Civ. Proc. § 2051).

Where ground of objection to question whether witness was convicted of felony is that record would show that witness was not convicted of a felony, and record is easily obtainable without delaying trial, court should insist on an inspection of such record, and, if it shows that conviction was in law only a conviction of misdemeanor, further inquiry along that line should be peremptorily shut off, since, under Code Civ. Proc. § 2051, witness may not be impeached by evidence of particular wrongful acts, except that it may be shown he has been convicted of felony.

3. Witnesses 🔑350—Permitting question whether accused had pleaded guilty to felony where offense, in view of punishment, was misdemeanor, held, subject to limitation that in such cases record should be inspected and further inquiry shut off, not error (Pen. Code, § 17).

In murder prosecution, overruling defendant's objection to question to accused inquiring whether he had pleaded guilty to receiving stolen property, a felony, where it appeared in testimony that punishment was only six months' imprisonment in county jail, making offense misdemeanor for all purposes, under Pen. Code, § 17, *held*, subject to limitation that in such cases record should be inspected and further inquiry peremptorily shut off, not error.

4. Homicide 🔑339—In murder prosecution, excluding evidence why defendant was carrying gun held not error, in view of evidence that he carried gun habitually.

In prosecution for murder, sustaining objection to question why defendant was carrying gun *held* not error, where defendant's testimony that he carried gun at all times was uncontradicted.

5. Homicide 🔑250—Evidence in murder prosecution held not to reduce offense to manslaughter.

In prosecution for murder in which defense was that defendant killed in self-defense, evi-

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★Hearing denied by Supreme Court.

dence *held* not to reduce offense to manslaughter.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

John Lando was convicted of murder, and he appeals. Affirmed.

W. T. Kendrick, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

CONREY, P. J. Count 1 of the information charged that on the 11th day of June, 1922, in the county of Los Angeles, defendant did willfully, etc., kill and murder one Edward Mejia. Count 2 charges that at the same time and place the defendant did willfully, etc., kill and murder one Jesus Mejia. On the first count the jury found the defendant guilty of murder of the second degree. On the second count the jury found the defendant guilty of murder of the first degree and fixed the penalty at imprisonment in the state prison for life.

[1] It is an admitted fact that defendant Lando (at that time known as Tony Tuzzolino) killed the Mejia brothers. At the trial his only defense was that the killing was done in self-defense. The circumstances of the killing, as shown by the prosecution, are clearly described in the testimony of Juan Saragosa, an eyewitness. The two Mejia brothers were sitting together next to the wall in a pool hall, where games were being played. The defendant came in through the front door and made a movement with the head, indicating or pointing toward the back yard. "He did like this to the boys making a movement with his head." The defendant walked out through the back door and the Mejia boys followed him, Edward walking behind Jesus. Just as Jesus was opening the door to go outside, the defendant fired several shots and fatally wounded both of said brothers. Edward died almost immediately and Jesus the next day. This witness, like some of the others who were present on that occasion, declared that he did not see any weapon in the hands of either of the Mejia brothers. There was introduced in evidence a dying declaration made by Jesus Mejia concerning the facts and circumstances of the tragedy. According to that statement the defendant and his two victims, together with others, had been playing in a crap game in the back yard, in which game Jesus lost $10. Then (in the language of the interpreter):

> "He says he lost his $10, and Tony Tuzzolino told him to get some more money, so he just told him that he hadn't got no more, and walked right into the pool hall, and he says later Tony come in the pool hall and motioned to him if he would come out in the back yard, and he says he and Edward get off the bench where we were sitting and follow him and before we get in the door into the back yard he started shooting.
>
> "Q. Who started? A. Tony started shooting at Jesus and Edward."

According to the testimony of the defendant, the Mejia brothers, after losing some money in the crap game, had a dispute with defendant about the money. In substance, defendant's statement was:

> That one of the Mejias drew back with his hand in his side pocket, but the brother drew him away, "telling him, let's go home, so finally he went with him"; that later the defendant went into the pool hall and while he was there the Mejia brothers came in and asked defendant if he wanted to fight; "I started to walk out towards the back, and when I got the screen door open this biggest boy he was right on my back, or in back of me, so I turned around; I thought he was going to fight. * * * So I turned around and I was ready to fight him, but he comes out with a knife out of his pocket, or he had it in his hand, he already had the knife in his hand; when I seen that, I pulled out my gun, and told him, I says, 'Drop that knife. * * *' So he raises the knife up like that to throw it at me and I shot him; as soon as I fired the first shot he came after me, still kept coming, I don't know just exactly where I hit him, he kept coming after me, and I shot him again, and that is when he fell down, and in the meantime the other brother come out, he was right at the door with his hand in his pocket like that, and he was trying to get it out, I don't know what he had, I didn't see it, and I shot him too."

According to some of the defendant's witnesses, one of the Mejias had a knife in his hand at the time of the preliminary altercation which took place in the yard at the time of the crap game. According to one of the defendant's witnesses, who testified as an eyewitness of the later transaction:

> The Mejia boys "got up and made motion and grabbing of the chest and pushed him backwards. * * * They were pushing him backwards and then when he got in the back yard there, then he shot. * * * One of them grabbed him by the chest and had knife in his pocket.
>
> "Q. Could you see any knife at all? A. There was a lot of people there and I couldn't see." (On motion, the statement that there was "knife in his pocket" was stricken out.)
>
> "Q. You saw the Mexican have his hand in his pocket? A. Yes; I saw."

According to this same witness, these two Mexicans, in following defendant out the back door, were five or six feet behind defendant, and the defendant was walking backwards. It will be noted that defendant himself did not agree with some of the statements made by this witness.

From the foregoing statement it is clear that the evidence is abundantly sufficient to justify the verdict, and that this is equally true as applied to both counts.

[2, 3] In addition to the claim that the evidence is insufficient to support a verdict of murder, the points on appeal are, first, that the court erred in overruling defendant's objection to a question asked by the district attorney on cross-examination of the defendant, inquiring whether the defendant, during the year 1924, in the superior court of Los Angeles county, "pleaded guilty to receiving stolen property, a felony." The defendant answered in the affirmative. But it further appeared in the testimony that in punishment of said offense the defendant had been sentenced only to serve six months' imprisonment in the county jail. Under those circumstances the offense to which the testimony referred became and should have been deemed "a misdemeanor for all purposes." Pen. Code, § 17; Doble v. Superior Court, 197 Cal. 556, at page 557, 241 P. 852. As the record was easily available to the district attorney, it was distinctly bad practice for him to attempt to create a prejudice against the defendant by compelling him to admit such former conviction. A witness may not be impeached by evidence of particular wrongful acts, except that it may be shown that he has been convicted of a felony. Code Civ. Proc. § 2051. Counsel for defendant, in objecting to this question, included as a ground of objection that the record itself would show that the witness was not convicted of a felony. We think that when such statement is made in connection with an objection of this kind, and when the record is easily obtainable without delaying the trial, the court should insist upon an inspection of such record, and, if it does show that the conviction was in law only a conviction of misdemeanor, further inquiry along that line should be peremptorily shut off. Subject to this limitation, however, we are of the opinion that the court did not err in overruling the objection. Many cases occur wherein a witness has been convicted of a felony and there is no available means of proving the fact, except by calling for his own admission of the truth.

[4] Appellant's next point is that the court erred in sustaining an objection to the question, "Why were you carrying the gun?" This occurred while the defendant was testifying, on direct examination, as a witness in his own behalf:

> "Q. When you had this first argument with them in the crap game, did you have this gun on you then? A. Yes, sir.
>
> "Q. How long had you had this gun? A. Why, I used to carry it around with me at all times.
>
> "Q. Why were you carrying the gun?"

The district attorney objected that the question was immaterial, and called for a conclusion of the witness. Objection sustained. The prosecution had not introduced any testimony tending to prove that defendant had procured the gun for the purpose of shooting the Mejia brothers or either of them. Defendant's testimony that he carried the gun "at all times," that is, habitually, was uncontradicted. In that state of the evidence the question, "Why were you carrying the gun?" was immaterial, and the court did not err in sustaining the objection.

[5] We find no merit in appellant's contention that the evidence necessarily reduced the offense to manslaughter.

We are satisfied that the record is free from any prejudicial error, and that in the verdict and judgment there is no miscarriage of justice.

The judgments and order are affirmed.

We concur: HOUSER, J.; YORK, J.

MORRIS et ux. v. TURLEY. (Civ. 5158.)

District Court of Appeal, Second District, Division 2, California. June 4, 1928.

Forcible entry and detainer 🔑36—Finding that defendant "unlawfully withholds and keeps possession" of property is conclusion and not finding of fact.

Finding that defendant "unlawfully withholds and keeps possession" of property is conclusion and not finding of fact on cause of action alleging forcible detention of property.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Herman R. Morris and wife against Dora A. Turley. Judgment for plaintiffs, and defendant appeals. Reversed.

Frank G. Tyrrell, of Los Angeles, for appellant.

Thomas S. Bunn, of Los Angeles, and W. Blair Gibbens, of Ocean Park, for respondents.

STEPHENS, Justice pro tem. The complaint in this case contains two causes of action. The first cause is for forcible entry and the second cause is for forcible detainer of real property. The court made findings to the effect that the allegations as to the forcible entry were true, and then, without finding upon the facts as to the forcible detainer, found that defendant unlawfully withholds and keeps possession of the property. The court further finds: "That by reason of the said acts of defendant the plaintiffs have been damaged in the sum of $300." Judgment follows, awarding $300 to plaintiff, and ordering restitution of the real property.

The judgment must be reversed for two reasons: The finding that the defendant "unlawfully withholds and keeps possession" of the property is a conclusion and not a finding of fact upon the cause of action alleging forcible detention of the property. Again, even if this were a sufficient finding, there is absolutely no evidence that the possession was withheld forcibly, as is alleged in the complaint. Assuming, but not deciding, that the facts proved a forcible entry, there is no manner of ascertaining from the findings whether the damages were wholly for the forcible entry, the "unlawful" withholding, or in some proportion for both.

Judgment reversed.

We concur: WORKS, P. J.; THOMPSON, J.

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92 Cal. App. 454

WALSH v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.
(Civ. 6439.) ★

District Court of Appeal, First District, Division 2, California. June 8, 1928.

Hearing Denied by Supreme Court Aug. 6, 1928.

Mandamus ⟹4(3)—Order denying motion to substitute defendant's executrix, on ground that action abated, held appealable, preventing interference therewith by mandamus (Code Civ. Proc. § 1086).

Where motion to substitute executrix after defendant's death was denied, on ground that action did not survive, objection was equivalent to a general demurrer, and order denying substitution was in effect final judgment, from which an appeal could be taken, thus requiring denial of mandamus to control trial court's action on account of existence of plain, speedy, and adequate remedy, under Code Civ. Proc. § 1086.

Application by Harry Edward Walsh for writ of mandate to be directed to the Superior Court for Alameda County and Hon. John J. Allen, Judge in Department 7 thereof, to compel respondent to grant a motion to substitute. Writ denied.

Vincent Surr, of San Francisco, for petitioner.

John L. McVey, of Oakland, for respondents.

STURTEVANT, J. The plaintiff alleges that his wife employed George H. Derrick for a compensation to perform, and he performed, an illegal operation on her. The plaintiff heard of the incident, a family quarrel was had, the wife obtained a divorce and the custody of the minor child, and the plaintiff commenced an action against Derrick to recover damages. It is not alleged that the plaintiff's wife was confined to her bed or made sick, or that medical expenses were incurred; but it is alleged the plaintiff's wife left him on May 9, 1927, and that since then they have continuously lived apart.

In his claim for damages the plaintiff inserted (1) loss of services, $15,000; (2) loss of services of his daughter, $15,000; (3) loss of the unborn child, $20,000. Derrick interposed a demurrer. Before the demurrer was heard, Derrick died testate, and his wife was appointed executrix of his estate. The plaintiff presented his claim to the executrix of the estate of Derrick, the claim was rejected, and the plaintiff prepared a supplemental complaint, and moved to substitute the executrix in the place of the deceased. The plaintiff supported his motion by his complaint, supplemental complaint, and all the records and files in the action. No other evidence was offered by either side. The motion to substitute was denied. Relying on the doctrine as stated in Wood v. Strother, 76 Cal. 545, 18 P. 766, 9 Am. St. Rep. 249, the plaintiff has made an application in this court for a writ of mandate compelling the trial court to grant the motion.

The plaintiff sets forth in his petition for a writ of mandate copies of the briefs which he presented to the trial court on his motion for a substitution of the executrix in the place of her deceased husband. The record before us does not show that in the trial court any question arose or was considered regarding the regularity of the proceedings, or of the sufficiency of the papers used by the moving party. But it does show that the sole question presented to the trial court was whether the plaintiff's cause of action, if any, survived the death of Derrick. But whether the proper practice or otherwise, that question was before the court only by treating the contention of the executrix as in effect a demurrer. The contention was sustained, and the motion to substitute was denied. It follows that the ruling thereon was in effect an order sustaining a demurrer. In the case of Howard v. Lunaburg, 192 Wis. 507, 509, 213 N. W. 301, at page 302, the Supreme Court of Wisconsin said:

> "The objection to the survival of the action was that, since the sole defendant was dead, it appeared from the face of the complaint that it stated no cause of action against the executrix. The objection was equivalent to a general demurrer, and the order overruling it was therefore appealable."

It is stated in 21 California Jurisprudence, 180:

> "While objections to the filing of a proposed amendment may be heard, objections to the sufficiency of proposed amendments and those based on the statute of limitations should not be considered; orderly procedure requiring the testing of the sufficiency of an amended plead-

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

ing in the first instance by demurrer after it is filed."

Nevertheless we are aware that it has been more or less the common practice to convert the hearing on the motion into a hearing as on a demurrer. While the practice is not the best practice, it is sometimes adopted. When, as here, that practice is adopted, the order made on such a hearing is not merely a ruling on the motion to substitute, but it is also, in legal effect, an order sustaining a demurrer, or overruling a demurrer, as the case may be.

The executrix contends that a writ of mandate should be denied, because the plaintiff had a plain, speedy, and adequate remedy by appeal. In making this contention she calls attention to the fact that the effect of the order made by the trial court was not only to decline to make the order of substitution but to terminate and finally end the litigation. In other words, she contends that the order was in effect a final judgment. The recent case entitled Howe v. Key System Transit Co. (Cal. Sup.) 246 P. 39, clearly supports her in the contention which she presents. See, also, Zappettini v. Buckles, 167 Cal. 27, 33, 138 P. 696. It follows that the plaintiff was entitled to appeal from the order. As he was entitled to appeal, apparently he had a plain, speedy, and adequate remedy. Code Civ. Proc. § 1086. As there is nothing in the record showing that his remedy was not plain, speedy, and adequate, the writ should be denied. Carton Corporation v. Superior Court, 76 Cal. App. 434, 438, 244 P. 932.

It is so ordered.

We concur: KOFORD, P. J.; NOURSE, J.

MASTER BUILDERS' CO. v. CLINTON CONST. CO. OF CALIFORNIA. ★

(Civ. 6263.)

District Court of Appeal, First District, Division 1, California. June 11, 1928.

Rehearing Granted July 10, 1928.

1. **Sales 🔑52(5)—Facts held to show meeting of minds of parties when buyer accepted price in telegram from seller to its agent.**

Facts *held* to show meeting of minds between parties to oral contract for sale of colormix when buyer accepted price contained in telegram from seller to its agent.

2. **Frauds, statute of 🔑89(3)—Buyer's acceptance of part of colormix ordered held sufficient to take oral sales agreement out of statute of frauds (Civ. Code, § 1739).**

Where buyer orally agreed to buy 18,000 pounds of red colormix and 3,500 pounds of gray colormix, buyer's acceptance and use of gray colormix was sufficient, under Civ. Code, § 1739, to take oral agreement out of statute of frauds.

3. **Sales 🔑181(11)—In action for breach of sales contract, facts held not to show that seller did not perform, nor offer to perform.**

In action by seller for breach of contract to purchase colormix, facts *held* not to show that seller did not perform, nor offer to perform, alleged contract.

4. **Corporations 🔑410—Vice president and manager of corporation could bind corporation on oral contract to purchase.**

Vice president and manager of corporation had authority to bind corporation by oral contract to purchase colormix.

5. **Sales 🔑377—In action for breach of contract to purchase colormix, allegation on which damages were based held sufficient.**

In action for breach of contract to purchase colormix, allegation that defendant had failed and refused to take balance of colormix, and that plaintiff had incurred liability for commissions on sale of same, and had lost profits arising from sale, and had thereby been damaged in sum of $3,060, on which damages were based, *held* sufficient.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action for damages for breach of contract by the Master Builders' Company against the Clinton Construction Company of California. From a judgment for plaintiff, defendant appeals. Affirmed.

Ernest K. Little, of San Francisco, for appellant.

Willard P. Smith, of San Francisco (Walton C. Webb, of San Francisco, of counsel), for respondent.

CAMPBELL, Justice pro tem. This is an appeal from the judgment awarding plaintiff $3,060 upon a contract found by the court to have been entered into between plaintiff, an Ohio corporation, and defendant, a California corporation, whereby plaintiff agreed to manufacture for, and deliver to, defendant 21,500 pounds of colormix at 22 cents per pound, to be delivered f. o. b. Cleveland, Ohio, between January 21 and May 1, 1925, upon which contract plaintiff manufactured and delivered between January 21 and April 13, 1925, 3,550 pounds of the colormix, and was at all times ready and willing to deliver the balance, but that defendant refused to accept the same, and finding that, by reason of defendant refusing to accept the balance of the colormix called for in the contract, plaintiff was damaged in the sum of $3,060, for which judgment was entered, and from such judgment defendant has instituted this appeal.

Appellant urges under general headings the following points on which he relies for a reversal of the judgment: (1) There was no

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Superseded on rehearing 270 P. 239.

meeting of the minds of the parties; (2) an oral order would have been within the statute of frauds; (3) plaintiff did not perform, nor offer to perform, the alleged contract on its part; (4) the vice president of defendant corporation had no authority to bind the corporation by an oral order; (5) the complaint does not set forth facts sufficient to constitute a cause of action.

Under the first general heading, appellant asserts:

> "(a) Plaintiff communicated its acceptance of a written proposition, bearing the false signature of defendant and its vice president, but which was never submitted to defendant; (b) there was no acceptance by either party; (c) there was no acceptance communicated until February 3, 1925, while Mr. Rodgers admits that he knew, as early as January 30, 1925, that Mr. Huber desired to withhold the alleged order for redtile colormix; and (d) the letter of January 21, 1925, from Mr. Rodgers was not a proposition from plaintiff; it was merely a suggestion from Mr. Rodgers as to the proposition which defendant should make to plaintiff."

These four contentions may be considered together.

[1] The record contains the following evidence relative to the transaction between the parties. In January, 1925, Joseph E. Rodgers, local agent of plaintiff, called upon A. Huber, vice president of defendant corporation, at defendant's place of business, and discussed the placing by defendant of the order for colormix. Mr. Rodgers testified:

> "We figured up the quantity of material that would be required from the plans and specifications of the San Francisco Relief Home,"

—and Mr. Huber then placed the order at 27 cents per pound. Mr. Huber stated that "for the quantity involved the price was, in his judgment, a little bit high," and, in an effort to secure a price that might be a little more favorable to defendant, he (Rodgers) wired to Cleveland, and received a reply to his telegram by wire, which he showed Huber:

> "Best price on eighteen thousand pounds red colormix twenty two cents per pound f. o. b. Cleveland."

Mr. Rodgers further testified as follows:

> "Mr. Huber then told me to go ahead and write up the order on the basis of 18,000 pounds of one color and 3,500 pounds of another color, which I did. He requested if I could not make that price which was mentioned in the telegram the guaranty delivery price at San Francisco, and I said that that would be impossible, because it would—as the material was then requested for delivery later in the year, I didn't know definitely whether a carload of material would be coming forward at that time, in which this could be included, or whether it would have to come by itself, and, of course, it would take different rates of freight both ways. I then phoned in Mr. Huber's—I phoned the railroad—and told him the difference in the rates between the two materials, and why it was impossible for me to give a guaranty delivery price at San Francisco. I told Mr. Huber then, if a full car was coming forward at the time when he would require his material, that the company would give him the benefit of the carload rate rather than L. C. L. (less carload lots) rate, but that I wanted it understood that, if we did not have a car coming forward, he would have to pay the 22 cent price f. o. b. Cleveland, plus whatever freight was involved."

Mr. Rodgers wrote and mailed a letter, which bears date January 21, 1925, to defendant, containing the following:

> "Confirming our verbal agreement of to-day we are entering your order for 18,000 lbs. Master Builders' tile red colormix and 3,500 lbs. battleship gray colormix, at the agreed price of 22¢ per pound, f. o. b. Cleveland, Ohio—same price both colors."

Mr. Rodgers received no reply to this letter. Prior to February 5, 1925, Rodgers received a phone message from Mr. Huber requesting that the red part of the order be held up, and Rodgers informed him that it would be impossible to hold up any part of the order originally given, because the matter was entirely in the hands of the Master Builders' Company, and they would be the ones to come to any decision regarding the matter. On January 23, 1925, Rodgers filled out an order blank, and forwarded it to plaintiff, calling for 18,000 pounds of red colormix and 3,500 pounds of battleship gray, and at the bottom wrote in the name under the signature of purchaser, "Clinton Const. Co. A. Huber." On February 5, 1925, defendant wrote J. E. Rodgers & Co.:

> "Kindly enter our order for approximately 3,500 lbs. battleship gray colormix. Price: 22 cents per pound, f. o. b. Cleveland, Ohio. Deliveries: 700 lbs. immediately. Balance April 1, 1925. Confirming our telephonic conversation of recent date, we wish to inform you that we have not made a decision on the type of red color hardener we intend to use. We will mail you a written order should we decide to use Master Builders' red tile colormix."

Plaintiff wired to defendant, February 5, 1925, as follows:

> "Our representative Rodgers advises substitution for colormix order being attempted Stop Be advised that order accepted manufactured for you and partly shipped Stop Can accept no change or cancellation See order signed by your Mr. Huber."

Sylvester W. Flesheim, president of plaintiff corporation, testified that J. E. Rodgers & Co. of San Francisco acts as their sales agent in California; that J. E. Rodgers & Co. is authorized to solicit orders subject to their approval; that every order J. E. Rodgers & Co. receives must be sent to plaintiff at Cleveland for acceptance; that, when plaintiff received the telegram from Rodgers containing the order for 18,000 pounds of red colormix and 3,500 pounds of gray colormix, the order was immediately accepted, and defendant notified accordingly; that tile red colormix is not a product that has a ready market, and little is carried in stock; that 18,000 pounds is a very large order; and that, when the order was accepted, instructions were immediately given to the factory to manufacture the material.

There was clearly a meeting of minds when defendant accepted the price of 22 cents contained in the telegram from plaintiff and confirmed in Rodgers' telegram to plaintiff. The fact that plaintiff in its telegram to defendant of February 5, 1925, stating that it would accept no cancellation or modification of the order, referred to the order signed by Huber, does not alter the situation, as the written order to which Rodgers attached Huber's name was merely an order reciting the terms of the verbal contract before entered into. If this were a case where it was agreed that the terms of the verbal contract were subsequently to be reduced to writing, there would be merit in defendant's contention (Las Palmas, etc., Distillery v. Garrett & Co., 167 Cal. 399, 139 P. 1077), but such is not the case here.

[2] As to appellant's second point that the oral agreement is within the statute of frauds, in that "(a) there is no evidence to sustain the finding of the court that there was a contract to manufacture; and (b) the gray colormix was not accepted as and for a part performance of the alleged oral order," it may be said Mr. Huber in his testimony admitted that a part of the colormix was received and used in the building for which it was ordered. "Q. Is it not a fact that the gray colormix was used on this job and part of the red? A. Yes. Q. Where was it used, on the sidewalks? A. No, on the floor. Q. But the gray was used first? A. Yes. Q. Is it not a fact that you got some shipment in January? A. of the gray? Q. Of the gray. A. We might have; I think we did probably." This is sufficient, under section 1739 of the Civil Code, to take the oral agreement out of the statute of frauds. The fact that the gray colormix "and part of the red" was used on the job is sufficient to sustain the finding that the gray colormix was accepted as a part performance of the oral contract.

[3] From the foregoing it is apparent that there is no merit in appellant's third contention "that plaintiff did not perform nor offer to perform the alleged contract on its part."

[4] It may likewise be said that appellant's fourth and fifth contentions, viz., that the vice president of defendant corporation had no authority to bind the corporation by an oral order, and that the complaint does not state a cause of action, are likewise without merit. It is true that Mr. Huber testified that he never did give any orders, unless they were in writing, as it is against the rules of the company. He further stated that, as vice president of the company, he had charge of buying the materials for jobs. It appears that Mr. Huber was vice president and manager of the corporation, and therefore, as such, could bind the corporation (Eells v. Gray Bros., etc., Co., 13 Cal. App. 33, 108 P. 735; Fowler Gas Co. v. First Nat. Bank. 180 Cal. 471, 181 P. 663; Davis v. Pacific Studios Corp. [Cal. App.] 258 P. 440). The court, having determined that Mr. Huber did enter into the oral agreement here, evidently did not place credence in his statement that he never gave verbal orders.

[5] The objection to the complaint is that the allegation on which damages are based is insufficient. The paragraph objected to is:

> "That defendant has wholly failed and refused to take the balance of said colormix, and that plaintiff has incurred liability for commissions on the sale of the same, and has lost the profits arising from said sale, and has thereby been damaged in the premises in the sum of $3,060."

This allegation is sufficient. Ahlers v. Smiley, 163 Cal. 200, 124 P. 827; Tahoe Ice Co. v. Union Ice Co., 109 Cal. 242, 41 P. 1020.

We have examined the authorities cited by appellant, and do not question the principles they announce, but merely their application to the facts in the present case.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

FILSON v. BALKINS. (Civ. 5042.)★

District Court of Appeal, Second District, Division 2. California. June 4, 1928.

Hearing Granted by Supreme Court Aug. 2, 1928.

1. **Negligence 🔑136(9)—Contributory negligence, though generally question of fact, becomes question of law, where only legitimate inference from evidence is that plaintiff's negligence contributed to injury.**

Contributory negligence is generally question of fact for determination by the jury, but it becomes a question of law for the court when the evidence is such that it will support no legitimate inference except that negligence of plaintiff contributed to injury; entire absence of conflict in evidence not preventing court's determination of question.

2. **Automobiles 🔑217(1)—Pedestrian who is negligent in crossing street is not excused by reliance on presumption that automobile drivers will use due care.**

Reliance on presumption that drivers of automobiles will use due care and caution to avoid striking him while crossing street does not excuse pedestrian who is negligent.

3. **Automobiles 🔑217(5)—Pedestrian, before proceeding to cross highway on which vehicles frequently pass, must look in both directions to ascertain whether path is clear.**

Pedestrian must use due care before proceeding to cross highway where vehicles fre-

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★Hearing granted by Supreme Court.

quently pass to see that he is not in immediate danger, and must look in both directions to determine approach of vehicles and their speed and proximity.

4. Automobiles 🔑217(5)—Pedestrian crossing street has continuing duty to maintain lookout for vehicles in direction from which danger is to be anticipated.

Pedestrian must not only look to left and right before stepping on street, but while crossing street must continue to look in direction from which danger is to be anticipated, particularly where he proceeds in a diagonal course, and duty is not met by looking once and then looking away.

5. Automobiles 🔑244(50)—Negligence of pedestrian struck by automobile while crossing street is determined from all facts and circumstances in evidence.

Question whether pedestrian struck by automobile in crossing street is negligent is to be determined from all facts and circumstances in the case.

6. Automobiles 🔑217(6)—Pedestrian crossing street diagonally without looking to ascertain whereabouts of automobile which he observed before starting to cross held contributorily negligent.

Pedestrian who looked before crossing street and saw automobile and then proceeded to cross diagonally without again looking in direction from which danger from passing vehicle might be anticipated *held* contributorily negligent as matter of law in action for injuries resulting when he walked into right front door of automobile which attempted to go around him.

7. Negligence 🔑80—Defendant's negligence is not available to plaintiff who was guilty of contributory negligence.

Plaintiff, who was guilty of contributory negligence, cannot rely upon the negligence of the defendant.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by W. F. Filson against N. J. Balkins for damages for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

Haas & Dunnigan, of Los Angeles, for appellant.

Jones, Wilson & Stephenson, of Los Angeles, for respondent.

HAZLETT, Justice pro tem. Plaintiff was given judgment upon the verdict of a jury in the sum of $1,500 on account of personal injuries he suffered while walking across a public highway, in a collision between his person and a Willys-Knight sedan automobile driven by defendant. Defendant appeals, contending that the evidence does not support the verdict or judgment, in that it is established that plaintiff was guilty of contributory negligence as a matter of law. Defendant made a motion for a new trial, which was not presented in time, and was denied by operation of law.

The only controversies in the evidence are as to the speed at which defendant's automobile was traveling at the time of the accident and whether plaintiff looked to his left before he started to walk across the highway.

The evidence shows the following facts without conflict: Plaintiff was employed by the Midway Gas Company, and in charge of a crew of men repairing a gas main located under the pavement of the state highway at a point about 2 miles south of Newhall. This highway ran north and south, and it was paved with a pavement 21 feet wide. The men were digging holes at the west of the pavement and tunneling under the pavement about 6 feet to the joints of the gas main. The highway was straight, unobstructed, and down grade for a distance of about 500 feet from a curve south of the point. Preceding the collision, machines were passing, some at a rapid rate and some slow. Just before the collision, plaintiff walked across the pavement from the west to the east and procured two flags for use in warning drivers of automobiles and trucks passing from traveling over the tunneled portion of the pavement. Intending to return to the west side of the pavement, plaintiff looked to the north and to the south to see if any automobiles were approaching, and observed one coming from the north and one from the south, and he stood off the pavement, to its east until they passed. He again looked each way, and saw no machine coming from the north, but observed defendant's machine approaching down the hill from the south, at the curve, about 400 or 500 feet distant (he also testified that he had a faint recollection of having seen the machine), and he testified that he started right away to cross the pavement. He walked in a diagonal direction, northwesterly at an average gait, but did not again look to the south. In fact, he looked down at the pavement until he reached a point 3 or 4 feet westerly on the center line of the pavement when he looked north to see if any machines were approaching from that direction. He or his witnesses heard no warning sound from any automobile or from the approach of defendant's machine before the collision occurred. His sight and hearing were good. When defendant's machine arrived at a point about 50 feet south of the place of collision, it was on the east half of the pavement and defendant thereafter swerved it toward and partly upon the west half of the pavement to go around and in front of plaintiff. When the collision occurred, the automobile had reached about the center of the pavement, a little more than half of the machine being west of the center line. Plaintiff's head came in contact with the glass in the right front door of the automobile, breaking the glass, and throwing it inside the machine, and the door handle was bent toward the rear. Plaintiff was thrown to the pavement about its center, with his body lying partly over on its west half, and his injuries consisted of a laceration over his left eye, one on top of his head on the left side, a wound on the back of his head, fractures of three bones on his right foot, and numerous contusions. The automobile proceeded 20 to 25 feet beyond the place of collision, stopped for a moment, and was then driven a short distance beyond. Skid marks were seen at the place, commencing on the easterly half of the pavement a few feet south of the place of collision, swerving toward the west until they were wholly upon the west half, and, in all, were about 20 feet long. One of plaintiff's witnesses, who was working about 50 feet north of the place of collision stated that in his opinion defendant's machine was traveling at about 30 miles per hour when the accident happened. Defendant and a passenger he had in his machine testified that when defendant's machine arrived about 100 feet south of the place of collision they observed plaintiff standing just easterly of the pavement and watched him all the time thereafter until the collision occurred; that the machine was traveling 12 to 15 miles per hour; that plaintiff did not look south toward the oncoming machine, and, when it was about 12 to 15 feet from plaintiff, plaintiff started to walk across the pavement and continued to the time of the collision, looking down, going in a northwesterly direction at a fair gait; that defendant sounded his horn when he first observed plaintiff and again when plaintiff started out on the pavement; that, in order to avoid striking plaintiff, defendant applied his brakes and swerved his machine toward and partly upon the west half of the pavement to go around him; that plaintiff walked into the right front door of the machine; and that at the time of the collision the machine was traveling 5 to 10 miles per hour; and defendant testified that traveling at 12 miles per hour he could stop his machine in 25 to 30 feet.

[1, 2] Negligence is a question of fact for determination by the jury, but it becomes a question of law for the court when the evidence is such that it will support no other legitimate inference except that plaintiff was guilty of negligence which contributed to his injury. It is never a question of pure law. The decision of the question by the court is a decision of fact. When the evidence is of such a character that the court is impelled to say that the record is not in conflict on the facts, and that from the facts reasonable men can draw but one inference pointing unerringly to the conclusion that plaintiff's negligence contributed to his injury, then the law forbids his recovery. To warrant the court in determining that plaintiff was negligent as a matter of law, it is not necessary that there should be an absence of conflict in the evidence, but, if there be a conflict, it must not be a substantial one. However, if the conceded facts are such that reasonable minds might differ upon the question, it is one of fact for the jury. Seller v. Market-Street R. Co., 139 Cal. 268, 271, 72 P. 1006; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 339, 343, 208 P. 125; Smith v. Southern Pacific Co. (Cal. Sup.) 255 P. 500; Moss v. Boynton Co., 44 Cal. App. 474, 476, 186 P. 631; Finkle v. Tait, 55 Cal. App. 425, 431, 203 P. 1031; Carey v. Pac. Gas & Electric Co., 75 Cal. App. 129, 134, 242 P. 97. "The question of contributory negligence must be determined without regard to any negligence on the part of defendant." Moss v. Boynton Co., supra; Mayer v. Anderson, 36 Cal. App. 740, 742, 173 P. 174; Lord v. Stacy, 68 Cal. App. 517, 521, 229 P. 874. While it has been held that a pedestrian crossing a street may presume that drivers of automobiles will use due care and caution to avoid striking them (Dullanty v. Smith [Cal. Sup.] 265 P. 814) reliance upon the presumption does not excuse one who is himself negligent. Truitner v. Knight (Cal. App.) 257 P. 447.

The facts in this case are such as to fairly raise the question whether plaintiff was guilty of contributory negligence as a matter of law. Viewing the testimony of plaintiff and his witnesses most favorably to plaintiff, it appears therefrom that plaintiff saw defendant's automobile at least 400 feet distant, and without again looking in the direction from which the automobile was approaching, but looking straight ahead or down (plaintiff testified he looked in the direction he was walking, and one of his witnesses said he was looking down as he walked), defendant proceeded to cross the pavement, walking at an ordinary pace, with his back partly toward the automobile, and that the collision occurred between his head and body and the door of the moving automobile. By calculation it appears that about one and one-half times the miles traveled per hour gives the feet per second, and at 30 miles per hour it required about 9 seconds for the automobile to travel the 400 feet; and, if plaintiff did not loiter, he walked at a pace of about 4 miles per hour, and in the 9 seconds he should have walked about 54 feet or past the west edge of the pavement to a position of safety. Apparently he walked about 19 feet from the east side of the pavement to the point of collision, the automobile was about 130 feet distant when he started across, and there was a period of 5 or 6 seconds between the time when he started to cross and the time of collision. From this it is evident that he did not look south immediately before he started to cross, and he proceeded without looking for danger. According to plaintiff's own testimony and that of his witness who saw him crossing, he did not exercise due care or ordinary care for his safety, and he was either mistaken in saying that he looked to the south immediately before he stepped upon the pavement, or he looked and was so preoccupied that he failed to see the proximity of defendant's automobile, and stepped out when it was too close to avoid the collision. He was not excused in either event. Lord v. Stacy, supra. The foregoing conclusions drawn from the evidence produced by plaintiff are reinforced by the testimony of defendant and the passengers in his machine; there being little if any substantial conflict in the evidence of the parties. While it is true that one of plaintiff's witnesses, who was about 50 feet north of the place of collision, testified that in his judgment the machine was traveling about 30 miles per hour; on the other hand, defendant and his passenger testified that the speed was 12 to 15 miles per hour, and that the machine was 12 to 15 feet from plaintiff when he started to cross. Defendant said his machine could be stopped in about 25 to 30 feet when traveling at 12 miles per hour, and plaintiff's witnesses testified that the skid marks were about 15 to 25 feet long, and that the machine proceeded about 25 feet beyond the place of collision before it stopped. In fact, plaintiff's evidence tends to corroborate the evidence produced by defendant in relation to the speed of the machine as well as the manner in which it was driven and its proximity. Had the machine not swerved to the west side of the pavement, plaintiff would have been hit by its front end and probably killed.

[3-5] It is the duty of a pedestrian to use due care before proceeding to cross a highway where vehicles frequently pass and repass, to see that he is not in immediate danger in attempting to cross, and he is required to look in both directions to see if any are approaching, and, if so, their rate of speed and proximity. Niosi v. Empire Steam Laundry, 117 Cal. 257, 49 P. 185. The observation of due care on the part of a pedestrian is not fully performed by merely looking to the left or right as he steps upon the street. It is imperative upon him during all the time that he is crossing, particularly if he proceeds in a diagonal course. Sheldon v. James, 175 Cal. 474, 479, 166 P. 8, 2 A. L. R. 1493; Mayer v. Anderson, supra, page 742 (173 P. 174); Atkins v. Bouchet, 65 Cal. App. 94, 223 P. 87; Moss v. Boynton Co., supra. Immediately before placing himself in a position of danger it is the duty of a pedestrian to look in the direction from which danger is to be anticipated, and this is a continuing duty, and is not met by looking once and then looking away. Moss v. Boynton Co., supra; Judd v. Webster, 50 Cal. App. 743, 747, 195 P. 929; Lord v. Stacy, supra. However, it has been held that, where a pedestrian crossing a street observed an automobile approaching from her left, half a block distant, and she continued to observe it until she reached the center of the street, when she looked to her right for vehicles approaching from that direction, that this appeared to have been reasonable prudence on her part. Wright v. Foreman (Cal. App.) 261 P. 481. The question whether or not a pedestrian is negligent is to be determined from all the facts and circumstances in evidence in the case. Reaugh v. Cudahy Packing Co., supra; Burgesser v. Bullock's, 190 Cal. 673, 678, 204 P. 649.

[6] Under all the circumstances shown in this case, it was plaintiff's plain duty, when about to proceed across the pavement, to see that he was not in immediate danger from the traffic on the highway. Having observed defendant's machine approaching 400 or 500 feet distant, it was his duty to again look for it immediately before starting to cross, and he should have looked and listened as he proceeded so as to avoid colliding with the machine; defendant exercising the common privilege of using the highway (see Judd v. Webster, supra; Niosi v. Empire Steam Laundry, supra), which he failed to do.

We hold that as a matter of law plaintiff was guilty of negligence which contributed proximately to his injuries.

[7] No attention is given to the question whether defendant was negligent in the operation of his automobile, for the reason that plaintiff was guilty of negligence contributing to his injuries, and therefore cannot rely upon the negligence of defendant, if any; and, for the same reason, we give no consideration to the question whether plaintiff had the right to rely upon any presumption to the effect that defendant would use due care to avoid a collision.

The judgment is reversed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

92 Cal. App. 292

JONES v. WICKSTROM. (Civ. 6285.)

District Court of Appeal, First District, Division 1, California. May 31, 1928.

1. Licenses ⟹39—Contract between builder and alleged architect, who was not licensed, but who represented that he was, held void in respect to amount claimed for plans (St. 1901, p. 641, § 5).

Contract between builder and alleged architect, who was not licensed and did not inform builder of such fact, but on contrary represented that he was licensed architect, *held* void in respect to amount claimed for preparing plans and specifications, as violating express provision of St. 1901, p. 641, § 5.

2. Appeal and error ⟹731(5)—Insufficiency of evidence to support findings could not be raised, where bill failed to specify wherein findings were unsupported.

Where appeal was taken by bill of exceptions which failed to specify wherein findings were unsupported by evidence, but purported to set forth evidence adduced at trial, *held* that insufficiency of evidence to support findings could not be raised.

3. Appeal and error ⟹931(1)—Appellate court must assume that findings were sustained by evidence presented at trial, where bill did not specify wherein findings were unsupported.

Where appellant has not in bill of exceptions made any specification of insufficiency of evidence to support findings, appellate court must assume that findings were sustained by evidence which was presented at trial.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by R. V. Jones, Jr., against Anna Wickstrom to foreclose a contractor's lien. From a judgment for the defendant, the plaintiff appeals. Affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

Richard A. Dunnigan, of Los Angeles, for respondent.

CAMPBELL, Justice pro tem. This action is one to foreclose a contractor's lien and recover a balance claimed to be due in the sum of $2,757.88 on the construction of an apartment house in the city of Los Angeles. Defendant in her answer sets up the defense that the contract was procured by plaintiff through fraud and misrepresentation; that plaintiff represented that he was a licensed architect and a builder of skill and efficiency, when in truth and in fact he was not a licensed architect, nor had he, at the time of entering into the contract—February 3, 1923—any experience in the building of apartment houses.

Under the terms of the contract on which this action is founded, the plaintiff undertook to construct for defendant on certain property owned by her in the city of Los Angeles a 56-room apartment house. The contract is what is commonly referred to as a cost plus contract; that is, one whereby the owner agrees to pay for all materials and labor furnished thereunder, and in addition thereto a percentage thereon as compensation to the contractor for his services. In the contract here the percentage on the net cost of the materials and labor was to be 10 per cent. of the cost of the construction of the building. The contract also provided for the payment to plaintiff of an additional compensation of 5 per cent. for services in drawing plans.

The evidence discloses the following facts: At the time of entering into the contract, the plaintiff was 28 years of age; that he had been engaged in selling automobiles and was engaged in the real estate business; that on February 3, 1923, he had in course of construction an apartment house, but prior to that time had never built an apartment house. While the contract provided for architectural supervision, plaintiff, as he himself testified, was not a licensed architect, and never had been, and made no statement in this regard to the defendant. The plans and specifications were not prepared by a licensed architect, but were prepared by the Home Seekers' Service Corporation, as plaintiff testified, "whom I employed to draw the plans. They were not licensed architects at that time."

Defendant testified that prior to entering into the contract she had never engaged the services of a contractor, architect, or builder. Plaintiff, in the procurement of the contract, represented to defendant that he could build a 56-room apartment house for $40,000 and that the building could be financed by his father; that she had no advice or counsel other than from plaintiff; that she believed the statements he made that he was an architect and builder; that at the time the contract was signed there were no plans or specifications attached to the contract; that plaintiff said he was qualified; that he had built some very good houses, lots of houses in Portland, and big apartment houses; that he built a number of houses in Los Angeles, and defendant asked to see some of them; that all he showed her were two or three bungalow courts and the Santos Apartments, which was under construction; that defendant told plaintiff that she was not very strong and would have to have somebody that was perfectly capable to look after the building and put it up; that he said he could recommend himself to be the best in the city; that she believed his statements that he was an architect and did building, or she would not have employed him.

After the building was started, it became necessary to remove the foundation forms in order to put in a deeper foundation. When the foundation forms were taken out, no ce-

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ment was taken out, and no concrete was poured.

On June 22, 1923, defendant notified plaintiff in writing that she intended to sublet all the carpenter work, both rough and finished, and finish hardware, in connection with the construction of the apartment house as specified in the contract, according to the plans and specifications, and that, with plaintiff's consent to such subletting and waiving the right to furnish the labor and material as may be involved therein, she would waive, relinquish, surrender, and extinguish any claim against plaintiff for defective workmanship or material or damages arising out of the contract. At the bottom of this notice plaintiff signed the following consent: "In consideration of the foregoing waiver, I hereby consent to the subcontract herein referred to."

Plaintiff did no further work or supervision under the terms of his contract subsequent to June 22, 1923, the date the consent mentioned was signed releasing him from liability. Up to this time there was not expended in construction under the contract in excess of $4,000.

According to the testimony of defendant, George R. Nickerson, superintendent for plaintiff, was there only a few minutes each day to check up the lumber for the purpose of seeing that the money represented by a mortgage of plaintiff's father was used for the purchase of materials to go into the building. Defendant further testified that all material after June 22, 1923, was ordered by the foreman working under the direction of defendant; that she was on the job a great deal of the time when Mr. Gale was there, and that after he left she was there most of the time; that she did not see Mr. Nickerson more than once every three or four days after June 22, 1923, and never saw plaintiff on the job after that date.

[1] Two thousand dollars of the amount claimed is for preparing plans and specifications, which admittedly were not drawn by a licensed architect, and on account of which, prior to learning that plaintiff was not a licensed architect, defendant paid $1,500. Plaintiff not being a licensed architect and not informing defendant of such fact, but on the contrary representing to her that he was a licensed architect, the contract in this respect is unlawful and void.

The act to regulate the practice of architecture (Stats. 1901, p. 641) establishes a state board of architecture and empowers such board to examine persons who desire to follow the profession of an architect and to issue them a license for that purpose. Section 5 of the act makes it a misdemeanor punishable by a fine "for any person to practice architecture without a certificate in this state"; and further provides "that nothing in this act shall prevent any person from * * * furnishing plans or other data for buildings for other persons, provided the person so furnishing such plans or data shall fully inform the person for whom such plans or data are furnished, that he, the person furnishing such plans, is not a certified architect." The act of 1901 was passed for the protection of the public, and "every case from every court recognizes that, when a statute has been made for the protection of the public, a contract in violation of its provisions is void." Payne v. De Vaughn, 77 Cal. App. 399, 403, 246 P. 1069, 1071; Tatterson v. Kehrlein (Cal. App.) 263 P. 285.

Up to June 22, 1923, according to the testimony of defendant, there was not to exceed $4,000 expended in the construction under the provisions of the contract, while Albert A. Hasford, auditor and general office man of plaintiff R. V. Jones, Jr., testified:

> "Up to the 22d day of June, 1923, on this job, there was paid out $2,718.10. * * * That was the amount that was actually paid out on this job to the 22d day of June, 1923, but $15,000 worth of bills had been contracted prior to that time on this job, approximately. In other words, we had made commitments to this extent; that is, we had obligated ourselves to the subcontracts to give orders to this amount, which we had issued. The subcontract had not been paid; it amounted to fourteen hundred and some off dollars. It was not completed prior to the 22d day of June, 1923, only partially completed. * * * On this $15,000 item some of the work had been done; some of the material was on the job, but had not been paid for; some of the contracts had been started, but nothing had been applied on them. Part of the $2,700 was for pay roll for labor performed, surveys, excavating; the original item is there for $1,500."

If the contract was modified or canceled on June 22, 1923, as found by the court, then the best plaintiff could claim would be 10 per cent. on the amount due for materials and labor on that date. According to the testimony of respondent, there was expended but $4,000, and there would therefore be nothing due, and, if we adopt the figure of $15,000 given by appellant's auditor and office man, he would be entitled to but $1,500, which amount he had received.

Appellant, in support of this appeal, urges only objections to certain findings wherein the court finds that the contract was terminated as of date June 22, 1923; that no services as provided by said contract were furnished by plaintiff to defendant subsequent to June 22, 1923; that plaintiff had little experience as a builder of apartment houses; that he represented to defendant that he was an experienced designer and experienced in building apartment houses, and that he concealed from defendant that he had practically little or no experience as a designer of apartment houses and that, had defendant known such facts, she would not have entered into the contract; that plaintiff represented to defendant that the maximum cost of construction of a 56-room apartment house, including plans and specifications, would not exceed $40,000, but that the apartment house consisting of but 48 rooms cost $50,000 by reason of the inexperience, unskillfulness and inefficiency of plaintiff as a builder. These findings are attacked by appellant in his brief on the ground that they are not supported by any evidence in the case.

[2, 3] The objection that the findings are not supported by the evidence is not available to appellant. He chose to appeal by a bill of exceptions. In the bill of exceptions he failed to specify wherein the findings are unsupported by the evidence. The bill of exceptions purports to set forth the evidence adduced at the trial, but contains no specifications whatever. This being the state of the record, the point made by appellant that the evidence is insufficient cannot be raised here. Moore v. Franklin, 49 Cal. App. 103, 108, 192 P. 1047. Such specifications are necessary in order to authorize the court to review the evidence and consider its sufficiency. Goldman v. Dahlberg, 79 Cal. App. 380, 249 P. 536; Winterburn v. Chambers, 91 Cal. 185, 27 P. 658; Meades v. Lasar, 92 Cal. 227, 28 P. 935; Estate of Depeaux, 118 Cal. 290, 50 P. 387; Estate of Behrens, 130 Cal. 418, 62 P. 603; Code Civ. Proc. § 648. We must assume that the findings are sustained by the evidence which was presented at the trial, as appellant has not in his bill of exceptions made any specification of insufficiency in that respect. Winterburn v. Chambers, supra.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

SENEY v. PICKWICK STAGES, NORTHERN DIVISION, Inc., et al. (Civ. 5738.) ★

District Court of Appeal, Second District, Division 1, California. June 8, 1928.

Hearing Granted by Supreme Court Aug. 6, 1928.

1. Appeal and error 🔑1010(1)—Ordinarily, findings of fact by lower court, supported by evidence, are conclusive.

Ordinarily, when sufficiently supported by evidence, findings of fact made by lower court are conclusive on appeal.

2. Appeal and error 🔑1008(3)—Findings of fact by lower court, based on typewritten transcript of testimony in former action, may not be disturbed on appeal.

Findings of fact made by lower court based on evidence consisting of typewritten transcript of testimony given by witnesses in former action may not be disturbed on appeal.

3. Negligence 🔑121(2)—"Res ipsa loquitur" is inference of negligence of defendant from which prima facie case is established for plaintiff, subject to rebuttal.

Effect of doctrine of "res ipsa loquitur" is merely that inference of negligence on part of defendant is indulged, from which it results that prima facie case only is established in favor of plaintiff, and such condition is not at all conclusive as to negligence of defendant, but is subject to rebuttal, same as though prima facie case had been established by testimony of witnesses.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Res Ipsa Loquitur.]

4. Carriers 🔑318(4)—Judgment in bus passenger's action was properly rendered for carrier, if prima facie case was overcome, or evidence did not preponderate in passenger's favor.

In passenger's action for wrongful death of her minor child and personal injuries to herself, where auto stage was overturned, though prima facie case of negligence on part of carrier may be inferred, nevertheless, if, by evidence introduced on behalf of carrier, effect of such prima facie case was either overcome or entire evidence left in such condition that it did not preponderate in favor of passenger, trial court was justified in rendering judgment in favor of carrier.

5. Carriers 🔑316(1)—Passenger had burden of proving carrier's negligence in action for injuries to herself and death of minor son when auto stage overturned.

In passenger's action for injuries to herself and death of minor son when auto stage overturned, burden of establishing negligence of carrier by preponderance of evidence rested on passenger.

6. Appeal and error 🔑1099(7)—Finding carrier was not negligent held conclusive on appeal, though based on typewritten transcript of evidence in former case in which carrier's negligence was affirmed on appeal.

In passenger's action for injuries to herself and death of minor son, where evidence consisted of typewritten transcript of testimony given by witnesses in former action brought for death of husband in same accident wherein judgment was rendered in favor of passenger and affirmed on appeal, finding that carrier was not negligent *held* conclusive on appeal.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Hattie L. Seney against the Pickwick Stages, Northern Division, Inc., and others, for damages for personal injuries. From a judgment for the defendants, plaintiff appeals. Affirmed.

See, also, 263 P. 299.

Edwin S. Earhart, of Los Angeles, for appellant.

Warren E. Libby and B. P. Gibbs, both of Los Angeles, for respondent.

HOUSER, J. It appears that plaintiff, her husband, and their infant son were passengers on an automobile stage operated by the defendant company, and that, in an accident in which such auto stage was overturned, both the husband and the child were killed

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★Hearing granted by Supreme Court.

and plaintiff sustained personal injuries. In an action brought against the defendant for damages caused by the death of her husband, a judgment was rendered in favor of plaintiff, which judgment on appeal to this court was affirmed. Seney v. Pickwick Stages (Cal. App.) 255 P. 279. In the second action, plaintiff sought damages against the defendant caused by the wrongful death of her minor child, as well as for damages arising from the personal injuries sustained by plaintiff in said accident. In the latter action, judgment was rendered in favor of the defendant. It is from such judgment that the present appeal is taken. In the second action, the record discloses the fact that, with the exception of evidence necessary to establish the amount of damages, if any, sustained by plaintiff, the evidence therein was identical with that of the first case; it having been stipulated by the parties to the litigation that the transcript of the evidence in the first case might be introduced on the trial of the second case with the same force and effect as though the respective witnesses were actually present and personally testifying in the action on trial. It should be noted that the judge who presided at the trial of the first action did not preside at the trial of the second action.

[1, 2] Appellant concedes the point that ordinarily the law is established that, when sufficiently supported by the evidence, the findings of fact made by the lower court are conclusive. However, in this connection, appellant contends that the rule should not apply where the evidence upon which the finding of fact is made consists of a typewritten transcript of testimony given by witnesses in a former action. In the matter entitled Estate of Bell, 157 Cal. 528, 108 P. 497, in substance it is held that the credibility of witnesses, whether testifying orally or by affidavit, is for the trial court; and in the case of McElhaney v. McPherson, 12 Cal. App. 678, 108 P. 525, the same principle of law is announced in the statement to the effect that the appellate court is not concerned with the credit which is to attach to the testimony of the several witnesses in the trial of an action; and the fact that much of such testimony may be produced by depositions of such witnesses does not affect the rule. In the instant case, based upon the assumption that the findings of fact are supported by the evidence, this court is led to the conclusion that such findings of fact may not be disturbed on appeal.

[3] In affirming the judgment in the first case between plaintiff and the defendant, among other things, this court held that, considering the facts therein, the doctrine known as res ipsa loquitur was applicable. Relying upon such declaration of law as affecting the facts in the first case and applying it to the identical state of facts in the instant case, appellant contends therefrom that, although the judgment in the trial court in the instant case was rendered in favor of the defendant, the duty devolves upon this court to order a reversal of such judgment and order a judgment in favor of plaintiff. But it is well-established law that the effect of the doctrine of res ipsa loquitur is merely that an inference of negligence on the part of the defendant is indulged; from which it results that a prima facie case only is established in favor of the plaintiff. Such a condition is not at all conclusive as to the negligence of the defendant, but is subject to rebuttal the same as though a prima facie case had been established by the testimony of witnesses regarding the manner in which the accident occurred. The law with reference thereto is succinctly stated in the case of Scarborough v. Urgo, 191 Cal. 341, 346, 216 P. 584, 586, where it is said:

> "* * * In this class of cases a prima facie case of negligence is made out by proving that the passenger was injured while being carried as such, and this being done, the carrier is called upon to rebut or overcome a presumption of negligence that follows from the mere fact of injury, by showing, if it can, the exercise of that degree of care which will excuse it under the rule of law above stated. Such a presumption is evidence in the case, but it has no greater or different effect than the testimony of witnesses, and in no degree changes the rule as to the burden of proof, viz., the burden of producing a preponderance of evidence. That burden does not shift from side to side on the trial of a case, but constantly remains with the party having the affirmative of the issue, who, in this case, is the plaintiff. All that is required of the defendant is to produce evidence sufficient to offset the effect of a plaintiff's showing. He is not required to offset it by a preponderance of the evidence. Valente v. Sierra Ry. Co., 151 Cal. 534, 91 P. 481. As is said in Sweeney v. Erving, 228 U. S. 233, 33 S. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905 (see, also, Rose's U. S. Notes), the doctrine of 'res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in the question for the jury is whether the preponderance is with the plaintiff' [citing cases]."

To the same effect, see 4 Cal. Jur. p. 980 et seq.; 19 Cal. Jur. p. 717 et seq.

[4-6] It follows that from the circumstances present in the instant case a prima facie case of negligence on the part of defendant may have been properly inferred; nevertheless, if by the evidence introduced on behalf of the defendant the effect of such prima facie case was either overcome or the entire evidence left in such a condition that it did not preponderate in favor of plaintiff, the trial court was justified in rendering a judgment in favor of the defendant. Concededly, the evidence presented by the defendant had a tendency to establish the ultimate fact necessary to its defense—that the accident in question was occasioned by inevitable casualty, or by some other cause which human care and foresight could not have prevented.

Throughout the trial of the action the burden of establishing the negligence of the defendant by a preponderance of the evidence rested with plaintiff. Relative to the negligence of the defendant, the question of the weight of the evidence on either side of the controversy, or, in order that plaintiff should be entitled to a judgment in the action, whether the evidence preponderated in favor of plaintiff, was solely for the determination of the judge of the trial court, and with whose conclusion, notwithstanding the affirmance by this tribunal of the judgment in the first action in favor of the plaintiff therein, this court is unauthorized to interfere. It would serve no useful purpose to here set forth the substance of the evidence; suffice it to state that an examination of the record discloses the fact that the evidence adduced on behalf of the defendant was substantial in its nature and effect. It is clear that in reaching the conclusion that plaintiff had failed to establish negligence of the defendant by a preponderance of the evidence the trial judge acted entirely within his province.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

92 Cal. App. 391

PEOPLE v. MILLER et al. (Cr. 1656.)

District Court of Appeal, Second District, Division 2, California. June 2, 1928.

Intoxicating liquors 🔑236(4)—Evidence held sufficient to prove plaintiffs maintained place in question and to sustain conviction for maintaining a common nuisance.

In prosecution for maintaining a common nuisance, evidence *held* sufficient to prove that defendants maintained place in question and to sustain conviction.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

Charles Miller and another were convicted of maintaining a common nuisance, and they appeal. Affirmed.

James A. Hall, of Hemet, for appellants.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

CRAIG, J. Appellants were convicted of maintaining a common nuisance, in that between January 10, 1928, and January 30, 1928, they continually maintained a place where intoxicating liquor was kept, sold, and bartered unlawfully. Appellants urge the appeal from the judgment and order denying a motion for a new trial on the sole ground that the evidence is insufficient to sustain the conviction, because, they assert, there is no proof that they operated or maintained the place known as the Bradford Café, where it is conceded the liquor was sold during the period alleged in the information.

One Hatzke, a witness called by the prosecution, testified that during the month of January, 1928, the defendants were "running the Bradford Café at Hemet." No objection was made to this evidence, and the witness was not cross-examined as to the subject-matter of his answer. The defendants did not take the stand. Hatzke's testimony was uncontradicted, and was sufficient to establish the defendants' connection with the place where other evidence showed intoxicating liquor was sold in the defendants' presence, so as to clearly show the creation of a nuisance within the meaning of the statute.

The judgment and order appealed from are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

92 Cal. App. 464

MAYER v. MALLOY. (Civ. 6340.)★

District Court of Appeal, First District, Division 2, California. June 9, 1928.

Hearing Denied by Supreme Court Aug. 6, 1928.

1. Appeal and error 🔑1011(1)—Conflicts in evidence do not warrant disturbing trial court's judgment on appeal.

Fact that there are conflicts in the evidence does not justify disturbing judgment of trial court on appeal.

2. Appeal and error 🔑1048(5)—Overruling of objection to question asked plaintiff concerning husband's inability to come home at night as hearsay held not error, in view of answer.

In action for alienation of affections, overruling of objection to question asked plaintiff as to cause of husband's inability to come home as hearsay *held* not error, in view of answer which was immaterial to issues.

3. Evidence 🔑471(11)—Ruling permitting witness to testify as to what she knew concerning connection between barrels in garage and defendant was not erroneous as permitting conclusions.

In action for alienation of affections, ruling of court in permitting witness to state what she knew, in response to question as to whether certain barrels in garage were in any way connected with defendant, *held* not error as permitting conclusions, where witness replied that she subsequently learned of the connection.

4. Husband and wife 🔑333(3)—Admission of husband's statements solely for purpose of showing his feelings, in suit for alienation of affections, was not error.

In action for alienation of affections, admission of plaintiff's testimony as to what husband stated to her concerning his absence from home was not error, where evidence was admitted solely for purpose of showing the feelings of

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★Hearing denied by Supreme Court.

the husband, and record did not disclose that the evidence was used for any other purpose.

5. **Husband and wife ⟹334(3)—$6,000 verdict for alienation of affections of plaintiff's husband, withdrawing plaintiff's support, held not excessive, though financial worth of defendant, put in issue by pleadings, was not shown.**

In suit for alienation of affections, in which plaintiff alleged that defendant was worth $100,000, and defendant alleged that her worth did not exceed $5,000, $6,000 verdict in plaintiff's favor was not excessive as a matter of law by virtue of fact that no evidence was introduced concerning defendant's worth, where trial court found that defendant had gained affections of plaintiff's husband, and that plaintiff and her minor daughter were left entirely without support.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by Beatrice Mayer against Georgia Malloy. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry G. Bodkin, of Los Angeles, for appellant.

F. O. McGirr and Joseph Musgrove, both of Los Angeles, for respondent.

STURTEVANT, J. The plaintiff obtained a judgment against the defendant awarding her damages for the alienation of the affections of her husband. The defendant has appealed, bringing up the judgment roll and a bill of exceptions. In framing her complaint, the plaintiff in certain instances pleaded her evidence. The findings as signed followed the allegations of the plaintiff's complaint, and are quite long.

[1] In presenting her case on appeal, the defendant makes nine different attacks, claiming that certain findings are not supported by the evidence. We have read the bill of exceptions from cover to cover. The material findings are supported by substantial evidence. True it is that there are some conflicts, but the fact that there are conflicts in the evidence does not justify this court in disturbing the judgment of a trial court.

[2-4] When the plaintiff was testifying in her own behalf, her attorney had developed the fact that on certain occasions the plaintiff's husband did not come home at night. Thereupon her attorney asked her what was the cause of his inability to come home. The defendant objected on the ground that the question called for hearsay. The objection was overruled. No error appears from the ruling. In the first place, the question did not necessarily call for hearsay; in the second place, the answer was that the plaintiff found in her garage three barrels, and that upon making inquiries of her husband he told her that he would subsequently explain. There was no motion to strike out. What the husband told her was not addressed at all to why he did not come home. Furthermore, the answer made to the question was apparently wholly immaterial to the issue on trial. Continuing, plaintiff's attorney asked her if the three barrels were in any way connected with the defendant. The defendant objected that the question called for the conclusion of the witness. The court ruled that she could state what she knew, but not her conclusions. Her reply was that she later learned that the three barrels were connected with the defendant. The ruling made by the trial court was clearly correct. There was no motion to strike out, and furthermore the answer, as made, does not show that any error was committed. The same witness had stated that in the month of July, 1924, she learned the reason why her husband was staying away from home. That she got the first statement from him. Her attorney then propounded to her the question, "What did he state to you in that regard?" The defendant objected that the question called for hearsay and that no proper foundation had been laid. After some argument it was claimed by the plaintiff that the subject-matter was admissible as showing what were the feelings of the plaintiff's husband. The court ruled that the question could be asked and answered for that purpose alone. The record does not disclose that the evidence was used for any other purpose. The defendant now argues that, if the evidence was considered for any other purpose, then the ruling of the court was erroneous. Conceding, for the purposes of this case, that the contention is well made, as the record does not show that the evidence was used for any other purpose, no error appears.

During the trial the plaintiff introduced several photographs. The defendant asserts that there was no foundation laid as to when the photographs were taken. In making this assertion, the defendant is mistaken. It may be claimed that there was some conflict in the evidence on the subject, but it may not be claimed that there was no evidence.

[5] The jury returned a verdict in the sum of $6,000. The defendant claims that the verdict was excessive. In making this contention, the defendant calls attention to the fact that in her complaint the plaintiff alleged that the defendant was worth $100,000, that in her answer the defendant alleged that she was not worth to exceed $5,000, and that no evidence was introduced by either party regarding the value of the defendant's properties. Conceding, without deciding, that the issue as to the worth of the defendant was properly inserted in the pleadings, and that no evidence was introduced on that issue, it does not follow as a matter of law that the verdict was excessive. Among other things, the trial court found that the defendant "willfully, wickedly, and maliciously gained

the affections of said George P. Mayer" away from the plaintiff; and that the plaintiff and her minor daughter of 8 years were thus left entirely without support. There was evidence in the record tending to support each one of these findings. This court may not say, as a matter of law, that the verdict was excessive. We find no error in the record.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

DARROW v. HOULIHAN et al. (Civ. 5513.)★

District Court of Appeal, Second District, Division 1, California. June 2, 1928.

Hearing Granted by Supreme Court July 30, 1928.

1. Brokers 🔑53—Broker securing acceptance of proposition is entitled to commission, unless right thereto was forfeited because of false statements inducing transaction.

Where real estate broker undertaking to secure an acceptance of proposition to exchange property secured acceptance thereof, he became entitled to commission, unless his right to demand it was forfeited by his false statements concerning incumbrance on land agreed to be exchanged as specified in such agreement.

2. Brokers 🔑84(1)—Owners disputing broker's right to commission had burden of establishing fraud in inducing contract.

The burden of establishing fraud on part of broker agreeing to effect exchange of properties rested on property owners disputing right to commission on ground statements concerning incumbrance on property exchanged were false.

3. Vendor and purchaser 🔑144(2)—Vendor need have title to property only when he becomes obligated to convey.

Vendor is only required to have title to property at time when he becomes obligated to convey.

4. Vendor and purchaser 🔑8—Vendor may sell property he does not at the time own.

One may contract to convey property which he does not own, or even in which he has no interest at the time, if he acts in good faith, since he may be able to furnish a good title when time for performance arrives.

5. Brokers 🔑63(4)—Owners refusing to go into escrow pursuant to exchange agreement because incumbrance on property was not as represented held liable for commission.

Where property owners, agreeing with broker for exchange of properties with a period of 60 days from date of acceptance for furnishing deeds and certificates of title, flatly refused to go into escrow on learning that incumbrance on property to be received was not as represented, they became liable for broker's commission because failing to show pecuniary damage, or that position was altered to their prejudice, in that vendor at time for furnishing deeds and certificates of title might have been able to comply with terms of agreement.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by M. F. Darrow against J. P. Houlihan and another. Judgment for defendants, and plaintiff appeals. Reversed, with directions.

T. W. Duckworth and Ben Harrison, both of San Bernardino, for appellant.
U. F. Lewis, of Redlands, for respondents.

WOOD, Justice pro tem. Plaintiff commenced the action to recover the sum of $600 alleged to be due for services rendered as broker in the exchange of two parcels of real estate. He appeals from a judgment in defendants' favor. On August 19, 1924, defendants signed an instrument by which they agreed to exchange certain real property owned by them, valued at $6,000, and subject to "an indebtedness in the sum of $2,000," for certain other real property owned by W. S. and Lillian M. Little, also valued at $6,000, and subject to an "indebtedness of $2,000." It was provided in the instrument that, if plaintiff should within 10 days "secure an acceptance of the proposition to exchange" the properties, defendants would pay him the regular commission. A period of 60 days from the date of acceptance was provided for the furnishing of the deeds and certificates of title. It was further provided in the instrument:

> "And in case either party fails to carry out any of the terms of this contract such failing party agrees to pay the agents herein mentioned the regular brokerage commission on the exchange value of all the properties involved."

Plaintiff immediately obtained from Mr. and Mrs. Little an acceptance in writing of the offer contained in the instrument signed by defendants. The Littles promptly put their papers in escrow, but the Houlihans refused to consummate the transaction for the reason, as alleged by them, that plaintiff had falsely represented to them that the property of the Littles was incumbered with a mortgage of $2,000 due in about six months, when in truth the incumbrance was in the form of a trust deed, payable at the rate of $25 per month, and that only the sum of $1,000 remained unpaid thereon. Mr. Houlihan testified that plaintiff had told him before the offer was signed that the Littles' property was incumbered by two mortgages of $1,000 each. On the day following the acceptance of the offer by the Littles, Mr. Houlihan had a conversation with Mr. Little, and suggested to him that the two mortgages might be consolidated with one single mortgage. He was then notified by Mr. Little of the true facts concerning the trust deed. Mr. Houlihan thereupon telegraphed his wife to cancel the

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing granted by Supreme Court.

contract and refused to proceed with the exchange. Plaintiff now claims the right to recover the commissions on both properties.

[1] Defendants agreed to pay the commission to plaintiff "when he has secured an acceptance of the proposition." Plaintiff secured the acceptance and became entitled to his commission, unless his right to demand it was forfeited by his statements concerning the incumbrance upon the Little property. In Jauman v. McCusick, 166 Cal. 517, 137 P. 254, the court said:

> "She agreed to pay a commission for securing a specific agreement. Such agreement having been secured, she was liable under the precise terms of her contract."

If defendants were in fact induced to sign the agreement by fraud on the part of plaintiff, there can be no question but that they should be relieved from paying the commission. The rule is well stated in 4 R. C. L. 49:

> "Once the customer procured by the broker is accepted by the employer, the latter is thereafter estopped from denying the purchaser's ability or willingness to complete the contract, inasmuch as he is not bound to accept the offer of such persons without a reasonable opportunity to inquire and satisfy himself in relation to it. Consequently his acceptance should estop him from alleging anything against the claim except fraud on the part of the broker in inducing the acceptance."

This rule has been followed in a number of California cases. Carrington v. Smithers, 26 Cal. App. 460, 147 P. 225; Freeman v. Creelman, 60 Cal. App. 14, 212 P. 56; Wood & Tatum Co. v. Basler, 37 Cal. App. 381, 173 P. 1109.

[2-5] The burden of establishing fraud on the part of plaintiff rested upon defendants. The real question to be determined on this appeal is whether defendants sustained this burden. Notwithstanding the findings are in favor of defendants, we are of the opinion that the conduct of plaintiff, taking as correct the testimony of defendants, was not such as justified their refusal to pay the commission. The Littles had 60 days within which to present the necessary documents to bring about a consummation of the transaction in exact accordance with the agreement. The rule is well stated in 25 Cal. Jur. 495:

> "The general rule is that a vendor is only required to have title to the property at the time when he becomes obligated to convey, and that one may contract to convey property which he does not own, or even in which he has no interest at the time, if he acts in good faith, since he may be able to furnish a good title when the time for performance arrives. Such a contract will be upheld and enforced if, when the time for performance arrives, the vendor is able to furnish the title he contracted to convey. The vendor has until that time to acquire such title, and is in default only when the purchaser has performed his part and made demand for a title which the vendor is unable to furnish."

There is nothing before the court to show that defendants would not have received exactly what they bargained for if they had performed their part of the agreement. No effort was made by defendants to proceed with the transaction and comply with the terms of the contract. On the contrary, they flatly refused to go into escrow. Manifestly it cannot be contended that any damage was shown. Before defendants could properly refuse to pay plaintiff's commission they would have to show that they had suffered some appreciable pecuniary damage, or that their position had been altered to their prejudice. In Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011, the court said:

> "That fraud which has produced, and will produce, no injury will not justify a rescission, nor support an action either for rescission or damages, is an established principle of law and equity. * * * It may be conceded that it must be shown that the plaintiff, by reason of the fraud, suffered an injury of a pecuniary nature, that is, an injury to his property rights, as distinguished from a mere injury to his feelings, but it will be sufficient if the facts alleged show that material injury will necessarily ensue from the fraud, although the amount of the pecuniary loss is not stated."

In the case of Munson v. Fishburn, 183 Cal. 206, 190 P. 808, the court quoted with approval from Stillwell v. Rankin, 55 Mont. 130, 174 P. 186, wherein it is stated:

> "Most of the courts and textwriters employ the term 'damage' in the sense of injury; a few restrict its meaning to financial loss. We prefer to adhere to the rule which gives to the term its broader significance, as including either pecuniary loss or the alteration of one's position to his prejudice."

Applying the rule stated in these decisions to the case at bar, we find that the facts established fall short of a justification for the defendants' conduct in refusing to proceed with the exchange of the properties. It was not shown that they did not or could not obtain what they bargained for; nor is it shown that defendants would have suffered any damage or prejudice whatever by the exchange of their property for the property of the Littles incumbered by a trust deed on which there was unpaid only the sum of $1,000 instead of two mortgages for $1,000 each. In such case it is apparent that defendant's pecuniary condition would have been improved rather than injured.

The judgment is reversed. A new trial of the action will not be necessary. It is ordered that the findings of fact and conclusions of law by the trial court, be stricken and that in lieu thereof the following be inserted:

> "That all of the allegations contained in plaintiff's complaint are true; that none of the representations or statements made by plaintiff to defendants at the time the defendants signed exhibit A, attached to the complaint, caused any

damage or injury whatever to defendants or caused them to alter their position to their prejudice."

Upon the going down of the remittitur it is ordered that the superior court enter judgment, upon the findings as herein set forth, in favor of plaintiff and against defendants in the sum of $600, together with interest thereon at the rate of 7 per cent. per annum from August 19, 1914.

We concur: CONREY, P. J.; YORK, J.

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92 Cal. App. 400

WALDRON v. LYON et al. (Civ. 6295.)

District Court of Appeal, First District, Division 1, California. June 4, 1928.

1. Corporations ⚷259(1)—Action against stockholders by indorsers paying notes held action on new obligation, arising by operation of law when notes were paid (Civ. Code, §§ 2847, 2848).

In action for stockholders' liability by assignee of rights of indorsers of notes of corporation who were forced to pay same, where stockholders asserted that only an action in assumpsit would lie for reimbursement or contribution between indorsers under Civ. Code, §§ 2847, 2848, and no such action was filed, *held*, that action was not on notes, but on new and original obligation which arose ipso facto by operation of law, when notes and obligations evidenced thereby were paid by indorsers.

2. Appeal and error ⚷544(1)—Finding of payment at instance of corporation which agreed to repay held conclusive on appeal, in absence of bill specifying insufficiency of supporting evidence.

In action for stockholders' liability, where indorsers were forced to pay corporate notes, finding that sum was paid at special instance and request of corporation on account of indebtedness, and that corporation agreed to repay same, *held* conclusive on appeal, in absence of bill of exceptions specifying insufficiency of evidence to sustain such finding.

3. Assignments ⚷41—Assignment that indorser did sell, assign, and transfer all sums of money due from corporation or stockholders held valid.

Assignment containing words "do hereby sell, assign, and transfer all and whatsoever sum or sums of money now due from corporation or stockholders thereof," *held* valid assignments of rights of indorser who was forced to pay corporate notes.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action by A. N. Waldron against Ernest C. Lyon and others for stockholders' liability. A. E. Wallace, J. W. Harriman, Sam McKee, and C. Pederson appeal from a judgment for the plaintiff. Affirmed.

Norman T. Mason, of Los Angeles, for appellant Harriman.

D. Joseph Coyne, of Los Angeles, for other appellants.

McGee, Sumner & Tilden, of Los Angeles, for respondent.

CAMPBELL, Justice pro tem. This is an appeal from a judgment entered severally against the defendants, and from such judgment defendants A. E. Wallace, J. W. Harriman, Sam McKee and C. Pederson have appealed.

The complaint alleges, and the court found, the following facts: That on or about June 20, 1923, Shallow Field Oil Company became indebted to the Marine Trust & Savings Bank of Long Beach for money loaned in the sum of $15,000, for which Shallow Field Oil Company delivered to such bank its promissory note, which note was indorsed by Andrew N. Waldron, Herbert Jutson, Thos. H. Waldron, M. V. Housman, F. S. Brennan, J. K. Hull, Libbie S. Lotz, F. B. Steen, W. F. Pascoe, C. I. Thorpe, and J. H. Sleeper; that the note was so indorsed for a valuable consideration; that at maturity the note was presented for payment to Shallow Field Oil Company, but no part thereof was paid, and suit was brought upon the note, and judgment by default was entered against the maker and indorsers of the note, and each of them became obligated to pay, and indorsers Herbert Jutson, M. V. Housman, F. S. Brennan, and Libbie S. Lotz paid the amount due to Marine Trust & Savings Bank; that, on or about December 11, 1922, Shallow Field Oil Company became indebted to the Marine Trust & Savings Bank of Long Beach for money loaned in the sum of $10,000, for which Shallow Field Oil Company delivered to such bank its promissory note, which note was indorsed by J. K. Hull, F. S. Brennan, M. V. Housman, W. F. Pascoe, John H. Sleeper, F. B. Steen, and Thos. H. Waldron; that this note was indorsed for a valuable consideration, and at maturity was presented for payment to Shallow Field Oil Company, but no part thereof was paid, and suit was brought upon the note, and a default judgment was entered against the maker and indorsers of the note, and each of them became obligated to pay, and indorsers Herbert Jutson, M. V. Housman, F. S. Brennan, and Libbie S. Lotz paid the amount due to the bank; that, on or about February 2, 1922, Shallow Field Oil Company became indebted to one John K. Hull, trustee, for money loaned in the sum of $3,500, for which Shallow Field Oil Company delivered to John K. Hull, trustee, its promissory note; that Shallow Field Oil Company, within three years prior to the filing of the complaint, became indebted to A. W. Wallace in the sum of $750, George Edwin in the sum of $250, I. N. Vining in the sum of $350, Pugh-Miller Drilling Company in the sum of $5,000, and that, prior to the commencement of the action, the indorsers Herbert Jutson, M. V. Housman, F. S. Brennan, and Libbie S. Lotz, of the first two promissory notes mentioned, and who did pay and discharged the indebtedness of Shallow Field Oil Company to Marine Trust & Savings Bank, and A. E. Wallace, George Edwin, I. N. Vining and M. V. Housman, did severally sell, assign, and transfer unto plaintiff their respective claims against Shallow Field Oil Company, and that plaintiff is now the owner and holder of such claims.

[1] Appellant urges three points: First, that no action can be maintained on the first two promissory notes under the theory of the stockholders' liability, for the reason that the principal obligation was satisfied by the payment of the notes, and only an action in assumpsit would lie against the corporation for reimbursement or for a contribution between indorsers, and cites us to sections 2847 and 2848 of the Civil Code; that no action was filed against the corporation to seek reimbursement in assumpsit, nor was the corporation made a party to the suit. In answer to this objection, it may be said that plaintiff's action is not on the notes, but on a new and original obligation which arose ipso facto by operation of law, when the notes and the obligations evidenced thereby were paid by the indorsers of the notes. The case of Yule v. Bishop, 133 Cal. 574, 62 P. 68, 65 P. 1094, cited by appellant, is not in conflict with this view, nor are the other cases cited. The cause of action against the stockholders, although arising at the same time as that against the corporation, is entirely independent of the cause of action against the corporation, and the creditor need not resort to the assets of the corporation, nor seek a judgment against it before bringing an action against the stockholders. Eva v. Andersen, 166 Cal. 420, 137 P. 16; Ellsworth v. Bradford, 186 Cal. 316, 199 P. 335; Union Trust Co. v. Journeay, 29 Cal. App. 502, 156 P. 999. The fact that plaintiff was a stockholder in Shallow Field Oil Company, or that plaintiff's assignors were also stockholders in such company, does not affect plaintiff's right to recover on the assigned claims their pro rata share of the corporate indebtedness from the other stockholders. Knowles v. Sandercock, 107 Cal. 629, 640, 40 P. 1047.

Yule v. Bishop, supra, principally relied upon by appellants, is a case where the accommodation indorser paid the note and took an assignment of the note from the bank. She subsequently assigned the note to one Black, who brought an action against the corporation, and recovered judgment for the amount so paid by the accommodation indorser. Thereafter the note was assigned to the plaintiff, who brought suit to enforce the statutory liability of the stockholders on this debt of the corporation evidenced by the note and judgment, which original debt the court held no longer existed—that by the payment to the payee the note became extinguished, and ceased to be a binding obligation. Here plaintiff does not seek to recover on the notes, but upon a new obligation which arose ipso facto by operation of law when the notes and the obligations evidenced thereby were paid by the indorsers.

[2] Appellant's next point is that the testimony of M. V. Housman, a witness called by plaintiff, shows that Housman paid the $5,000 as a volunteer—as a stockholder whose primary obligation was to pay the corporate debts, and as an officer and director he was not in a position to agree to repay himself in such manner as to constitute him a surety for the corporation debt to Pugh-Miller Drilling Company on a partial settlement of a demand in suit paid to release an attachment on his private business; that the evidence shows an entire lack of authority to support the allegation that the Shallow Field Oil Company promised and agreed to repay Housman the money paid to release the attachment. The court, however, finds that the sum of $5,000 was paid at the special instance and request of the corporation upon account of the indebtedness to Pugh-Miller Drilling Company; and that the corporation agreed to repay to Housman the $5,000; and that no part thereof had been paid. We must assume, therefore, that this finding of fact is sustained by the evidence which was presented at the trial, as appellants have not in their bill of exceptions made any specification of insufficiency in that respect. Winterburn v. Chambers, 91 Cal. 170, 185, 27 P. 658.

[3] There is no merit in the final objection to the sufficiency of the assignment from M. V. Housman to plaintiff. The assignment contains the following:

> "* * * Do hereby sell, assign and transfer to said A. N. Waldron all and whatsoever sum or sums of money now due to me from the Shallow Field Oil Company, a corporation, or the stockholders thereof."

This disposes of the points urged by appellants in support of their appeal, and from what has been said it follows that we find no error in the record.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

92 Cal. App. 360

HALEY v. TRAEGER, Sheriff. (Civ. 5151.)

District Court of Appeal, Second District, Division 2, California. June 1, 1928.

1. Replevin 🔑93—Finding held not objectionable because value of interest of third party in property he was purchasing under agreements was not found, where interest was determinable by calculation.

In action for claim and delivery against sheriff for goods which he had seized from third party under writ of attachment, where court determined value of property, and by calculation it was readily determinable what portions third party was purchasing under agreements, *held* that finding was not objectionable, because there was no finding of third party's interest in portion of property purchased under agreements.

2. Trial 🔑404(2)—That finding of fact was erroneously placed in conclusion of law does not prevent it from being treated as finding of fact.

In action for claim and delivery, where finding of value of third party's interest in property was erroneously placed in conclusions of law, *held*, that fact did not prevent it from being considered and treated as finding of fact.

3. Evidence 🔑113(8)—Amount third party paid on purchase price of property held some evidence of value of his interest therein.

In action for claim and delivery against sheriff who seized property from third person under writ of attachment, amount third party actually paid on purchase price of portions of property he was buying under agreement *held* some evidence of value of his interest in property, since it was proper to consider sum actually paid for property in arriving at its value.

4. Replevin 🔑93—Where one finding determined value of property and another date of attachment, there was no merit in contention that there was no finding of value on date of levy.

In action for claim and delivery against sheriff who seized goods from third party under writ of attachment, where plaintiff contended that there was no finding of value of third party's interest in portions of property he owned outright on day of levy, *held*, that contention was without merit, where value of items was determined in one finding and date of attachment in another.

5. Appeal and error 🔑920(4)—Appellate court must assume that payment was made prior to attachment, where it was apparent trial court made that assumption.

In action for claim and delivery against sheriff who had seized property from third party under writ of attachment, where plaintiff asserted that attaching creditors could only secure lien on interest which third party had in attached property on date of attachment, and that attaching creditors acquired no lien whatever on any interest third party acquired in property after levy, basing contention on fact court did not expressly find sum was paid before levy, *held*, on appeal on judgment roll alone, that, since all intendments must be indulged in support of judgment appealed from, and it being apparent that court assumed sum was paid before levy of attachment, appellate court must assume payment was made prior to attachment.

6. Judgment 🔑248—Attachment plaintiff, seizing tires as equipment of gasoline station, could not predicate error in judgment requiring their return, though amended complaint did not mention tires.

Judgment, in action of claim and delivery against sheriff who seized equipment of gasoline and oil station under writ of attachment requiring return of tires not mentioned in amended complaint *held* not erroneous since tires were treated as station equipment.

7. Appeal and error 🔑762—Appellate court need not consider contention made for first time in reply brief.

Appellate court need not consider contentions made for first time in reply brief, and, in absence of showing good cause for their omission, they will be considered as waived.

Appeal from Superior Court, Los Angeles County; Harold Louderback, Judge.

Action by John O. Haley, etc., against William I. Traeger, Sheriff of Los Angeles County, etc., in claim and delivery. From the judgment, plaintiff appeals. Affirmed.

Edward Winterer, of Los Angeles, for appellant.

Everett W. Mattoon, County Counsel, and Meserve & Meserve, Clifford E. Hughes, and Timon E. Owens, all of Los Angeles, for respondent.

HAZLETT, Justice pro tem. This is an action in claim and delivery. Defendant, as sheriff of Los Angeles county, had seized the personal property in question as the property of one J. E. Lange, under a writ of attachment in an action brought by Richfield Oil Company against Lange. Plaintiff, claiming to be the owner of the property, demanded that defendant deliver it to him, and, his demand being refused, brought this action, and by means of this action obtained possession of the property from defendant. Judgment was given in favor of defendant requiring that plaintiff return the property to defendant or that plaintiff pay defendant $944.20 as the value of the interest of Lange in the property, and plaintiff appeals upon the judgment roll alone.

[1] The court found that certain described portions of the property were owned outright by Lange, and that the remainder were being purchased by him under executory agreements of sale. Appellant contends that there is no finding of the value of Lange's interest in the portions of the property he was purchasing under the agreements. Finding VII of the findings of facts is in part as follows:

> "That for some months prior to May 24, 1923, and up to the 29th day of May, 1923, and the time of taking of said property under attachment as hereinafter set out, said above-described property, except as hereinafter set out was owned by, and the same was lawfully in the possession of, and under the control of, one J. E. Lange; that on said 29th day of May, 1923, and at the time of the commencement of this action, the Paramount Service Station, described in paragraph IV of the amended complaint, together with all the appliances and equipment used and incidental thereto, together with the reasonable value thereof, was as follows: [Here follows an itemized list of all the property, showing the reasonable value of each item, totalling $2,979.45.]"

Finding VIII finds and describes those particular items of the property listed in finding VII which Lange was purchasing under the agreements, and finds that Lange had paid $370 of the purchase price thereof, but the values of those items so being purchased were not repeated in finding XIII. By simple calculation from the figures as to values found and set out in finding VII it is readily determined that the value of the portions of the property Lange owned outright was $574.20, and that the whole value of the remaining portions he was purchasing under the agreements was $2,405.25, on the day the attachment was levied.

[2] We find erroneously placed in the conclusions of law a finding of the value of Lange's interest in all of the property as follows:

> "Defendant is entitled to judgment * * * for the return of all the following described property: [Here follows an itemized description of all the property] or the value of the interest of J. E. Lange therein, to wit, $944.20. * * *"

Therefore the value of Lange's interest in all of the property was clearly found. The fact that a finding may be mistakenly placed in the conclusions of law does not prevent it from being considered and treated as a finding of fact, and our courts have uniformly held that it will be so treated. Matter of Forrester, 162 Cal. 493, 495, 123 P. 283; Collins v. Ramish, 182 Cal. 360, 366, 188 P. 550; Stanward v. Yellow Taxicab Co., 75 Cal. App. 96, 102, 241 P. 902; 24 Cal. Jur. 961.

[3] The amount Lange actually paid on the purchase prices of the portions of the property he was buying under the agreements was some evidence of the value of his interest in the property. It is proper to consider the sum actually paid for property in arriving at its value. Otten v. Spreckels, 24 Cal. App. 251, 261, 141 Pac. 224. The findings clearly determine that the value of Lange's interest in the portions he was purchasing was $370—the amount he had paid under the agreements of purchase. This is the difference between the value of the portions he owned outright ($574.20) and the value of all his interests in the property ($944.20). There is no merit in the contention made by appellant.

[4] Appellant also contends that there is no finding of the value of Lange's interest in the portions he owned outright on the day of the levy of attachment. There is no merit in this contention, for the reason that finding VII determines that those items were of the value of $574.20 "at the time of the taking of said property under attachment" (all of the property, including those portions), and it is found in finding IX that the attachment was levied on or about the 29th day of May, 1923.

[5] Appellant asserts that Richfield Oil Company, through the levy of the writ of attachment, could secure a lien only on the interest which Lange had in the attached property on the date of the attachment, and contends that the company acquired no lien whatever on any interest Lange acquired in the property after the levy. Apparently he bases this contention on the fact that the court did not expressly find that the sum of $370 was paid or was all paid before the levy. However, when an appeal is taken on the judgment roll alone, which is the case here, "all intendments must be indulged in support of the judgment appealed from and findings should be so construed as to support the judgment, and any uncertainty will be construed to uphold rather than defeat it." Jarrett v. Redman, 79 Cal. App. 482, 250 P. 183; Willett v. Schmeiser Mfg. Co. (Cal. App.) 255 P. 529; Booth v. Friedman (Cal. App.) 255 P. 222. "And, if from the facts found other facts may be inferred which will support the judgment, it will be assumed that the trial court made such inferences." Smith v. Armstrong (Cal. App.) 260 P. 347. The findings are such that it is very apparent the trial court properly assumed that the $370 was all paid by Lange before the levy of the attachment. The latter contention is likewise without merit.

[6] Appellant also contends that the judgment erroneously requires the return of certain automobile tires not described in the amended complaint. The amended complaint and the answer thereto describe the property in question as "that certain gasoline and oil station [giving its location] known and designated as the Paramount Station, consisting of [here listing items of personal property] together with all other appliances and equipment of and for said Paramount Station and used with and incidental thereto, including 530 gallons of gasoline." But no automobile tires were therein listed. The findings include 22 Firestone automobile tires of the value of $300 among the items of the property which the court found were owned by, and in the possession of, Lange at the time of the levy of attachment and seized by defendant under the writ and taken from defendant in this action. It is apparent that the tires, like

the gasoline, were treated and considered as a part of the equipment of the station, and having taken the tires from defendant in and by reason of this action, plaintiff is not in a position to retain the tires. His contention that they were improperly included among the items of the property he was ordered to return is not well taken.

[7] In his reply brief, for the first time, appellant makes the additional contention that "the findings do not support the judgment for $944.20, or in any other sum, because there is no finding of any indebtedness existing or owing by said J. E. Lange to said Richfield Oil Company, at the time of the attachment or at any other time." All the points which an appellant desires to urge for a reversal should have been presented in his opening brief, and, unless good reason is shown why the points were not made in the opening brief, we are not required to look with favor upon a point so made. Such practice is not fair to a respondent, and tends to delay final disposition of appeals. Therefore the courts of appeal may properly consider the points waived which are not presented in the opening brief. Hibernia Savings & Loan Society v. Farnham, 153 Cal. 578, 584, 96 P. 9, 126 Am. St. Rep. 129; Burns v. Ross, 190 Cal. 269, 275, 212 P. 17; Philbrook v. Randall, 195 Cal. 95, 104, 231 P. 739; California National Supply Co. v. O'Brien, 51 Cal. App. 606, 612, 197 P. 414. No showing is made by appellant in this appeal why the point he urges in his reply brief was not presented in his opening brief and respondent given an opportunity to answer it. Therefore we are not required to consider the point.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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92 Cal. App. 424

ATKINSON v. ADKINS. (Civ. 5194.)

District Court of Appeal, Second District, Division 1, California. June 6, 1928.

1. Judgment 🔑900—Statute relating to enforcement does not affect right of judgment creditor within period of limitation to institute action on judgment (Code Civ. Proc. § 685).

Code Civ. Proc. § 685, under which plaintiff might have enforced original judgment by execution either before or after lapse of five years from date of entry, and under which plaintiff by supplemental pleading might have renewed judgment without instituting separate action, does not affect right of judgment creditor within period of limitation to institute an action upon his judgment.

2. Pleading 🔑345(1)—In action on judgment, in which defendant admitted judgment was duly made and did not allege payment, court properly granted plaintiff's motion for judgment on pleadings.

In action on judgment, in which defendant admitted that judgment was duly given and made within five years before commencement of action, and answer alleged that defendant was not informed as to whether judgment remained unpaid, and therefore did not allege payment, court did not err in granting plaintiff's motion for a judgment on pleadings, since, prima facie, the judgment was unpaid.

3. Process 🔑63—Action was not barred by estoppel or laches because summons was not immediately served at time of commencing action (Code Civ. Proc. § 336, subd. 1).

Action was not barred by estoppel or laches because summons, which was served within period limited by statute (Code Civ. Proc. § 336, subd. 1), was not immediately served upon defendant at or near time of commencement of action.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action on judgment by Lynn S. Atkinson, Jr., against Charles H. Adkins. From a judgment for plaintiff, defendant appeals. Affirmed.

James W. Barbee, of Long Beach, for appellant.

H. G. Bittleston and Edward Judson Brown, both of Los Angeles, for respondent.

CONREY, P. J. Judgment on the pleadings was rendered against the defendant. The complaint, duly verified, which was filed on the 24th day of August, 1923, declared upon a judgment rendered in favor of the plaintiff and against the defendant Adkins (and the defendant Delaney, who was not served and did not appear in this action), on the 29th day of August, 1918. In his answer appellant admitted that he has not paid the judgment, but "as to whether or not no part of said judgment has ever been paid and/or that said judgment now remains wholly or at all unpaid this defendant is not informed, and this defendant has no information or belief upon the subject sufficient to enable him to answer said allegation, and, placing his allegation upon that ground, denies the same." As a separate defense appellant pleaded that the action is barred by the provisions of section 336, subd. 1 of the Code of Civil Procedure, which prescribes a five-year limitation for action upon a judgment. As a further defense appellant pleaded that the plaintiff is estopped because of laches, in that the summons herein was not served upon appellant until April 25, 1925, although appellant during all of the preceding time while the action was pending was residing and well known to be residing in the city of Los Angeles.

The grounds of appeal are: That appellant's general demurrer to the complaint should have been sustained, for the reason that no cause of action was stated; that the motion for judgment on the pleadings should not have been granted, inasmuch as, in the manner hereinabove stated, the defendant denied that no part of the judgment has been paid, and denied that the judgment remains wholly or at all unpaid; that respondent is estopped by reason of laches and delay in the prosecution of the action.

[1] Section 685 of the Code of Civil Procedure provides:

> "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion or by judgment for that purpose, founded upon supplemental pleadings. * * *"

It is the contention of appellant that because the plaintiff might have enforced his original judgment by execution either before or after the lapse of five years from the date of its entry, or by supplemental pleading might have renewed the judgment without instituting a separate action, the right to institute a separate action is by law superseded and denied. We think that there is no merit in this point. Section 685, Code of Civil Procedure, deals only with the method of enforcing a judgment, and especially the method of enforcing a judgment after the right to institute a new action has become barred. The section does not either directly or by implication affect the right of a judgment creditor, within the period of limitation, to institute an action upon his judgment.

[2] With regard to appellant's claim that his answer raised an issue which entitled him to go to trial upon the matter of nonpayment of the judgment, we are of the opinion that, the existence of the judgment being admitted, and in the absence of any plea of payment, there was no fact undetermined, and on the face of the record the plaintiff was entitled to judgment. In Janeway & Carpender v. Long Beach, etc., Co., 190 Cal. 150, 211 P. 6, the defendant admitted the existence of a certain obligation to pay money, and denied the allegation of nonpayment. Judgment on the pleadings was granted, and the defendant appealed. The Supreme Court, after noting the denial as above stated, said:

> "But the admissions of the other essential allegations of the complaint established the proposition that the defendant owed this sum of money to plaintiff for the goods sold to him. When that is established the rule of law is that it then devolves upon the defendant to prove the payment thereof. Melone v. Ruffino, 129 Cal. 518, 62 P. 93, 79 Am. St. Rep. 127. Consequently the plaintiff might have rested its case upon the pleadings, and awaited the introduction of proof of payment of this count, or part hereof by the defendant."

The court then said that if it was technically erroneous to grant the motion for judgment on the pleadings, the error was cured by certain subsequent stipulations. The court did not definitely say that the granting of the motion was erroneous, but affirmed the judgment because on the entire record it was considered to be a case within the scope of section 4½ of article 6 of the Constitution, because evidently there was no miscarriage of justice.

In Melone v. Ruffino, 129 Cal. 514, at 518, 62 P. 93, 94 (79 Am. St. Rep. 127), the court said:

> "Where a plaintiff has proved the existence of a debt sued on—at least, within the period of statutory limitation—the burden of proving payment is on the defendant. That this is the rule at common law no one can doubt; and we have no statutory law changing it. Greenleaf states it as follows: 'The defense of payment may be made under the general issue, in assumpsit; but, in an action for debt on a specialty or on a record, it must be specially pleaded. In either case the burden of proof is on the defendant, who must prove the payment of money, or something accepted in its stead, made to the plaintiff, or to some person authorized in his behalf to receive it.' In Cowen & Hill's Notes to Phillips on Evidence, vol. 1, side page 810, the authors, quoting from an authority and citing others, give the rule in this language: 'The principle that he who alleges himself to be the creditor of another is obliged to prove the fact of agreement upon which his claim is founded, when it is contested; and that, on the other hand, when the obligation is proved, the debtor who alleges that he has discharged it is obliged to prove the payment, is clearly one of those propositions in which every system of jurisprudence must concur in general, whatever particular rules may be adopted, as to the mode and form of the allegations, by which the necessity of such proof is to be determined.' The same rule has been recognized and declared frequently in this state."

See, also, Miller & Lux v. Dunlap, 28 Cal. App. 313, 152 P. 309.

In the case at bar the action is "on a record"—that is to say, on a judgment. It being admitted that the judgment was "duly given and made" within five years before the commencement of this action, the plaintiff was entitled to judgment thereon in this action, unless the defendant alleged and proved payment, or some other valild defense. The answer as made herein did not allege payment. Prima facie, the judgment was unpaid. In such state of the pleadings, the court did not err in granting the motion for judgment on the pleadings. Moreover, there is no suggestion that the defendant, either by answer or in resisting the motion, asked to be permitted to prove payment.

[3] The answer is wholly insufficient as a plea of estoppel. We are not aware of any

rule of law or of equity which permits an action to be barred by estoppel or laches merely because a summons which was served within the period limited by the statute, was not immediately served upon the defendant at or near the time of commencement of the action.

It appearing that the appeal has been taken for purposes of delay, it is ordered that the judgment be affirmed, and that respondent recover his costs of appeal together with added damages in the sum of $50.

We concur: HOUSER, J.; YORK, J.

92 Cal. App. 329

PIGG et ux. v. KELLEY et ux. (Civ. 5463.)★

District Court of Appeal, Second District, Division 1, California. May 31, 1928.

Hearing Denied by Supreme Court July 30, 1928.

1. Appeal and error ⚷694(1)—Where evidence was wholly documentary and documents were set out in findings, appeal was determinable from brief containing judgment roll without evidence.

Statement of evidence was not required to be printed in brief on appeal, where evidence was entirely documentary and entire judgment roll was printed, including findings which set out all the documents.

2. Landlord and tenant ⚷214—Provision in lease acknowledging receipt of rent in advance held not affected by subsequent provision that part of amount was retained as forfeiture in case of breach of condition.

Provision in lease acknowledging receipt of payment "representing the first and last two months' rent paid in advance" *held* not altered or affected by later provision that part of the amount was to be retained by the lessors as a forfeiture if the terms of the lease were violated, since lessor may retain rent paid in advance, on lessee's breach of condition, without any provision to that effect.

3. Landlord and tenant ⚷214—Rents paid in advance are not recoverable after termination of lease through tenant's fault.

Rents paid in advance cannot be recovered by the tenant upon the termination of the lease for condition broken, where such termination is not brought about by the wrongful act of the landlord.

4. Landlord and tenant ⚷214—Provision for forfeiture of advance payments of rent is void if constituting attempt to fix damages in advance.

Provision in lease for forfeiture of part of amount received as advance payment of rent on breach of condition is void if constituting attempt to fix damages for breach of contract in advance.

5. Vendor and purchaser ⚷196—Contract for sale and escrow instructions were considered together in determining whether vendor assigned purchaser advance payments of rent (Civ. Code, § 1642).

Contract for sale, buyer's escrow instructions, and rent statement to which escrow instructions referred were considered and construed together to ascertain whether vendor assigned rents paid in advance in connection with assignment of lease to purchaser under Civ. Code, § 1642.

6. Vendor and purchaser ⚷196—Purchaser held not entitled to advance payments of rent made vendor by tenant, under escrow instructions prorating rent based on rent statement which failed to provide for such payments.

Purchaser *held* not entitled to recover rent paid in advance by vendor's lessee covering last two months of term, where escrow instructions called for prorating rents based on rent statement, which failed to provide for assignment to purchaser of the advance rents paid.

York, J., dissenting.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Frederick W. Pigg and wife against Freeman McG. Kelley and wife for rents claimed to be due under a lease. Judgment for plaintiffs, and defendants appeal. Reversed, and new trial ordered.

Sidney J. Parsons, of Los Angeles, for appellants.

Evans, Pearce & Campbell, of Los Angeles, for respondents.

SHAW, Justice pro tem. [1] The defendants appeal from a judgment against them. The record on appeal was prepared under sections 953a et seq. of the Code of Civil Procedure. The appellants have printed in their brief the entire judgment roll, but nothing purporting to be a statement of the evidence. However, the respondents concede that the evidence was entirely documentary and that all of the documents are set out in the findings, and hence we conclude that the parts of the record printed in appellants' brief are sufficient for a determination of the appeal.

To state very generally the nature of the controversy, this action was brought by the plaintiff Carrie D. Pigg, as purchaser of certain real property on which a lease was outstanding at the time of her purchase, to recover from the defendants, who were the sellers, rents which defendants had received under the said lease prior to the sale, and which said plaintiff claims under the provisions of the agreement of sale. From the findings the following facts may be gleaned: On May 1, 1922, the defendants, as owners of the real property above mentioned, made a written lease thereof to Leo Kanner and Aaron Gershen for a term of five years, at the rental of $16,800, payable in monthly installments

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

of $200 per month for the first year and $300 per month for the last four years. The lease contained the following provision:

> "Receipt is hereby acknowledged of the payment of $800.00, representing the first and last two months' rent paid in advance; $600.00 of said amount to be retained as a forfeiture by the parties of the first part if the terms of the lease are violated."

[2-4] The object of this action is to recover the sum of $600 mentioned in the quoted provision of the lease. Although the plaintiffs in their complaint alleged that said sum was a payment of rent, on this appeal they contend that it was a deposit by way of security, and that since it is such security, and they have taken an assignment of the lease and agreed to perform all of the lessor's covenants, they are entitled to the security. Defendants admitted by their answer, and still contend, that this $600 was an advance payment of rent. It thus appears that there was no issue raised as to the nature of this payment—notwithstanding which, the court in its findings declared that said sum of $600 was paid as security for the faithful performance of the conditions of the lease. But since the entire lease was copied in the findings, this statement must be regarded as a mere legal conclusion, setting forth the opinion of the court as to the construction of the lease. We think the construction so adopted is erroneous. The provision of the lease is that the $600 is "rent paid in advance." This provision is not altered or affected by the later provision that it is to be retained by the lessors as a forfeiture if the terms of the lease are violated. Without the latter provision the lessors would be entitled to retain any advance payment of rent if the tenants' violation of the lease led to a termination thereof. "Rent paid in advance cannot be recovered by the tenant upon the termination of the lease for condition broken, when such termination was not brought about by the wrongful act of the landlord." Wetzler v. Patterson, 73 Cal. App. 527-532, 238 P. 1077, 1078. To the same effect see Curtis v. Arnold, 43 Cal. App. 97, 184 P. 510. If the provision as to forfeiture was intended to go further than this, it is void as an attempt to fix in advance the damages for a breach of contract. Green v. Frahm, 176 Cal. 259, 168 P. 114; Wetzler v. Patterson, supra. These provisions of the lease are much like those under consideration in Wetzler v. Patterson, where it was held that the lease provided for the payment of rent in advance and that the provision as to forfeiture was inserted merely to declare the result which the law would work in case of an advance payment of rent. The difference between the two leases is merely that in the case last cited the advance payment was included in a specified sum to be paid upon the execution of the lease, with a subsequent provision that it should be credited upon the rental due for the last three months of the term, and there was no other express provision for payment of rent for the last three months; whereas here the provision was for rent to be paid at fixed rates upon the 1st day of each month of the term, with a subsequent provision that the rent for the last two months is paid in advance. This difference is not sufficient to require a different construction of the two leases.

[5, 6] Adopting this construction of the lease, we turn our attention to the facts upon which plaintiff claims the right to recover this $600 payment. On August 21, 1923, the plaintiff Carrie D. Pigg and the defendants entered into an agreement by which said plaintiff agreed to buy and defendants to sell the real property above mentioned, "subject to a lease of record executed by Freeman McG. Kelley and wife in favor of Leo Kanner and Aaron Gershen, dated May 1, 1922, the vendee herein assuming all conditions and terms in said lease which have been heretofore assumed by the lessor herein." On the same date the same parties gave certain written escrow instructions to the Glendale State Bank regarding this sale. The instructions given in behalf of the buyer contained the following provision:

> "Subject to leases of record which I am to approve. I understand said leases are made in favor of my grantors and you will hold for me an agreement whereby my grantors agree to assign all their interest in said leases to the above grantee when the deed to said grantee is filed, and that all rents collected under said leases are to be paid to said grantee from Aug. 21, 1923. Prorate insurance as of August 21, 1923. Prorate rents as of August 21, 1923, based on rent statement handed you by my grantors."

The agreement and the escrow instructions show by their terms that they relate to the same sale and the instructions refer to the agreement; hence these several instruments must be considered and construed together to ascertain the whole contract between the parties (Civ. Code, § 1642), and the clause just quoted from the instructions must be taken as a part of that contract. The contentions of the respective parties here are based on differing constructions which they give to this clause. The last sentence, calling for rents to be prorated, must, of course, be read with the preceding provision that rents are to be paid to the grantee. It appears to us that these two provisions are merely different statements of the same intent, and that both are qualified by the words, "based on rent statements handed you by my grantors," found in the later provision. The question at once arises, what rent statement is thus referred to? Looking further into the findings we discover that on August 15, 1923, the defendants, who are the grantors referred to in the escrow instructions, "submitted a rent statement, as called for by the escrow agreement, into the said escrow at Glendale State Bank."

Following this statement in the findings is a document dated August 15, 1923, which begins with a receipt for $1,000 as a first payment on the sale of the property already mentioned, after which, under the heading, "Rent Statement," is a schedule signed by defendant Freeman McG. Kelley, listing eight rooms or apartments, with the name of the tenant, the amount of rent, and the date to which rent is paid, stated after each, the statement as to the property subject to the lease above mentioned being "Store, Tanner, rented at $300 per month, paid to September 1, 1923." To our minds this statement is clearly the document referred to in the escrow instructions. It had already been delivered into the escrow and was therefore before the parties when the escrow instructions were given. It is exactly such a document as the instructions called for, and while it is signed by only one of the defendants, yet, according to the findings, it was submitted by "the defendants," and the one who signed it was acting for both defendants in giving the escrow instructions. This instrument must therefore be referred to in order to ascertain what rents are to be prorated and paid to the plaintiffs. Looking at it we find that the rents sued for are not mentioned, and hence plaintiff is not entitled to recover them.

The judgment is reversed and a new trial ordered.

I concur: HOUSER, Acting P. J.
I dissent: YORK, J.

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92 Cal. App. 393

PHELAN et al. v. DRESCHER et al.
(Civ. 3450.)

District Court of Appeal, Third District, California. June 2, 1928.

1. Boundaries 🔑48(6)—Acquiescence of adjoining landowners in fence and occupancy of disputed strip held not to prevent determination of true line, where there was no agreement that fence should be dividing line.

Acquiescence of adjoining landowners in location of division fence and occupancy of disputed strip by defendants and their predecessors in title for 54 years *held* not to prevent establishment of true boundary other than that acquiesced in, in action to quiet title, where there was in fact no agreement that the fence should be the dividing line between the properties.

2. Boundaries 🔑37(5)—Evidence held to sustain finding of absence of agreement on fence as dividing line, in action between adjoining landowners to quiet title.

In suit between adjoining landowners to quiet title to disputed strip after acquiescence in division fence and occupancy over long period, evidence that the true line was straight, whereas the fence was irregular and built to avoid overflow of river, and that defendants' predecessors admitted it was not the true line, *held* to sustain court's finding that there was no agreement between the property owners that the fence should be the dividing line.

3. Appeal and error 🔑1011(1)—Weighing of conflicting evidence is function solely for trial court.

Weighing of conflicting evidence is a function exclusively for the trial court sitting as a jury, and is not within the province of the reviewing court.

4. Adverse possession 🔑66(2), 89—Defendants occupying land under agreement as to division fence could not claim title by adverse possession, where they failed to pay taxes and there was no agreed dividing line.

In suit to quiet title between adjoining property owners, defendants who occupied property in dispute under agreement as to division fence were not entitled to claim the land by adverse possession, where they failed to pay taxes thereon, and where there was in fact no agreed dividing line.

5. Adverse possession 🔑112—One claiming title by adverse possession has burden to prove all necessary elements.

There are no equities in favor of one claiming title by adverse possession, but claimant must prove all the necessary elements to establish his right.

6. Adverse possession 🔑19, 20, 21—Defendants, claiming adverse possession under old statute, were required to prove protection of disputed property by substantial inclosure, or cultivation and improvement (Code Civ. Proc. § 325, prior to amendment of 1878).

Defendants, claiming title by adverse possession under Code Civ. Proc. § 325, prior to the amendment of 1878, which did not require payment of taxes, were required to show that strip of land claimed was either protected by substantial inclosure or was cultivated and improved for a continuous period of five years.

7. Adverse possession 🔑19—Inclosure under claim of adverse possession must involve complete inclosure of land by fences alone or in conjunction with natural barriers.

To constitute inclosure necessary for adverse possession, lands must be completely inclosed by fences or by combination of fences with natural barriers.

8. Adverse possession 🔑27—Defendants, who failed to prove inclosure of land, except on one side, or cultivation or improvement thereof, failed to show title by adverse possession (Code Civ. Proc. § 325, prior to amendment of 1878).

Defendants, who merely showed inclosure of land claimed on one side and who failed to show that land was cultivated or improved, were not entitled to property on ground of adverse possession, under Code Civ. Proc. § 325, prior to amendment of 1878.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action to quiet title by James D. Phelan and others against P. C. Drescher and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

William E. Kleinsorge, of Sacramento, for appellants.

Bond & Deirup, of Chico, for respondents.

PRESTON, Justice pro tem. Plaintiffs brought this action to quiet title to about 24 acres of land in Butte county, and to establish the dividing line between their lands and those of defendants. The defendants answered, asserting title by adverse possession to the land claimed by plaintiffs, and alleging that the dividing line between their lands is different than that claimed by plaintiffs. Defendants also allege in their answer that plaintiffs' claims are barred by the various provisions of the statute of limitations.

Judgment was rendered in favor of plaintiffs, from which judgment defendants prosecute this appeal.

The case was tried by the court sitting without a jury. The court found, among other things, that the true and correct dividing line between the lands of plaintiffs and defendants is as claimed by plaintiffs, and that plaintiffs owned the land in dispute, and it is north of this dividing line, and that defendants owned the land to the south of said line. The court further found in favor of the plaintiffs on the issues of adverse possession, agreed boundary, and the bar of the statute of limitations.

Appellants contend that these findings are not supported by the evidence.

The first question to be determined, therefore, is the sufficiency of the evidence to support the finding of the court that no agreed boundary line was ever established. There is no direct evidence that there was, or was not, such an agreement, and the question must be determined by the conduct of the respective owners of the lands, viewed in the light of the surrounding circumstances.

The sole purpose of this action was to determine the ownership of a triangular strip of land, containing about 24 acres, which plaintiffs claim lies within the south boundary of their land, and which defendants claim lies within the north boundary of their land. Prior to September 10, 1868, one D. M. Reavis owned more than 10,000 acres of land, lying on the east bank of the Sacramento river, in the county of Butte, and was known as the "Farwell rancho." On September 10, 1868, D. M. Reavis conveyed a portion thereof, consisting of more than 2,000 acres, to John W. Bowers, the predecessor in interest of the appellants. The land conveyed to Bowers was more or less covered with brush and oak trees; only a part of it being cultivated. In the year 1871 John W. Bowers constructed a fence along the north boundary of his land, and from the date of its acquisition by him, in 1868, until 1891, Bowers lived upon the land and farmed a portion thereof. During that period, the Sacramento river at times overflowed its banks, and some portions of the fence were washed away, particularly in the swales or low places. Immediately after the waters had subsided, Reavis and Bowers would repair the fence and place it in its original position. During all the period from 1871 to 1891 Reavis owned the land on the north side of the fence and also north of the true line, and Bowers owned the land on the south side, and, as far as the record shows, at no time during that period was there ever any dispute or controversy of any kind between Bowers and Reavis regarding the fence or its location. The evidence shows that the land in dispute was brushy and in places covered with a heavy growth of trees, and in many places the fence was attached to the nearest tree in the course of the line of the fence, and at other places it was fastened to oak posts, many of which are still to be found in the present fence, although repairs have been made to the fence frequently from the date when it was first built until the commencement of this action, in May, 1925.

On October 1, 1891, the said John W. Bowers sold his land to John Crouch. In 1894 the lands of D. M. Reavis lying on the north side of the Bowers or Crouch land, and constituting the north half of the Farwell rancho, were sold under foreclosure, and by that sale the respondents became the owners of the property of the said D. M. Reavis. The record does not reveal any dispute between Crouch and Reavis regarding the fence or its location. John Crouch farmed his land from 1891 until the 27th of April, 1905, and during that time the strip of land in controversy was cleared of brush and trees and cultivated by Crouch.

The witness Murphy, who had for some 33 years been the superintendent and resident manager of the lands of respondents, testified that in the year 1893 or 1894 John Crouch told him that when he (Crouch) bought the property there was a fence along the north boundary line, and the said Crouch cleared the property to the fence, that he grubbed and cut out the timber on the property to that fence line, and that the said Crouch agreed with him (Murphy) that the true line is as claimed by respondents and found by the court, and that said Crouch further stated "that he might some time go ahead and fix the fence," but that nothing was ever done by either party. Murphy further testified that he took the matter up several times with respondents, but they never did anything, and the said Crouch never did move the fence. Murphy further testified that at times thereafter the fence was repaired and that it was repaired by him and placed where it was originally, and at other times respondents furnished the material for the repairs and appellants did the work of repairing, and each time the fence was put back approximately where it had been originally.

John Crouch died before the time of the trial. On the 27th of April, 1905, said John Crouch conveyed the land to John Crouch Land Company, a corporation, which company cultivated and farmed said land until the 10th of February, 1912, when the said corporation conveyed the property to the appellants herein, who have ever since last-named date cultivated and farmed the entire property.

The witness Henry Bowers, son of John W. Bowers, testified that about 1871 he and his father built a fence along pratically the same line as that occupied by the present fence; that the fence line was put upon high ground, wherever practical, for the purpose of avoiding the damage that would have been done to it by the overflow of the river.

The evidence also shows that the old fence followed the high land and, to strengthen it against overflow, was fastened to trees when they appeared within a few feet of the line of the fence. In recent years the fence has been straightened out so as to run directly through certain swales, or lagoons, rather than around upon the high ground.

The facts necessary to be proven in order that a fence may become an agreed boundary line between two property owners has been the subject of consideration by the Supreme Court and also by this court on numerous occasions, and the decisions on the question are by no means harmonious. In the earlier cases decided by the Supreme Court, notably Sneed v. Osborn, 25 Cal. 619, the court said:

> "The authorities are abundant to the point that, when the owners of adjoining lands have acquiesced for a considerable time in the location of a division line between their lands although it may not be the true line according to the calls of their deeds, they are thereafter precluded from saying it is not the true line. The better opinion is that the considerable time mentioned in the cases must at least equal the length of time prescribed by the statute of limitations to bar a right of entry."

See, also, Helm v. Wilson, 76 Cal. 476, 18 P. 604; Truett v. Adams, 66 Cal. 223, 5 P. 96; White v. Spreckels, 75 Cal. 610, 17 P. 715; Wheatley v. San Pedro, etc., R. R. Co., 169 Cal. 514, 147 P. 135; Columbet v. Pacheco, 48 Cal. 397; Loustalot v. McKeel, 157 Cal. 642, 108 P. 707.

Under this rule the facts in the case at bar would preclude respondents from saying that the old fence in question is not the true line dividing their lands and those of appellants. But, under the recent decisions of both the Supreme Court and this court, it has been held that the mere acquiescence in the existence of a fence and the occupancy of the land on either side of it does not amount to an agreement that it is an accepted boundary line. See Staniford v. Trombly, 181 Cal. 372, 186 P. 599; Hill v. Schumacher, 45 Cal. App. 362, 187 P. 437; Dauberman v. Grant, 198 Cal. 586, 246 P. 319, 48 A. L. R. 1244; Wilder v. Nicolaus, 50 Cal. App. 776, 195 P. 1068; Raney v. Merritt, 73 Cal. App. 250, 238 P. 767; Cosgrave v. Donovan, 52 Cal. App. 628, 199 P. 808, 810. These last-mentioned authorities hold that, in order to establish an agreed boundary line, the evidence must show more than mere acquiescence and occupancy for the time prescribed by the statute of limitations; it must go farther, and show that the boundary line was uncertain, or believed by all parties to be uncertain, and that the conterminous owners agreed among themselves to fix and establish the dividing line, and that they actually did designate said agreed line upon the ground.

In Clapp v. Churchill, 164 Cal. 745, 130 P. 1062, the court said:

> "But the doctrine of an agreed boundary line and its binding effects upon the conterminous owners rests fundamentally upon the fact that there is, or is believed by all parties to be, an uncertainty as to the location of the true line. When that uncertainty exists, or is believed by them to exist, they may amongst themselves by agreement, fix the boundary line, and that agreement will bind all the consenting parties. Acquiescence is merely evidence of the agreement and can properly be considered as evidence of an agreement only when a formal agreement would itself have made a binding contract."

See, also, Cosgrave v. Donovan, supra.

[1-3] Therefore we have this question squarely presented: Is acquiescence and occupancy of the disputed strip of land for 54 years, under the circumstances above stated, sufficient evidence to overthrow the finding of the trial court that there was no agreement that the fence should be the dividing line between the two properties? We think not. The fact that the true line was a part of the line cutting the Farwell rancho of 10,000 acres into two parts; that it was marked by granite monuments; that it was a straight line, while the fence was irregular and built partly on high ground to avoid the swales and overflow of the Sacramento river; that John Crouch admitted to respondents' superintendent, Mr. Murphy, that the fence was not on the true line, and agreed to move it—are all circumstances against appellants' claim that there was an agreed boundary line. Whether these and other similar circumstances are sufficient to overcome the inference from long acquiescence and occupancy of an agreed boundary, under the other circumstances shown, involves the weighing of conflicting evidence, a function exclusively of the trial court, and is not a question of law within the province of a reviewing court. Under such a situation, we are powerless to interfere with the findings of the trial court.

[4] Appellants have no record title to the strip of land in dispute, and have paid no

taxes thereon. The court found there was no agreed line. Therefore appellants are in no position to claim the land by adverse possession, based upon the doctrine that, where an agreed line varies from the true line, a conveyance or payment of taxes according to the original description will be taken to extend to the agreed line and to cover the intervening land. Price v. De Reyes, 161 Cal. 484, 119 P. 893; Young v. Blakeman, 153 Cal. 483, 95 P. 888; Grants Pass Land Co. v. Brown, 168 Cal. 456, 143 P. 754.

[5] Irrespective of the payment of taxes, and the question of an agreed boundary line, appellants contend that John W. Bowers, their predecessor in interest, held the strip of land in question adversely to D. M. Reavis, the true owner, from 1871 to May, 1878, and thereby gained title by adverse possession. The evidence is insufficient to sustain this contention. The payment of taxes was not a necessary element in gaining title by adverse possession under section 325 of the Code of Civil Procedure prior to the amendment of 1878. The burden is, however, upon appellants to show that all the requirements of section 325, Code of Civil Procedure as it stood prior to 1871, were fully complied with in order to sustain their claim of adverse possession.

There are no equities in favor of one claiming title by adverse possession; he must prove all the necessary elements to establish adverse possession. Glowner v. De Alvarez, 10 Cal. App. 194, 101 P. 432; Janke v. McMahon, 21 Cal. App. 781, 133 P. 21.

[6] The appellants do not claim under a written instrument, judgment, or decree. It was therefore incumbent upon them to show that the strip of land in question was either protected by a substantial inclosure or was cultivated or improved for a continuous period of five years immediately following 1871.

[7, 8] There is no evidence in the record that there was any fence to inclose the land conveyed to John W. Bowers other than the asserted boundary line fence on the north. Lands must be completely inclosed by fences, or, in proper cases, such fences may be combined with natural barriers. Goodwin v. McCabe, 75 Cal. 584, 17 P. 705; Baldwin v. Durfee, 116 Cal. 625, 48 P. 724; Nathan v. Dierssen, 146 Cal. 63, 79 P. 739; Hibberd v. McCosker, 55 Cal. App. 568, 203 P. 810; Botsford v. Eyraud, 148 Cal. 431, 83 P. 1008. The evidence also shows that the strip of land in question was not usually cultivated or improved; it never had any improvements on it. Before 1878 nearly the entire length of the strip was uncultivated. There was a portion of the tract purchased by Bowers which had trees, but no brush on it, and at some time or other Bowers cultivated this part of his land, but there is no evidence he ever did so before 1878. For these reasons alone appellants' claim of title by adverse possession must fail.

While appellants plead in their amended answer that plaintiffs' right to maintain this action is barred by sections 318 and 319 of the Code of Civil Procedure, no effort was made to sustain this contention. The defense of laches was not raised, either in the trial court or this court; neither was it pleaded.

Under the record presented, we are not authorized to disturb the findings and judgment of the trial court.

The judgment is therefore affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

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92 Cal. App. 487

HARVEY et al. v. SAN DIEGO ELECTRIC RY. CO. (Civ. 6327.)

District Court of Appeal, First District, Division 2, California. June 11, 1928.

1. Trial 🔑260(1)—Refusing instruction held not error, where court fully instructed jury on subject.

In action for personal injuries sustained by plaintiff mailing letter on street corner when part of derrick defendant street railway was using in street, broke, and materials fell on plaintiff, refusing instruction that question to be determined was whether defendant acted with due care *held* not error, where court fully instructed jury on subject.

2. Street railroads 🔑118(1)—Instruction that due care by street railway engaged with tools and materials over thoroughfare was reasonable or ordinary care held properly refused.

In action for damages for personal injuries caused when part of street railway derrick broke, instruction that due care on part of defendant was reasonable or ordinary care *held* properly refused, where defendant was engaged with tools and materials directly over thoroughfare, since defendant was called on to exercise greatest care and caution in performance of work in such case.

3. Street railroads 🔑118(10)—Instruction that, if defect in tool used over thoroughfare could not have become known to street railway, it was not liable, held properly refused.

In action for personal injuries sustained by plaintiff when material from derrick fell on plaintiff while she was mailing letter, instruction that, if bull-ring on derrick-truck, used by street railway company, and breaking of which caused injury to plaintiff, was purchased from reputable manufacturer, and gave no indication of being unsafe, and defect in bull-ring was screened, and could not have become known to defendant, verdict must be for defendant, *held* properly refused, since it was incorrect as stating that defendant was not liable, if it used ordinary care under circumstances.

4. Street railroads ⚿118(10)—Instruction that street railway is not liable for damages through latent defects in machinery which could not have been discovered by examination "or tests" held proper.

In action for personal injuries alleged to have been caused by breaking of bull-ring on derrick-truck used by street railway company over thoroughfare, instruction that person is not liable for damages incurred through latent defects in machinery, which could not have been discovered by examination "or tests," *held* not erroneous on ground that instruction was to effect that, if defect in bull-ring could have been ascertained by any test, practicable or impracticable, defendant was liable in damages for not discovering flaw.

5. Street railroads ⚿118(1)—Instruction that street railroad, using tools and materials over thoroughfare, must exercise greatest care, held not erroneous because derrick extended partly over street and partly over sidewalk.

In action for personal injuries due to breaking of derrick-truck used by street railway company, instruction that party or corporation engaged with tools and materials directly over throughfare where people are constantly traveling must exercise greatest care and caution in performance of work *held* not erroneous because derrick did not extend over entire sidewalk, but in part extended over street.

6. Trial ⚿296(7)—Instruction that "law presumes" accident arose from defendant's lack of care held harmless error, in view of other instructions.

In action for personal injuries, instruction that, where accident is such as in ordinary course of things does not happen, in absence of explanation, "law presumes" that accident and injury to plaintiff arose from lack of care on part of defendant street railway, *held* harmless error, in view of other instructions.

7. Street railroads ⚿117(3)—Whether street railway met burden of showing lack of negligence, where pedestrian was injured when derrick broke, held for jury.

In action for personal injuries sustained by plaintiff who got out of automobile to mail letter, when part of derrick defendant street railway company was using in street broke, and materials fell on plaintiff, question whether defendant met burden resting on it to explain how accident happened and to show that it had not been guilty of any negligence *held* for jury.

8. Street railroads ⚿114(4)—Evidence sustained verdict for plaintiff struck by falling materials when derrick street railway was using in street broke.

In action for damages for personal injuries sustained by plaintiff when she got out of automobile to mail letter, and was struck by falling materials when part of derrick defendant street railway company was using in street to remove poles broke, evidence *held* sufficient to sustain verdict for plaintiff.

9. Street railroads ⚿117(17)—Contributory negligence of one struck by falling materials when street railway's derrick broke held for jury.

In action for damages for personal injuries sustained by plaintiff when she got out of automobile to mail letter on street corner, and was injured by falling materials when part of derrick defendant street railway was using on street to remove poles broke, contributory negligence of plaintiff *held* for jury.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action for damages for personal injuries by Henry Harvey and another against the San Diego Electric Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Sweet, Stearns & Forward and Elwin L. Eckert, all of San Diego, for appellant.

Alfred T. Roark, of San Diego, for respondents.

STURTEVANT, J. The defendant is the owner and operator of a street railway in San Diego. The cars are operated by electricity, which is conducted by an overhead trolley, and the trolley is supported by poles located on the opposite sides of the streets, including, among others, Broadway. Prior to the 11th day of February, 1925, the defendant used wooden poles to support the wires. About that time it had commenced to substitute metal poles and to take out the wooden poles. Broadway runs east and west. State street intersects Broadway, and runs north and south. On the afternoon of February 11, 1925, at about 3 o'clock, the defendant was engaged in removing a wooden pole at the northeast corner of Broadway and State streets. For that purpose it used a truck having attached to it a derrick not unlike a steam shovel, excepting that the truck-derrick had no shovel attached, but did have appliances for attaching to the wooden poles and lifting and pulling the poles. The truck was backed toward the pole at the corner of Broadway and State, but was located on the north line of Broadway from 8 to 15 feet east of the pole which the defendant's servants were engaged in pulling. The plaintiffs, together with some guests, drove north on State street, and, when they noticed a mail box at the corner of Broadway and State, Mr. Harvey stopped his automobile on the east side of State street and north of Broadway. The automobile was therefore slightly around the corner from the derrick-truck. The corner was built up, and was occupied by the Federal drug store. Mrs. Harvey stepped out of the automobile and returned to the mail box. As she did so, her hand was crushed and bruised by falling missiles. It later was learned that the defendant's apparatus broke, and a part fell on the lamp post, causing metal and glass

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

to fall on Mrs. Harvey's hand. This action was commenced to recover damages for the injuries sustained. The defendant answered, and a trial was had before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiff, and the defendant has appealed under section 953a of the Code of Civil Procedure.

[1, 2] Claiming that the doctrine of res ipsa loquitur applied to the facts, the plaintiffs introduced their case accordingly. In the trial court the defendant made no objection to the procedure, and we do not understand that it makes any objection to that procedure in this court. However, it claims that certain rules of law governing the application of the doctrine of res ipsa loquitur were departed from to the prejudice of the defendant. The first point made in this behalf is that the trial court improperly refused one of its instructions worded as follows:

> "You are further instructed that plaintiffs do not here complain that the servants of the defendant were incompetent or inexperienced, and the only question for you to consider with reference to them is whether on the occasion of the accident they acted with the care and prudence which reasonably prudent men under the circumstances would have exercised."

As we understand the defendant, it contends that the proposed instruction was to the effect that the issue before the court was whether the defendant, at the time and place alleged in the pleadings, acted with due care. Conceding such to have been the meaning of the instruction, the court did not err in not giving it, for the reason that it most carefully and fully instructed the jury on that subject; and, moreover, it confined its instructions to that subject. However, the proposed instruction was so worded as to advise the jury that due care under the circumstances of this case was reasonable or ordinary care. Such is not the law. In Knott v. McGilvray, 124 Cal. 128, 131, 56 P. 789, 790, the court quoted with approval:

> "Respondent's evidence also established a prima facie case of negligence upon the part of the appellant. He was engaged with tools and materials directly over |a thoroughfare where people were constantly traveling and had an undoubted right to travel. Under such circumstances, the law demanded of him more than ordinary care. He was called upon to exercise the greatest care and caution in the performance of his work, in order that travelers might not be injured."

[3] The defendant requested, and the trial court refused to give an instruction worded as follows:

> "You are further instructed that latent defects which are concealed in defective workmanship of a reputable manufacturer are among the casualties which no man can avoid without that extraordinary care and vigilance which the law does not impose. If you believe from the evidence that the 'bull-ring' on the derrick-truck, the breaking of which caused the injury to the plaintiff, was purchased from a reputable manufacturer, and gave no indication of being unsafe up to the time of the accident testified to, and if you find from the evidence that the defect in said bull-ring was screened and unknown to defendant, and by the exercise of ordinary care could not have become known to defendant, then your verdict must be for defendant."

The instruction was clearly incorrect as stating that defendant was not liable if it used "ordinary care" under the circumstances. Knott v. McGilvray, supra.

[4] The defendant requested, and, after adding the last two words, the trial court gave, an instruction as follows:

> "You are further instructed that a person is not liable for damages incurred through latent defects in machinery which could not have been discovered by examination or tests."

The defendant argues that the instruction as given was to the effect "that, if the defect in the bull-ring could have been ascertained by any test, whether reasonable or unreasonable, practicable or impracticable, defendant was liable in damages for not discovering the flaw." The attack is wholly without merit. The same attack could have been addressed to the instruction as tendered by the defendant as well as to the instruction as modified and given by the trial court. The trial court in other instructions most carefully instructed on the degree of care. Reading the instructions together, there was no room whatever for the attack made by the defendant.

[5] The trial court instructed the jury as follows:

> "You are instructed that, where a party or corporation is engaged with tools and materials directly over the thoroughfare where people are constantly traveling and have an undoubted right to travel, under such circumstances the law demands of such party or corporation more than ordinary care. Such party or corporation is bound, under such circumstances, to exercise the greatest care and caution in the performance of his work in order that travelers may not be injured."

The defendant asserts that the instruction should not have been given because the derrick did not extend over the entire sidewalk, but in part extended over the street, and therefore that it did not extend "over the thoroughfare where people are constantly passing, and have the undoubted right to pass." To state the argument is to answer it.

[6] The court instructed the jury as follows:

> "You are further instructed that if, in your judgment, based upon the evidence in this case, it is shown that the instrumentality causing the injury to plaintiff, if any, was under the management and control of the defendant, San Diego Electric Railway Company, a corporation, and that the accident was such as in the ordinary course of things does not happen, in the absence of explanation of said defendant the *law*

presumes that the accident and injury to plaintiff arose from the lack of care on the part of said defendant." (Italics defendant's.)

Both in the trial court and in this court the defendant has made the contention that the instruction was erroneous. Davis v. Hearst, 160 Cal. 143, 116 P. 530; Albert v. McKay & Co., 53 Cal. App. 325, 200 P. 83. Conceding that the instruction, if standing alone, would be erroneous, the slight error was cured in this particular case by the other instructions which were given by the court. When the point was called to the attention of the trial court on a motion for a new trial, the learned trial judge replied as follows:

> "I doubt very much whether I ever gave a set of instructions that there was no error in. The question arises whether or not, if there were any errors, *were they prejudicial errors?* I can't think for a moment that the court would hold that *it was prejudicial error* to use 'presumption' instead of 'inference.' The average juror, I think, wouldn't be expected to distinguish between the two. In the ordinary use of the word, outside of court, I think there is very little distinction between 'presumption' and 'inference.'" (Italics ours.)

It is sufficient to state that we fully concur in that comment as applicable to the facts of this case.

[7, 8] After the plaintiffs had rested, the defendant took up the proof and proceeded to introduce evidence showing exactly how the accident happened. In doing so it called an outsider as an expert witness. It also called three of its employees who were operating the derrick-truck when the accident happened. In this manner the defendant introduced evidence tending to prove a bull-ring was used on the derrick-truck; that the bull-ring had been purchased from a reputable house; and that the defendant had not noticed any defect therein. In this behalf the defendant contends that it had made a careful examination. However, an examination of the record does not sustain the defendant in this contention. Some of its employees testified that they had examined the truck, had seen it, had oiled certain parts, etc., but no single witness testified that he had personally examined the ring for the purpose of locating defects, if any, therein. After the above evidence had been given by the defendant's witnesses, the plaintiffs did not call any witnesses in rebuttal. Both in the trial court and in this court the defendant earnestly contended that it had met the burden resting on it to explain how the accident happened and to show that it had not been guilty of any negligence. The point is not a new one. In the recent case, Michener v. Hutton (Cal. Sup.) 265 P. 238, the court said:

> "In view of the authorities, the implied finding of the jury that the appellants had failed in their attempt to rebut the inference of negligence created by the application of said maxim cannot be said to be without support in the evidence. And this despite the uncontradicted testimony of the appellant Goekler tending to show that the top length of pipe as placed and secured by him could not have fallen upon the respondent. For, as stated in Quock Ting v. U. S., 140 U. S. 417, 420, 11 S. Ct. 733, 734 (35 L. Ed. 501): 'Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced.'"

Further authorities regarding the conclusiveness of the testimony of the defendant's employees will be found collected in 8 A. L. R. 814–828. As to the conclusiveness of the testimony of the expert, see Spencer v. Collins, 156 Cal. 298, 306, 307, 104 P. 320, 20 Ann. Cas. 49. Bearing these authorities in mind, it follows that the trial court did not err in denying defendant's motion for a directed verdict; nor in denying its motion for judgment notwithstanding the verdict; nor in denying defendant's motion for a new trial. Moreover, it is clear that it cannot be said that the evidence is insufficient to sustain the verdict, or that the verdict is against law.

[9] Finally, it is contended by the defendant that the evidence affirmatively shows that Mrs. Harvey was guilty of contributory negligence. The defendant cites certain passages, and specially calls them to our attention, but it does not show wherein Mrs. Harvey was guilty of contributory negligence. No diagrams are before us, but the record shows that, when Mrs. Harvey stepped out of the automobile and returned to the mail box, the truck-derrick was around the corner, and not necessarily within her vision. She testified that she did not see the truck until after the accident happened. There was nothing improbable in this testimony. The implied finding of the jury is to the effect that the jury believed her. There is not a particle of evidence in the record that Mrs. Harvey could have known that the defendant's agents were in the very act of pulling on the pole at the instant that she approached the mail box, nor that she should have seen or known that the defendant had its appliances attached to the pole.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J; NOURSE, J.

92 Cal. App. 371

PEOPLE v. MALONEY. (Cr. 1649.)

District Court of Appeal, Second District, Division 1, California. June 2, 1928.

1. Criminal law ⚷1169(1)—Witnesses ⚷359—Admission of commitment for felony, to impeach defendant's testimony, held error but not prejudicial, though judgment should have been presented (Code Civ. Proc. § 2051; Cal. Vehicle Act, § 146).

Where defendant prosecuted for robbery testified that he had not been convicted of felony, judgment showing conviction of felony, should have been presented to impeach defendant under Code Civ. Proc. § 2051, but evidence of commitment to Preston School of Industry, reciting that defendant had pleaded guilty in superior court to violation of Vehicle Act, § 146 (St. 1923, p. 564), a felony, was not prejudicial.

2. Criminal law ⚷1172(1)—Instruction naming prosecuting witness as "Ramola Leon," which witness gave as name without objection, held not injurious error under information naming witness as "Leon Ramola."

Where defendant was charged in information with having committed robbery by taking certain property from "Leon Ramola," and prosecuting witness testified without objection on ground of variance that his name was "Ramola Leon," instruction to convict if jury found defendant feloniously took property from "Ramola Leon" was not miscarriage of justice or error injuring defendant.

3. Criminal law ⚷781(2)—Elaborate and argumentative instruction regarding extrajudicial admissions held properly refused, where defendant admitted only to accompanying party cashing bill similar to one stolen.

In prosecution for robbery in which $50 bill was stolen and only evidence of admission by defendant was testimony of officer that defendant told him he was with a party who cashed a $50 bill, it was not error for court to refuse elaborate and argumentative instruction regarding extrajudicial admissions, in view of paucity of testimony thereon.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Frank Maloney was convicted of robbery, and he appeals. Affirmed.

Theodore Gottsdanker, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

WOOD, Justice pro tem. Defendant was tried by a jury and convicted of the crime of robbery. On the night of December 18, 1927, two men entered the room of one Ramola Leon and aroused him from his sleep. One of them carried a revolver which he held against Leon's stomach. Leon was robbed of the sum of $74 and a watch and chain, a $50 bill being part of the money taken. The next morning Leon recognized the defendant in a barber shop as one of the robbers and called the police. At the trial he positively identified defendant as the man who had held the revolver. Officer Steventon testified that the defendant admitted to him that he was with a man who "cashed" a $50 bill at a store after the robbery; that defendant stated that he did not know the name of the man who "cashed" the bill.

[1] The defendant was sworn as a witness, and on cross-examination was asked whether or not he had been convicted of a felony, to which he replied in the negative. Thereupon the court received in evidence what counsel for defendant terms "a certified copy of action No. 29736, in which the defendant was sentenced to Ione." The document was in fact a certified copy of the commitment of the defendant to the Preston School of Industry, in which it is recited that defendant had "pleaded guilty in the superior court of the state of California, in and for the county of Los Angeles, of an offense of violating section 146 California Vehicle Act, a felony, as charged in the information." Defendant now contends that the court erred in admitting this document in evidence. The Attorney General has filed a brief in which he concedes that error was committed, but asks this court to refuse a reversal on the ground that defendant was not prejudiced thereby. He insists that the evidence so conclusively established defendant's guilt that there has been no miscarriage of justice. In conceding error the Attorney General cites the cases of People v. Hoffman, 199 Cal. 155, 248 P. 504, and People v. Adams, 76 Cal. App. 178, 244 P. 106. The facts in those two cases were very different from the facts in the case at bar. In the Hoffman Case the record of the juvenile court was held to be erroneously admitted for the reason that the proceedings in that court are not penal in their character. In the Adams Case the error consisted in the admission of evidence showing that defendant had been committed to the Whittier Industrial School at the age of 13 years. In neither case could it be said that defendant had been convicted of a felony. The commitment which was admitted in evidence in the case now before us did not issue in a proceeding in the juvenile court. Defendant had pleaded guilty to a violation of section 146 of the Motor Vehicle Act. In this section certain acts are described, followed by the statement that any one guilty thereof "shall be deemed guilty of a felony." In People v. Ward, 134 Cal. 301, 66 P. 372, a witness was asked upon cross-examination whether he had been convicted of a felony. It was shown that the witness had been found guilty by a verdict of the jury, but had not been sentenced. The court said:

> "It is contended that at the time the witness testified he had not been 'convicted of a felony';

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

that to sustain the ruling of the court, it must be assumed, as a matter of law, that the verdict of guilty constituted a 'conviction.' That such verdict does constitute a conviction within the ordinary as well as the technical meaning of the word, seems to be well settled." People v. Kepford, 52 Cal. App. 508, 199 P. 64.

Section 2051 of the Code of Civil Procedure provides that a witness may be impeached by "the record of the judgment, that he had been convicted of a felony." In accordance with this section, the proper procedure would have been for the district attorney to present the judgment itself rather than the commitment wherein the plea of guilty is set forth. We think, however, that the criticism is only technical and that the defendant was not prejudiced by the admission in evidence of the commitment.

[2] Defendant is charged in the information with having committed robbery by taking certain property from "Leon Ramolo." The court instructed the jury that if they found that defendant feloniously took the property from "Ramolo Leon" by means of force or fear, they should find defendant guilty. Defendant now contends that the instruction was erroneous and that defendant could not be found guilty unless it was shown that he robbed a person named "Leon Ramolo." The record discloses that when the prosecuting witness was sworn he gave the name Ramolo Leon and that the defendant did not at that time or at any other time make any objection to his testimony on the ground of variance, or call the attention of the court to the error of the district attorney in stating in the information that the witness robbed was named Leon Ramolo. Doubtless if this matter had been brought to his attention the district attorney would have sought and obtained permission to amend the information. We are of the opinion that defendant did not suffer any injury by the error complained of and that there has been no miscarriage of justice on this account.

[3] Defendant complains of the refusal of the court to give the following instruction:

> "The court instructs the jury that evidence has been introduced to show the defendant made certain admissions appearing in evidence. Verbal statements or admissions should be received by you with great caution, as they are subject to much imperfection and mistake, owing to the person speaking not having clearly expressed his own meaning, or the person spoken to not having clearly understood the speaker. It frequently happens, also, that the witness, by unintentionally altering a few words or expressions really used, gives an effect to the statement entirely at variance with what the speaker actually did say. But when such verbal statements are precisely given, and identified by intelligent and reliable witnesses, they are often entitled to great credit."

No evidence was introduced showing an admission on the part of defendant unless it be found in the testimony of officer Steventon, who stated that defendant had told him he was with a party who had "cashed" a $50 bill. It cannot be said that the court erred in refusing to give this elaborate and somewhat argumentative instruction in regard to extrajudicial admissions in view of the paucity of testimony on the subject.

We cannot say that there has been a miscarriage of justice in this case.

The judgment and order denying a new trial are affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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92 Cal. App. 470

PEOPLE v. PECCOLE. (Cr. 1022.)

District Court of Appeal, Third District, California. June 9, 1928.

1. Assault and battery 🔑92—Conviction for assault with deadly weapon held authorized under evidence (Pen. Code, §§ 217, 245).

In prosecution for assault with intent to murder under Pen. Code, § 217, evidence that defendant threatened to get gun and kill prosecuting witness, that defendant returned next day and shot at prosecuting witness, who did not assault defendant prior to firing of shots, together with inconsistent and false statements by defendant of manner in which he received injury sustained in struggle with prosecuting witness, supported conviction of assault with deadly weapon under section 245.

2. Criminal law 🔑706, 1171(1)—Question by district attorney whether witness became hysterical on seeing defendant fire gun in same manner as she became on being asked to identify gun held error but not prejudicial.

Question by district attorney of witness whether she became hysterical on seeing defendant draw and fire gun in same manner as she became on being asked to identify gun as that used by defendant, though error, was not prejudicial to any substantial right of defendant as matter of law, since it afforded defendant opportunity to show that witness' testimony as to events at time of assault was not dependable.

3. Criminal law 🔑382—Collateral matters relevant to issue being tried may be inquired into.

In examination and cross-examination of witness, collateral matters which are relevant to issue being tried made by pleadings may be inquired into.

4. Assault and battery 🔑88—Circumstances of quarrel between prosecuting witness and defendant day before assault held admissible to show occasion for threats by defendant and intent with which act was done (Pen. Code, § 245).

Testimony concerning trouble occurring between prosecuting witness and defendant, convicted of assault with deadly weapon under Pen. Code, § 245, which was direct cause of assault on following day, *held* relevant to issue as showing occasion for threat by defendant to return and kill prosecuting witness and intent with which defendant's act was committed.

5. Criminal law 🔑351(10)—Testimony of false stories told by defendant to police officers, brought out in rebuttal and as impeachment, held admissible to show motive of assault and to raise inference that defendant feared arrest.

Testimony brought out in rebuttal and as impeachment of defendant regarding false stories told by defendant to police officers of manner in which he received injuries sustained in quarrel with prosecuting witness *held* admissible to show defendant's motive in assaulting prosecuting witness with deadly weapon and to raise inference that defendant knew of unjustifiable attack and sought to withhold facts under fear of arrest.

6. Criminal law 🔑1186(4)—Witnesses 🔑370(4)—Question of witness whether she lived as wife of prosecuting witness held proper as affecting credibility of testimony, but exclusion, though error, was not prejudicial under other testimony (Const. art. 6, § 4½).

Cross-examination of state witness whether prior to commission of assault by defendant she had been living with prosecuting witness as husband and wife, though not married, *held* proper as tending to show witness' friendly interest in prosecuting witness, which would bear on question of credibility of her testimony, and exclusion of question, though error, was not prejudicial or miscarriage of justice under Const. art. 6, § 4½, where evidence otherwise showed witness maintained intimate personal relation with prosecuting witness.

7. Criminal law 🔑1170(2)—Exclusion of impeaching testimony held not prejudicial where jury, presumed to believe other testimony, could not reasonably have reached any other conclusion.

Exclusion of cross-examination impeaching witness *held* not error, though testimony sought to be disclosed would have discredited witness' entire testimony, where jury, presumed to believe other testimony, could not reasonably have reached any other conclusion.

8. Criminal law 🔑1165(1)—Errors to show miscarriage of justice would have to be prejudicial on their face where evidence was convincing of guilt (Pen. Code, § 245).

Where evidence was singularly convincing as to guilt of defendant of assault with deadly weapon under Pen. Code, § 245, errors of themselves or on their face prejudicial to rights of accused would have to be found to show miscarriage of justice.

9. Criminal law 🔑1170½(1)—Error in examining prosecuting witness in rebuttal on same matter testified to in main case held not prejudicial, where result could not have been changed.

Where prosecuting witness in main case denied striking defendant assaulting him, examination in rebuttal on same matter was error but not prejudicial, where evidence of guilt was too apparent to justify conclusion that conviction would not have been obtained but for error.

10. Witnesses 🔑407—Witnesses should not be permitted to reiterate testimony given in main case for prosecution under guise of rebuttal.

It is improper to allow witnesses to reiterate testimony previously given in original case under guise of rebuttal, since testimony should not be emphasized before jury by reiteration thereof after defendant in defense has presented proof tending to contrary effect.

11. Criminal law 🔑720(7)—Argument in assault case suggesting course of conduct by defendant and threats held within evidence, though misstating witness giving testimony (Pen. Code, § 245).

Argument of district attorney in prosecution for assault with deadly weapon under Pen. Code, § 245, suggesting that accused might have procured weapon and subsequently returned to place of assault, to show that defendant had feeling of malice toward prosecuting witness for beating sustained on previous day and had threatened to return with gun, *held* within theory established by evidence, though prosecuting attorney misstated witness testifying to threat.

12. Criminal law 🔑720(6)—Prosecuting officer may advance any theory in argument which reasonably comes within evidence received.

Prosecuting officer in arguing case for people to jury is entitled to advance any theory of case which may reasonably and fairly come within evidence received into record.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Pete Peccole was convicted of assault with a deadly weapon, and he appeals. Affirmed.

Jos. R. Huberty, of San Andreas, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, Acting P. J. The defendant was accused by an information filed in the superior court of Calaveras county of the crime of assault with intent to commit murder (Pen. Code, § 217), and was convicted of the crime of assault with a deadly weapon (Pen. Code, § 245). He brings his case to this court on an appeal from the judgment of conviction and also from an order denying a motion for a new trial made by him.

It is not claimed by the accused that there is not disclosed by the record evidence sufficient to uphold the verdict. His contention is that the court erred to the serious prejudice of his rights by allowing and disallowing certain testimony, and, further, by certain asserted misconduct of the district attorney in the presentation of the case of the people to the jury; that such errors and such misconduct were of sufficient gravity to require this court to order a reversal, notwithstanding that the verdict stands supported by sufficient evidence.

The facts will be stated herein mainly in narrative form, and, with the exception of such reference to the testimony of the defendant and a witness introduced by him as may be deemed necessary, will be taken from the testimony presented by the people to support the charge. The witnesses upon whose testimony the verdict was in the main evidently founded were R. L. Blackburn, Mrs. Edna G. Blackburn, Mrs. Dorothy Hayes, and William Azevedo, the prosecuting witness. The Blackburns mentioned were husband and wife.

The crime charged in the information was committed in the early evening of December 7, 1927, at a "roadhouse" or public resort situated approximately a mile from the town of Campo Seco, in Calaveras county. The party alleged to have been assaulted is one William Azevedo, who at the time the assault was committed was in possession of and managing said public resort, which, for brevity, will hereinafter be referred to as "the resort" or "the premises." These premises were owned by one Nick Ponzetto. It was through the defendant that Azevedo met Ponzetto and leased from the latter the premises. The house consisted of a large front room, in which customers, when desiring so to do, engaged in the pastime of dancing, and in which also "soft" drinks (and as is to be inferred "drinks" not so "soft") were dispensed, two bedrooms, a kitchen, and a small dining room. The premises were situated a short distance back from a public road and were divided from the road by a fence with a gate of sufficient width to admit of the entrance of the ordinary automobile into the premises from the road. This road extended from Campo Seco to and beyond the premises.

Near the hour of 11 o'clock p. m. of December 6, 1927—the day immediately preceding that on which the assault is alleged to have been committed—the defendant, accompanied by his wife, one Giannotti, and Nick Ponzetto, made his appearance at the resort, having gone there from Campo Seco in his (defendant's) automobile. Present at the resort at that time were the Blackburns, Mrs. Hayes, and Azevedo. There is no testimony that, up to the time that defendant and his party arrived at the resort, there were any but the most amiable and cordial relations existing between the defendant and Azevedo, or any cause for any other character of personal relations between them. However, immediately upon the appearance at the resort of the defendant, his wife, Giannotti and Ponzetto, all the parties began drinking, and, after a few hours thus spent, Mrs. Peccole began to show evidence of being intoxicated. The defendant, observing her condition, took hold of her and started to the point where their automobile was parked on the premises, near and inside of the fence above spoken of. It appears that the other members of the party, including Azevedo, followed the defendant and his wife, going to the spot near which the automobile stood. Mrs. Peccole got into the car, and the defendant, probably enraged because of her intoxicated condition, immediately began beating her about the face and body. Azevedo thereupon rushed to the car, and, placing his hand on the shoulder of defendant, exclaimed, "For ——— sake, cut that out!" While Azevedo and the defendant were engaged in this altercation, Mrs. Peccole jumped from the car and started to walk "up the road," whereupon defendant started after her, and, upon overtaking her, struck her a blow which knocked her to the ground and thereafter struck her several times about her body. Azevedo, observing this, or hearing the sounds of the blows, rushed to the point on the road where the defendant and his wife then were, and, declaring that he would not "stand for any man beating a woman," took hold of defendant and a fight between them ensued. Defendant struck at Azevedo several times, and the latter dealt the former several blows with his fists, finally knocking him (defendant) to the ground. Defendant received several minor injuries about his face and head. The fighting having ceased, the defendant returned to and got into his car, and overtook his wife, who was walking on the road towards Campo Seco. She entered the car, and the two then started in the direction of Campo Seco. Before getting into his car (Mrs. Hayes' testimony), the defendant declared that he intended to procure a weapon and return to the premises and "shoot and kill" Azevedo, to whom the threat was immediately communicated by Mrs. Hayes.

On the following day (the 7th of December) between the hours of 5:45 and 6:30 p. m., Mrs. Blackburn, who, with her husband, at the times concerned herein, was residing at the resort, was in the kitchen of the house, and from there, looking through the kitchen door to the outside, she observed a party, whom at first she did not recognize. When the automobile arrived at the point near the gate to the fence, she saw the driver get out of the car, and, leaving the car, with the motor still running, start toward the house. As the party was approaching the house and on reaching a point sufficiently near thereto to enable her to recognize him as the defendant (darkness then coming on) she closed the kitchen door, and then in a tone of voice loud enough to be heard by Azevedo, warned the latter of the defendant's presence. The defendant was let into the kitchen by Mrs. Blackburn and immediately asked her, "Where is my friend?" explaining to Mrs. Blackburn, upon inquiry by her as to the party he was thus referring to, that he meant Azevedo. At that moment of time Azevedo was in the "front room," or the "dance hall" part of the building. Upon being told by Mrs. Blackburn that the defendant was at the house, Azevedo stepped from the "front room" to his bedroom and procured from under the mattress of the bed his pistol. He opened his shirt and placed and concealed the weapon in the bosom thereof and thereupon stepped from the bedroom to the door between the dining room and the kitchen. Azevedo, proceeding in the direction of the point in the kitchen where the defendant was standing with his hands in the pockets of his trousers, addressed the latter in a friendly way, saying "Hello, Pete." Without replying to that salutation or saying a word, and immediately, the defendant drew a revolver from the right front pocket of his trousers (Mrs. Blackburn's testimony) and fired in the direction of Azevedo, who testified that in his opinion the bullet missed hitting his person by approximately an inch. Azevedo, so he testified, thereupon sprang upon the defendant and "grabbed" him by the wrist of his right hand, in which he (defendant) held his pistol. A struggle between the two men followed. Azevedo (so he testified) "grabbed one arm (of the defendant) about the wrist and the other by the shoulder and give him a twist and threw him on the floor, and I think I had my knee on his hand, the one he had the gun in; then I grabbed him by the throat and choked him and he begin to beg for me not to choke him. * * * I let loose of his throat and he rolled over on his stomach, and he got up kind of on his hands and knees, and I had one hand on his back, and I told him to give me the gun. He didn't do it, so I reached in and got my gun out and took it by the barrel and hit him on the head. I saw he didn't have the gun in his hand; and there was an icebox by the door, and I thought maybe it was under there, and I was watching. Then he reached under the stove and pulled the gun out, and then I hit him a light tap on the head and reached down and took the gun away from him. He got up and then wanted to shake hands. I did. I told him if he behaved himself that I wouldn't say a word to nobody about it. He agreed to the fact. When he was going out the door he said, 'I am going to get another gun and come back.' * * * I unbuttoned my shirt and stuck the gun down in here (indicating his bosom). They said he was going to kill me. I didn't think he would shoot. I didn't want him to know I had the gun if he did not want trouble. * * * I had no coat or vest on that night." Azevedo further testified that he at no time, on the evening of the 7th of December, struck or assaulted the defendant until after the latter fired his pistol, as related.

The Blackburns saw the defendant fire his pistol, and Mrs. Blackburn said she saw the flash reflect upon the body of Azevedo. Mr. Blackburn was at the time putting wood in the stove in the kitchen, but he saw defendant shoot at Azevedo. Both witnesses testified that, instantly upon the shot being fired, Mr. Blackburn grabbed his wife and "hustled" her out of the house, both going together. Neither saw the struggle between Azevedo and the defendant after the shot was fired, but both heard the noise produced by the struggle.

The defendant's testimony of the occurrences in the house was very much different from the story thereof as told by Azevedo and his witnesses. As to the difficulty between Azevedo and the defendant near the gate on the night of the 6th day of December, the witness Giannotti testified that he saw Azevedo follow the defendant to the gate as the latter was taking his wife to his automobile, and heard Azevedo, when the three were near the gate, call defendant a "dago s——n of a b——ch." The witness at the time was between 25 and 30 feet from the gate. It was dark, Giannotti said, and he therefore could not see what was going on between the parties, but that he "heard" Azevedo strike the defendant several blows and saw the latter fall to the ground and Azevedo thereupon return to the house.

The defendant's testimony was to the effect that Azevedo started the trouble on the 7th of December by assaulting him (the defendant) without cause. He said that he went to the resort on the 7th of December merely to learn how the trouble of the night before had occurred and "what it was all about." He admitted, though, that he went there with a loaded pistol on his person and had it in his hand in the house, having drawn it after being struck by Azevedo; but, he continued, while the two were engaged in a struggle after he was knocked to the floor by Azevedo, his weapon was accidentally discharged. In a conversation with an officer of San Joaquin county, the defendant having gone to Stockton on the night of the 7th after the alleged assault was committed, and in a conversation subsequently with the sheriff of Calaveras county, to whose custody he was delivered by the Stockton officer, he made inconsistent statements regarding the manner in which he received his injuries, both of which were confessedly untrue. To the Stockton officer he stated that while traveling "down" a certain road about a mile from Campo Seco, he was intercepted by two men, who "pulled him out of the machine and hit him over the head with a revolver." When asked by said officer if he knew who the parties thus assaulting him were, he replied in the negative. That officer in the same conversation then said: "I will go and call up Sheriff Zwinge (sheriff of Calaveras county); this is a case for Calaveras county," whereupon the defendant said: "Don't call the sheriff." To Sheriff Zwinge, the defendant, in reply to categorically propounded questions by that officer, stated that he received his injuries by being hit "over the head by a fellow"; that he did not know who the party was that hit him, nor why he (such party) hit him; that he was hit by the party on Main street of Campo Seco, near "two vacant lots by the old butcher shop"; that his assailant said nothing to him, but stepped up to him, struck and then choked him; that the party took no money from him; that he had on his person the sum of $1.50 only; that he could not give a description of his assailant.

[1] The officers, upon investigation of the premises and particularly the room in which the shooting occurred, discovered two holes, apparently made by a bullet, in the floor near the spot where Azevedo stood when, as he and the Blackburns stated, the defendant fired the shot. It was also likewise discovered that a bullet had entered and passed through the bottom of the radio stand which stood in the dining room near the door leading therefrom into the kitchen and at which Azevedo appeared upon hearing the defendant ask Mrs. Blackburn where he (Azevedo) was. The table on which the radio stood was 17½ inches in height from the floor. In view of the reduced verdict, it is not important, and therefore not necessary, to attempt to indicate herein, from the sheriff's description of the situation in the room as it appeared after the shooting, the probable course of the bullet after it left the pistol, since it is true that there is ample evidence which shows that the accused fired at the body of Azevedo the instant the latter appeared at the door between the dining room and the kitchen. It may be suggested that it is apparently true from the testimony that, if he took any aim at all, the defendant directed the shot towards the lower part of Azevedo's body, perhaps below the waist; but, as above intimated, conceding that to be the fact, the evidence clearly and abundantly supports the conclusion of the jury, as indicated by their verdict, that the accused was guilty at least of assault with a deadly weapon.

[2] The first assignment of error occurring during the course of the trial is as to the conduct of the people's witness, Mrs. Blackburn, when testifying. In the brief of defendant it is stated that that witness, when shown by the district attorney, for the purpose of identifying it, the weapon with which the defendant assaulted Azevedo, became hysterical, and stated, in response to a question by the prosecutor, that on the occasion of the assault, upon seeing defendant fire his pistol at Azevedo, she was thrown into a like nervous condition. The specific objection is that it was misconduct on the part of the district attorney to ask the witness that question. The record does not show that Mrs. Blackburn became hysterical while she was on the witness stand and giving her testimony, nor does it show what her particular conduct or actions were that caused the district attorney to ask her the question as to the effect upon her upon seeing the defendant draw his weapon and fire the shot on the occasion of the assault. We may judge that, when testifying, she became nervous or excited and betrayed such condition in a noticeable manner. But whatever may have been the nature of her actions on the witness stand, whether due to hysteria or other less demonstrative acts of a supernervous condition, the question asked her by the district attorney whether she was likewise overwrought when she witnessed the near tragedy was improper. If the question were proper under any circumstances, it involved, it seems from defendant's brief, an inquiry more appropriate for the defendant's counsel to have pursued with the view of showing, if thus he could, that the witness' mind, by reason of the nervous state into which she had been thrown by witnessing a near tragedy, was so upset or shifted from its normal poise as to render her testimony of what she claimed to have seen of the trouble not altogether dependable. Brought into the record and before the jury as it was, and assuming that the witness became hysterical upon the witness stand while testifying, and that she was, as she said, in reply to the district attorney's question, thrown into a like condition at the time of the trouble, on seeing defendant with a weapon and shoot at Azevedo, defendant's counsel, if he did not do so in his argument to the jury, thus had opened up to him by the prosecutor an opportunity to treat the incident, if not successfully, so far as the ultimate result was concerned, in a manner favorably to his client's defense. This proposition is so obvious that it would seem that a jury composed of persons of average intelligence would thus view the matter; and for this very reason, if for no other, the error in permitting the district attorney's question to be asked and answered cannot be held, as a matter of law, or at all, to have resulted in prejudicing or militating against any substantial right of the accused in the trial of the case.

[3, 4] The objection that the court erred in allowing, over defendant's objections, the district attorney to show the circumstances of the difficulty between the two men on the 6th of December, is untenable. The contention is that the effect of allowing that testimony was to put before the jury "a collateral issue in the case." The rule as to the examination and cross-examination of a witness upon matters collateral to the issue made by the pleadings is that where such collateral matters are relevant to the issue being tried it is proper to inquire into them. Of course, if the collateral matters have no relevancy to the issue on trial they cannot be gone into or inquired about. In the present case, the trouble occurring between the two men on the 6th of December, as the evidence unquestionably shows, was the origin or direct cause of the assault upon Azevedo by the defendant on the 7th day of December, and therefore testimony showing the circumstances and the

nature of the difficulty between the two men on the 6th would obviously involve matters relevant to the issue under trial. Indeed, that testimony had a direct bearing upon the issue before the jury, since thus it was revealed that the defendant had threatened that he would return to the resort and kill Azevedo for the beating the latter had administered to him (defendant). It tended to show that there was occasion for such a threat being made, and further to show that the motive or purpose of defendant's return to the resort on the 7th, armed with a loaded revolver, was to carry out the threat so made. We have yet to learn that, an assault or a homicide having been committed by a party, it is improper to prove that such party at some time previous to the commission of such crime, had threatened to commit it. Such testimony bears directly upon the question of the intent with which the act was done.

[5] The testimony of the officers above mentioned of the representations to them by the accused as to the circumstances under which he received his injuries was properly allowed. The testimony was brought out in rebuttal and as in impeachment of the denial by the accused that he had had any such conversations with the officers. The testimony would have been proper as in proof of an independent fact relevant to the case. As above stated, the defendant told a different story to each officer as to how he was injured, in neither of which did he say that his injuries were the result of a physical combat between him and Azevedo; or that he had had any difficulty with the latter. He certainly had some motive for giving the officers a fabricated account of how he had been injured, and we think the falsity of his stories as so given affords the inference that, being conscious of having committed an unjustifiable attack upon Azevedo, he purposely withheld from the officers knowledge of his visit, with a loaded revolver, to the resort on the evening of the 7th, under the fear that a disclosure of those facts to the officers would be followed by an investigation which probably would result in his arrest and prosecution for the assault. Undoubtedly, had he honestly believed, as he undertook to show at the trial of his case, that he was not in the wrong in the trouble between him and Azevedo on the evening of the 7th of December, he would have unhesitatingly told the officers the truth of how he was beaten and bruised about the head and face. This view of the defendant's false representations of the circumstances under which he received his injuries is, in no slight degree, reinforced by the fact that, when the Stockton officer, on hearing the story of the accused, stated, in the presence of the latter, that the case was one for the Calaveras county authorities and that he (the officer) would call Sheriff Zwinge of that county on the phone and give him information regarding the assault, he (defendant) protested against calling Zwinge or giving him any information about the matter. The foregoing, we think it clear from a consideration of the entire affair as the record here reveals it, is a fair and reasonable and, indeed, the only rational interpretation of the motive of the accused in giving to the officers false accounts of how he was injured, and we may therefore well assume that such was the view the jury took of the untruthful representations of the circumstances under which he received his injuries. Being rationally subject to such interpretation, the testimony of the officers that the accused had given to them untruthful accounts of how he was injured was properly allowed.

[6, 7] On cross-examination of the people's witness, Mrs. Hayes, counsel for the defendant asked her whether she and Azevedo were, and for some time prior to the commission of the assault charged in the information, had been, living together as husband and wife, notwithstanding that they were not and never had been husband and wife. The court sustained the district attorney's objection to the question, and erred in so doing. The inquiry was proper as tending to show that the witness cherished a friendly interest in Azevedo which would bear upon the question of the credibility of her testimony. People v. Souleotes, 27 Cal. App. 288, 289, 149 P. 802; People v. Crandall, 125 Cal. 129, 136 et seq., 57 P. 785, concurring opinion of Justice Temple, in which Justice Henshaw and Chief Justice Beatty joined. But it is not made to appear that from that ruling the defendant suffered prejudice to any of his substantial rights at the trial. In fact, it is quite clear from the general situation of affairs as to these parties, as the record shows it, that the jury could readily acquire the impression—a strong impression—that Azevedo and Mrs. Hayes maintained intimate personal relations with each other while they resided at the resort and even prior to the time at which Azevedo leased the premises from Ponzetto. They went to Campo Seco together in an automobile and were together when Azevedo first told the defendant that he was desirous of renting the resort. They were together when the contract of lease was executed and Azevedo thereupon put in possession of the premises. From the time such possession was taken by Azevedo until the evening of the assault both resided at the premises and occupied rooms in the house. From all these circumstances, the jury could make no mistake in concluding that the two were practically maintaining between themselves the relation of husband and wife. At any rate, it could not have been a matter of serious difficulty for the jury to discern, upon all the circumstances mentioned, that there existed between the two an uncommonly strong tie of personal friendship, naturally sufficient, if so she was disposed, to lead her so to magnify the conduct of the defendant on the occasion

of the shooting as to make it appear to the jury that he was not only the aggressor in the combat, but that whatever part Azevedo took in the affray was required of him for his own protection against injury or death at the hands of the former. Thus the defendant lost no benefit or advantage of which otherwise he would have been deprived by the erroneous ruling foreclosing his right to inquire of Mrs. Hayes whether she and Azevedo were maintaining and for some time prior to the date of the assault had maintained, practically, the relation of husband and wife. But further may it be stated that if the cross-examination interdicted by the ruling now under consideration had been permitted and the fact thus sought to be elicited had been disclosed, either through the cross-examination or later by impeaching testimony, and the witness' testimony thereby wholly discredited, the jury, believing the other testimony, as it is to be presumed that they did, could not reasonably have reached any other conclusion than that evidenced by their verdict. Certainly, in view of the testimony referred to, and which has been hereinabove reviewed, it cannot properly be held that the ruling now under consideration resulted in a miscarriage of justice. Const. art. 6, § 4½.

[8] There are several other assignments involving attacks upon the rulings of the court relative to the evidence. These we will not take the time specifically to consider herein. We have carefully examined the assignments. Some of them are without a foundation, legally, to support them. Others, even if exposing errors, are not of sufficient gravity to call for a reversal. There can hardly be any doubt from the evidence that the defendant went to the resort on the evening of the 7th day of December with the deliberate purpose of assaulting or killing Azevedo. He admitted that on the 6th of December Azevedo struck and beat him, and claimed that the act of Azevedo in thus attacking him was wholly without cause or justification. That for the punishment inflicted upon him by Azevedo he conceived and nourished a bitter grievance against Azevedo was quite natural, and, indeed, cannot well be questioned upon a consideration of the view which he (defendant) thought he was justified in taking of the circumstances under which the punishment was administered. He threatened to procure a weapon, return to the resort, and avenge the wrong to which he firmly believed Azevedo had without just cause subjected him, and he did return, with a loaded revolver on his person, to the resort. This fact itself, it may be suggested, corroborates the testimony of Mrs. Hayes that, on the night of the 6th, he made the threat that he would procure a weapon and return to the resort for the purpose of killing Azevedo. Errors in and of themselves or upon their face prejudicial to the rights of the accused would have to be found in this record to compel the conclusion that, in the face of the singularly convincing evidence of the guilt of the defendant as disclosed by the record, and as pointed out herein, a miscarriage of justice had been thereby produced; and we have found here no such errors.

[9, 10] There are several assignments of misconduct on the part of the district attorney in the trial of the case which it is claimed worked prejudice to the rights of the accused. Two of these assignments only we deem worthy of special notice herein. The first which may be considered arises from the act of the prosecuting officer in recalling in rebuttal the principal witnesses for the people, and, against the objection of defendant, causing them to repeat in part the testimony they had given in the people's original case. The defendant, testifying in his own behalf, stated that Azevedo started the fight on December 7th by striking him (defendant) on the head with a revolver; that up to that time he had made no threat of bodily injury upon the person of or hostile demonstration towards Azevedo. As in rebuttal, the district attorney recalled Mr. and Mrs. Blackburn and Azevedo to the witness stand and asked them if the last named, before the defendant fired at him or displayed any purpose to assault him, struck the accused about his head or body with a revolver. The same question was asked the same witnesses in the people's original case, and the answer of each was, as was the answer of each to the same question when called in the purported rebuttal, that Azevedo made no such assault or any assault on the defendant until the latter fired the shot. It is improper to allow witnesses to reiterate the testimony previously given by them in the original case of the people "under the guise of rebuttal." People v. Van Ewan, 111 Cal. 144, 149, 43 P. 520. The reason for the rule is, obviously, that testimony tending to show the guilt of the accused, having been properly and necessarily received in the presentation of the people's original case, should not, in fairness to the defendant, be emphasized before the jury by a reiteration thereof by such witnesses after the defendant in his defense has presented proof tending to a contrary effect. But the error in permitting that course to be adopted by the district attorney in this case is not of such seriousness as to require a reversal. The evidence of guilt, as stated and shown hereinabove, is too apparent to justify the conclusion that a conviction would not have been obtained but for that error. The case of People v. Van Ewan, supra, cited by the defendant, was reversed, but not because of the like error committed therein.

[11, 12] The other assignment of misconduct on the part of the prosecuting officer to be considered occurred in the course of his argument to the jury, and the particular

language of that officer which defendant condemns as misconduct is the following:

> "Mr. Peccole was able after the shooting that night and after this choking and after these beatings over the head to get up and go out and get into his automobile, start his car, and leave. Mr. Blackburn tells us that Peccole's car passed him with Peccole in it as he was going to town for help upon the hill by the cemetery. Mr. Peccole says he didn't go into Campo Seco. Very well—not a great deal of importance, but if Mr. Blackburn is telling us the truth Mr. Peccole went into town; his gun had been taken away from him by Azevedo. If he (referring to defendant) had come there that night to get Azevedo with a gun and he was still able to go about and use his strength and drive his car, as he tells us, would not the first thing that he would want to do, was to do as Mrs. Blackburn said he stated he would do—go and get another gun and come back. I say to you that Mr. Blackburn, I think, was telling us the truth, and Mr. Peccole's car went on into town and he was on his way perhaps for another gun; that then it was that he came back; perhaps he went back there that night. We don't know. The other witnesses left; they came to Valley Springs and swore out a complaint."

The criticism of the foregoing language specially stressed by counsel for the defendant is that there is no evidence to be found in the record which warranted it. Mrs. Blackburn, in narrating such of the circumstances of the fight between the two men on the 7th as she witnessed, did state that she heard the defendant, as he was leaving the house after the trouble had ceased on that occasion, "make the remark that he was going to get another gun and come back and get him," referring to Azevedo; but that portion of her testimony was stricken from the record on the motion of defendant's counsel. But Azevedo testified that he heard defendant make such a threat as he was departing from the house, and that testimony remained in the record. Of course, so long as the testimony was before the jury it could make no difference as to the person giving it, in so far as may be concerned the arguments of counsel for the parties before the jury. The theorizing by the district attorney as to what the defendant might have done after he left the premises on the 7th, thus suggesting that the accused might have procured a weapon and later on that night returned to the resort, involved merely one of those speculative suggestions which are often justified, as is true here, by the general facts and circumstances of the case as they are shown by the evidence. In this instance the district attorney, in advancing the suggestion referred to, was evidently endeavoring to impress upon the jury the proposition that, from the time he was beaten and bruised by Azevedo on the 6th up to the night of the shooting, the accused carried in his heart and mind for and towards the latter a feeling of malice and a determined purpose to gratify such feeling. There is evidence in the case which clearly authorizes that theory, and the testimony of Azevedo that defendant did make the threat referred to constituted a sufficient predicate for the theory advanced by the prosecutor as indicated in his remarks before the jury objected to here. It will be borne in mind that Azevedo testified that he, Mrs. Hayes, and the Blackburns left the premises immediately after the shooting and did not return thereto that night, the implication from that testimony being that those parties feared further trouble from the accused. But be that as it may, it is clear that the remarks of the prosecutor complained of here were well within the general theory of the case as it was established by the evidence. A prosecuting officer, in arguing a case for the people to the jury, is entitled to advance any theory of the case which may reasonably and fairly come within the evidence received into the record. Upon this proposition, see the following cases: People v. Glaze, 139 Cal. 154, 72 P. 965; People v. Rossi, 37 Cal. App. 778, 782, 174 P. 916, 918; People v. Swigart, 80 Cal. App. 31, 47, 48, 251 P. 343; People v. Piazza, (Cal. App.) 257 P. 592.

The judgment and the order are affirmed.

We concur: PLUMMER, J.; JAMISON, Justice pro tem.

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92 Cal. App. 468

MURPHY v. AGEN. (Civ. 5206.) ★

District Court of Appeal, Second District, Division 1, California. June 9, 1928.

Hearing Denied by Supreme Court Aug. 6, 1928.

Usury ⇐32—Amount added to price of automobile to one purchasing on monthly installments held not to render contract usurious; "forbearance" (St. 1919, p. lxxxiii; Deering's Gen. Laws 1923, Act 3757).

Amount added to price of automobile purchased on monthly installments, which was made a part of the purchase price, was not paid on account of forbearance in relation to installments provided for by the contract and was not an exaction of interest or charges in the nature of interest so as to permit purchaser's recovery of penalty under Usury Law (St. 1919, p. lxxxiii; Deering's Gen. Laws 1923, Act 3757); "forbearance" being the act by which the creditor waits for payment of debt due him by debtor after it has become due.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Forbearance.]

Appeal from Superior Court, Kern County; Erwin T. Owen, Judge.

Action by Paul Murphy against Fred Agen. Judgment for defendant, and plaintiff appeals. Affirmed.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

George M. Cook, of Taft, for appellant.

Brittan & Brittan and O. V. Anderson, all of Bakersfield, for respondent.

CONREY, P. J. The plaintiff brought this action to recover the sum of $440.37, alleged to be three times the amount of interest paid by him to the defendant on a contract in violation of the Usury Law (St. 1919, p. lxxxiii). After the defendant had filed an answer denying the principal allegations of the complaint, each party moved for judgment on the pleadings. The plaintiff's motion was denied, and defendant's motion was granted, and judgment thereupon entered that plaintiff take nothing. The plaintiff appeals.

The transaction between the parties was not a loan of money or other property, nor was it anything in the nature of a loan. It appears that the Taft Motor Company, Inc., sold to the plaintiff an automobile for a stated price. The written contract, a copy of which is attached to the complaint, provides that the sale shall be for the total price of $1,987.24, of which $550 was paid at the signing of the contract and the remainder was payable in certain monthly installments. The only provision of the contract referring to interest is a provision for interest in the event of default in the payment of any installment. It appears that all installments were paid in full, either to the Taft Motor Company, Inc., or (after assignment of the contract to defendant) to the defendant Agen. Nevertheless in his complaint the plaintiff alleged that the actual price of the automobile, together with certain accessories and including an item of $66.50 for insurance, amounted to only the sum of $1,840.45, and that the remaining $146.79 which the plaintiff paid was interest on the unpaid installments. And the plaintiff alleged that said sum, when thus treated as interest on the installments, amounted to interest in excess of 1 per cent. per month, and that therefore the interest so paid was an exaction of interest which was in violation of the Usury Law.

From the foregoing statement it is clear that no interest was paid on account of "forbearance" in relation to the installments provided for by the contract. "Forbearance" is "the act by which a creditor waits for the payment of a debt due him by the debtor after it has become due." 2 Bouv. Law Dict. p. 1254. The transaction was not one in which an agreement was made to pay interest upon the loan of any "money, goods, or things in action." It is our opinion that the contract was not one within the scope of the terms or objects of the usury law. Stats. 1919, p. lxxxiii; Deering's General Laws, 1923 Ed., Act 3757. Moreover on the face of the contract itself said sum of $146.79 was a part of the purchase price of the property sold to plaintiff, and was not an exaction of interest or of charges in the nature of interest. The facts alleged in the complaint are not to the effect and do not show directly or indirectly that the contract as drawn was intended to accomplish an evasion of the law against usury, or that it was anything except a sale of personal property for the full stated price thereof. The complaint did not state a cause of action.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

ANDREWS et al. v. GLICK et al. (Civ. 5049.)★

District Court of Appeal, Second District, Division 2, California. May 31, 1928.

Hearing Granted by Supreme Court July 30, 1928.

1. Continuance 🔑48—Dismissal and nonsuit 🔑73—Court concluding statute requiring partnership to file certificate applied held not obligated to take testimony, where pleading fully disclosed firm name (Civ. Code, § 2466).

Court concluding that Civ. Code, § 2466, providing that partnership transacting business under fictitious name or designation not showing names of persons interested must file certificate with clerk of county in which principal place of business is situated, applied to action brought by corporation, *held* not obliged to hear testimony before denying continuance or entering dismissal, where pleading revealed all in regard to firm name that proof could do.

2. Partnership 🔑64—Statute requiring certificate held inapplicable to action by Andrews and Cordano, doing business under firm name of Andrews-Cordano Plumbing Company; "fictitious name" (Civ. Code, § 2466).

Where action was brought by Harry W. Andrews and Frank Cordano, doing business under firm name and style of Andrews-Cordano Plumbing Company, a copartnership, pending publication of certificate required by Civ. Code, § 2466, for partnerships doing business under fictitious name or designation not showing names of persons interested as partners, *held*, that statute was inapplicable, since such partnership was not transacting business under "fictitious name" nor "designation not showing names of persons interested as partners."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fictitious Name.]

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by Harry W. Andrews and Frank Cordano, doing business under the firm name and style of the Andrews-Cordano Plumbing Company, a copartnership, against Fannie Glick and others. From a judgment of dismissal as to the named defendant, plaintiffs appeal. Reversed.

★Superseded by opinion of Supreme Court, 272 P. 587.

Irvin C. Taplin, of Los Angeles, for appellants.

Overton, Lyman & Plumb, of Los Angeles, for respondent.

STEPHENS, Justice pro tem. A judgment of dismissal was entered as to defendant Glick. Plaintiffs appeal therefrom.

The title of the cause as to plaintiffs is as follows:

> "Harry W Andrews and Frank Cordano, doing business under the firm name and style of 'Andrews-Cordano Plumbing Company,' a copartnership."

And it is alleged in the complaint:

> "That at all times herein mentioned plaintiffs were and now are copartners doing business under the firm name and style of Andrews-Cordano Plumbing Company."

This allegation is specifically admitted in the answer. At the opening of the trial much discussion was had over the fact that the certificate required by section 2466 of the Civil Code had not been filed, though it was in process of publication. At no time do plaintiffs specifically conceded that they come within the terms of the Code section, but, as they put it in their brief, they sought to comply therewith "as a precautionary measure only." No evidence was introduced upon the merits of the case, but one of counsel for plaintiffs testified as to his and his associate's connection with the case and as to their diligence in the question of filing the certificate. The court refused to grant a motion for continuance until after the required publication had been completed, but ordered a judgment of dismissal as against the defendant Glick. No findings were asked for, offered, or signed, nor were findings waived. The judgment contains the following recital:

> "* * * A trial by jury having been waived, and the plaintiffs and defendant Fannie Glick, through their respective attorneys, having stipulated in open court that said plaintiffs had not filed and published the certificate required by section 2466 of the Civil Code of the state of California, and defendant Fannie Glick having moved for a judgment of dismissal, and the court, being fully advised in the premises, now grants said motion. * * *"

[1, 2] Counsel for appellants contend in their briefs that the court was not possessed of sufficient knowledge of the case upon which to refuse to grant a continuance or to enter the dismissal judgment, and that it was necessary for the court to take testimony or to receive an opening statement of the facts. With this we cannot agree. Viewing the law as the court did, viz. that the section of the Code referred to covers the case, it was not obliged to go forward consuming time vainly. There was no need of taking testimony to reveal the situation, as the pleadings reveal all in regard to the firm name that proof could do. The facts are alleged and admitted, viz. that Harry W. Andrews and Frank Cordano were doing business under the firm name and style of "Andrews-Cordano Plumbing Company," and that no others were associated therein. Sweeney v. Stanford, 67 Cal. 635, 8 P. 444. The real point in the case is: Does section 2466 apply to these admitted facts? We think it does not.

Section 2466, Civil Code, reads as follows:

> "Except as otherwise provided in the next section every person transacting business in this state under a fictitious name and every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the county in which his or its principal place of business is situated, a certificate, stating the name in full and the place of residence of such person and stating the names in full of all the members of such partnership and their places of residence. Such certificate must be published once a week for four successive weeks, in a newspaper published in the county, if there be one, and if there be none in such county, then in a newspaper in an adjoining county. An affidavit showing the publication of such certificate shall be filed with the county clerk within thirty days after the completion of such publication."

In analyzing the meaning and intent of this Code section we discover at the outset that there is no "fictitious" name used. Nor is the name "Andrews-Cordano Plumbing Company" a "partnership transacting business in this state under a fictitious name." It is not fictitious at all, but is a real name of the partnership. As was said in Spreckels v. Grace Darling Hospital Ass'n, 28 Cal. App. 646, at page 648, 153 P. 718:

> "The complaint affirmatively shows that the business in which the plaintiff is engaged is that of publisher of a newspaper known as the San Francisco Call. The name of this newspaper is not fictitious, but is as real as the name of a hotel or a building or a steamship, or any other medium of business or article of commerce, which, for convenience or of necessity, should have a particular designation."

And again in Pendleton v. Cline, 85 Cal. 142, 145, 24 P. 659, 660:

> "Nor is there any opposition or contrast between the phrase 'a fictitious name,' and the phrase 'a designation not showing the names of the persons interested.' The latter is supplementary to the former. For instance, if in the case before us Pendleton or Williams was not the real name of either partner, the firm name would be fictitious. But if such names were the true names of the partners, and the firm name was Pendleton & Co., it would not be fictitious, but would be a designation not showing the names of all the persons interested as partners."

The same point is decided the same way in McLean v. Crow, 88 Cal. 644–647, 26 P. 596.

Is the firm name in the instant case, then, "a designation not showing the names of the persons interested as partners in such business"? In our opinion it is not. Heretofore we have referred to the fact that the pleadings themselves make it certain that the two men named and no others were interested in the partnership, but the question of course is broader. Under the law does the designation, aside from the pleadings, show the names of those interested as partners? The case of Pendleton v. Cline, supra, decides the point that the name "Pendleton and Williams" sufficiently designates those interested in the partnership. In Lauferty v. Wheeler, 11 Daly (N. Y.) 194, where it is held that a person doing business under the name of "Alderney Manufacturing Company, Oleomargarine Butter, E. Lauferty, Proprietor," does not violate the statute in using the words "Alderney Manufacturing Company," the court says:

> "I have read the statute in vain to find any prohibition therein contained which is applicable to the case at bar. The statute * * * merely prohibits the use of the name of a partner not interested in the business, and the use of the words 'and company' or '& Co.' unless representing an actual partner. The plaintiff in this action does not use the name of a partner not interested in the business, neither does he use the words 'and company' or '& Co.' in any form."

While the foregoing decision is premised upon a different statute, the case by analogy is authority for the point that the mere addition of the word "company" does not purport to suggest that others than those named in the designation have a partnership interest, and our statute merely requires that those so interested shall be named.

The Supreme Court of Oklahoma, in Patterson v. Byers, 17 Okl. 633, 89 P. 1114, 10 Ann. Cas. 810, under a statute the same as the California Code section 2466, decided that a designation "Patterson Furniture Company," with two partners named Patterson, does not come under the statute as a fictitious name. It further decides that such a designation sets out the name of the partners in such a way as not to require the certificate provided by the section. Whether our court would go this far, in view of the decision in North v. Moore, 135 Cal. 621, 67 P. 1037, wherein was held that the name "Abrams Bros." does not sufficiently designate the interested persons, is a question not necessary here to decide. See, also, Guiterman v. Wishon, 21 Mont. 458, 54 P. 566, where exactly the opposite decision was given as to the name "Guiteman Bros." Lander v. Sheehan, 32 Mont. 25, 79 P. 406, holds that where a single individual named Lauder conducts a business under the designation "Lauder Furniture & Carpet Company," the certificate is not required.

The case of Kohler v. Stephenson, 39 Cal. App. 374, 178 P. 970, is in point, and for the sake of brevity we quote from the syllabus:

> "In an action by the owner of a laundry called the 'Kohler Steam Laundry,' to recover moneys collected by the defendants while in her employ as drivers, the special defense that the plaintiff was not entitled to maintain the action because she was doing business under a fictitious name without having complied with the provisions of sections 2466 and 2468 of the Civil Code, was not sustained, when it appeared from the record by the direct testimony of the plaintiff, and also from the face of the bills, receipts and the printed matter used in the business, that the plaintiff personally conducted the business under her own name as the proprietor thereof."

In our opinion the judgment of dismissal in the instant case was had upon a mistake as to the law as applied to the pleadings in the action.

The judgment is reversed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

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92 Cal. App. 495

CHING WING v. KISHI. (Civ. 6321.)

District Court of Appeal, First District, Division 2, California. June 12, 1928.

1. Automobiles 🔑245(72)—Contributory negligence held for trial court, in action for death of pedestrian struck by truck while crossing street.

In action for damages for death of pedestrian struck by truck while crossing street, contributory negligence of decedent *held* question of fact for trial court to determine from all evidence in case.

2. Negligence 🔑136(8, 9)—Negligence or contributory negligence is question of law only when facts are clear and undisputed and no other inference can be drawn.

When facts are clear and undisputed, and no other inference than that of negligence or contributory negligence can be drawn from such facts, then, and only then, is question of negligence or contributory negligence one of law.

3. Appeal and error 🔑1011(1)—Trial court's finding of fact on conflicting evidence is conclusive, and all reasonable inferences are indulged in support thereof.

Trial court's finding of fact on conflicting evidence is conclusive, and all reasonable inferences are to be indulged in support of such finding.

4. Appeal and error 🔑901—Burden is on appellant claiming error to show its existence.

Burden is on appellant who claims error to show its existence.

5. Appeal and error ⚷989—When appellant contends that finding is not supported by evidence, power of appellate court begins and ends with inquiry whether there is substantial supporting evidence.

When appellant contends that any particular finding is not supported by evidence, power of appellate court begins and ends with inquiry whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support conclusions reached by trial court, and, if on any material point the testimony is in conflict, it must be assumed that trial court resolved conflict in favor of prevailing party.

6. Automobiles ⚷217(5)—It was duty of pedestrian crossing street to look in direction from which danger was to be anticipated.

It was duty of pedestrian crossing street in front of approaching truck as act of ordinary prudent person to look in direction from which danger was to be anticipated.

7. Automobiles ⚷217(5)—Pedestrian killed by truck while crossing street held contributorily negligent in failing to look, where view was unobstructed.

In action for death of pedestrian killed when struck by truck while crossing street, where it appeared that deceased had clear, unobstructed view in direction from whence truck approached for 150 to 200 feet, and that truck's lights were on, *held* that deceased was contributorily negligent.

8. Automobiles ⚷226(2)—That truck was driven at unlawful rate of speed did not preclude court from finding that pedestrian walking across street without looking was contributorily negligent.

In action for death of pedestrian killed when struck by truck, fact that truck might have been traveling at unlawful rate of speed, rendering driver guilty of negligence, would not preclude court from finding that pedestrian's own negligence in failing to look before crossing street was proximate cause of his death, barring recovery.

9. Automobiles ⚷217(6)—Pedestrian is not contributorily negligent because he attempts to cross street when automobile is approaching.

Pedestrian is not guilty of contributory negligence merely because he attempts to cross street when automobile is approaching.

10. Automobiles ⚷217(1)—Pedestrian may expect that persons operating automobiles on public street will operate them in manner and at speed customary at particular place.

Pedestrian has right to expect that persons operating automobiles on public street will operate them in manner and at speed customary at particular place.

11. Appeal and error ⚷1010(1)—Finding that pedestrian, killed while attempting to cross street in front of approaching truck, was contributorily negligent, supported by evidence, held conclusive on appeal.

Finding that pedestrian, killed while attempting to cross street in front of approaching truck, was guilty of contributory negligence, *held* conclusive on appellate court, where supported by evidence.

12. Automobiles ⚷245(49)—Negligence of truck driver in turning to avoid one pedestrian, thereby killing another, held question of fact for trial court.

In action for death of pedestrian killed while attempting to cross street in front of approaching truck, negligence of driver of truck in turning suddenly to left to avoid hitting another pedestrian, thereby striking deceased, *held* question of fact for trial court.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Ching Wing as administrator of the estate of Ching Wing Sing, deceased, against Frank Kishi for damages for death. Judgment for the defendant, and the plaintiff appeals. Affirmed.

Harry M. Irwin, of Los Angeles, for appellant.

J. Marion Wright, of Los Angeles, for respondent.

PRESTON, Presiding Justice pro tem. This is an appeal by plaintiff from a judgment in favor of defendant in an action for damages for the death of plaintiff's intestate, Ching Wing Sing.

Ching Wing Sing was killed at a street crossing in the city of Los Angeles by being struck by an automobile truck driven by defendant.

Plaintiff alleges that deceased was killed through the negligent and careless operation of said truck by defendant. Defendant denies any negligence on his part, and pleads in his answer, and contends that deceased came to his death by reason of his own negligence and carelessness.

The case was tried by the court sitting without a jury, and the court found that deceased met his death by reason of his own contributory negligence, and rendered judgment accordingly. Appellant contends that this finding is not supported by the evidence, and that the evidence shows that respondent was guilty of gross negligence, which caused the death of deceased.

[1, 2] The question of the contributory negligence of deceased, like that of the negligence of defendant, were questions of fact for the trial court to determine from all the evidence in the case. When the facts are clear and undisputed, and when no other inference than that of negligence, or contributory negligence, can be drawn from such facts, then, and only then, is the question of negligence or contributory negligence one of law. Moss v. H. R. Boynton Co., 44 Cal. App. 476, 186 P. 631; Fike v. San Joaquin Light & Power Co., 73 Cal. App. 712, 239 P. 344, and cases there cited.

[3-5] The law, of course, is also well es-

tablished that any finding of the trial court upon conflicting evidence is conclusive, and all reasonable inferences are to be indulged in support of such finding. Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Wilbur v. Wilbur, 197 Cal. 7, 239 P. 332. The burden is upon appellant, who claims error, to show its existence. When two or more inferences can be reasonably deduced from a certain state of facts or circumstances, a reviewing court is not permitted to substitute its deductions for those of the trial court. Wilbur v. Wilbur, supra.

When appellant contends, as he does in the case at bar, that any particular finding is not supported by the evidence, our power begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusions reached by the trial court. If, upon any material point, the testimony is in conflict, it must be assumed that the trial court resolved the conflict in favor of the prevailing party. Gjurich v. Fieg, 164 Cal. 429, 129 P. 464, Ann. Cas. 1916B, 111; Treadwell v. Nickel, supra. Therefore the sole question presented on this appeal is whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached by the trial court that deceased met his death through his own carelessness and negligence.

The accident occurred in the city of Los Angeles on March 11, 1924, at about the hour of 7 p. m. North Los Angeles street is a business street of the city of Los Angeles. The deceased attempted to cross from the east side of North Los Angeles street to the west side thereof at a regular pedestrian crossing. Another man was crossing just in front of him. Respondent was driving his Ford truck south on the west side of Los Angeles street. There was no other traffic on the street at that time, and the vision of the deceased was unobstructed between him and the approaching truck. Deceased, when he entered the street, did not look either to the right or to the left, but looked straight ahead, and, when he reached the center of Los Angeles street, he did not stop or look north, from which the traffic would come, but looked straight ahead, and continued on his course until he reached a point about five feet east of the west side of Los Angeles street, when he was struck by respondent's truck, and instantly killed. There is some evidence in the record that respondent was traveling at an unlawful rate of speed. Respondent testified that he did not see the deceased until he was within about five feet of him, and that he turned his car to avoid hitting the man in front of deceased, and, as he did, the deceased "jumped," as he expressed it, in front of his truck, and was struck.

The foregoing is only a brief summary of the evidence produced at the trial; it would serve no useful purpose to state it all in detail. We have, however, examined the entire record with care, and are satisfied that the trial court was warranted in finding that deceased was guilty of contributory negligence, which caused his death.

[6] It was the duty of the deceased, as the act of an ordinary prudent person, immediately before placing himself in a position of danger, to look in the direction from which danger was to be anticipated. This was a continuing duty, and would not have been met by looking once and then looking away. In the exercise of ordinary care, it was the duty of deceased, as well as it is the duty of every pedestrian, "to look to the right and to the left whenever he has voluntarily put himself in a position which may be one of peril, coming from either direction." Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A. L. R. 1493; Moss v. H. R. Boynton Co., supra; Straten v. Spencer, 52 Cal. App. 98, 197 P. 540; Davis v. Breuner Co., 167 Cal. 683, 140 P. 586; Lord v. Stacy, 68 Cal. App. 517, 229 P. 874.

[7] The evidence shows that for 150 feet to 200 feet the deceased had a clear and unobstructed view to the north from whence respondent's truck was approaching, and that its lights were on. He therefore could have seen the truck at all times if he had looked, and could have used ordinary care for his own protection. If he did not look, then it was contributory negligence on his part, as no man is permitted to cross a busy thoroughfare without looking both ways for vehicles and traffic which might be expected thereon.

[8] The mere fact, that respondent might have been traveling at an unlawful rate of speed and, therefore, guilty of negligence, would not preclude the court from finding that deceased's own negligence was the efficient and proximate cause of his death. In such a case, if the negligence of deceased directly contributed to his death, then appellant cannot recover. Davis v. Breuner Co., supra, and cases there cited; Lord v. Stacy, supra.

[9-11] We are not to be understood, however, as holding that a person is guilty of contributory negligence merely because he attempts to cross a street when an automobile is approaching. If that were so, he never could attempt to cross a street upon which automobiles are being operated; he has a right to expect that persons operating automobiles upon a public street will operate them in the manner and at the speed customary at the particular place. We think the following authorities sustain this position: Scott v. San Bernardino, etc., Co., 152 Cal. 604, 93 P. 677; Clark v. Bennett, 123 Cal. 275, 55 P. 908; Schneider v. Market Street Ry. Co., 134 Cal. 482, 66 P. 734; Erdevig v. Market Street Ry. Co. (Cal. Sup.) 264 P. 252. While the above authorities all deal with the right and duties of a pedestrian in crossing a city street in front of an approaching street car, still we think the same rule should gov-

ern in a case of a pedestrian crossing in front of an automobile. What we do hold is that whether deceased was guilty of contributory negligence in attempting to cross the street in front of respondent's approaching truck depends upon all the circumstances under which he acted, and the question is one of fact for the determination of the trial court. Its finding that deceased was guilty of contributory negligence finds support in the evidence, and is therefore binding upon this court.

[12] Appellant lays great stress upon the admission of respondent, on cross-examination, to the effect that he did not see the deceased until his truck struck him, and that he did not see the man in front of deceased until he was within about five feet of the "first man," and he then suddenly turned his truck to the left to avoid hitting the "first man," and, when he did so, he struck deceased.

Appellant contends that this shows gross negligence on the part of respondent. It is true that there is some contradiction in the testimony of respondent, but the amount of weight and credit to be given to the testimony of respondent was a question for the trial court, and whether respondent was guilty of negligence in suddenly turning his truck to the left was, likewise, a question of fact to be determined by the trial court in the light of all the other facts and circumstances revealed by the evidence.

We find no reason for disturbing the conclusions reached by the trial court.

The judgment is therefore affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

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92 Cal. App. 521

CREMER v. LITTLEJOHN et al. (Civ. 5140.)

District Court of Appeal, Second District, Division 1, California. June 13, 1928.

Executors and administrators ⟹132—Administratrix could not bind estate by implied consent to contract for repair of building without probate court's approval.

Administratrix could not bind estate by implied consent to contract between plaintiff and tenant for repair and alteration of building without approval of probate court, so that plaintiff could not enforce asserted mechanic's lien.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action for foreclosure of mechanic's lien by F. E. Cremer against Frances W. Littlejohn, formerly Frances M. Wilson, individually and as administratrix of the estate of Peter Wilson, deceased, and another. From the judgment, plaintiff appeals. Affirmed.

E. A. Klein, of Bakersfield, for appellant.

Rowen Irwin and Rollin Laird, both of Bakersfield, for respondents.

CONREY, P. J. From the record it appears that the real property against which the claim of lien is asserted formerly belonged to one Peter Wilson. Upon the death of Wilson his surviving wife, Frances M. Wilson (now Littlejohn), was appointed administratrix of the estate. While the estate was in course of administration the plaintiff and one Raymond Chow entered into an agreement for the repair and alteration of a certain building on said premises. We assume, as intimated by counsel, that Chow was a tenant of the premises. On the completion of the repairs made under the contract between plaintiff and Chow, plaintiff filed his claim of lien, and also presented to the administratrix his claim as a creditor of the estate, which claim was rejected. Thereupon he instituted this action in which, by his complaint, he alleged the foregoing facts, and alleged that during the times mentioned defendant Wilson, individually and as administratrix of said estate, was the owner of said land and building and had knowledge of such work, and that it inured to the benefit of such estate. It was stipulated that the allegations of the complaint are true; but the argument of counsel for appellant seems to admit, as evidently the fact was, that Mrs. Wilson's interest in the premises was only such interest as she acquired by reason of the fact that the property was community property and that she was the sole heir at law of her late husband, and that the property at the close of administration would be distributed to her as such heir if not required in satisfaction of the claims of creditors of the estate.

The court allowed personal judgment against the contracting party defendant Chow, but refused to recognize the plaintiff's claim of lien. It is from that part of the judgment refusing to enforce said asserted lien that the plaintiff appeals.

We think that the judgment was correct. There is no pleading or proof that the contract was ever submitted to the probate court for approval. In San Francisco Paving Co. v. Fairfield, 134 Cal. 220, 66 P. 255, the Supreme Court declared that it is not within the power of an executor without an order of the court to make a contract which would give a right to file liens on estate property. As recently as last year the Supreme Court (in a decision wherein, however, it must be admitted that the question did not directly arise) referred with apparent approval to San Francisco Paving Co. v. Fairfield, supra, and other decisions covering the same point. Mailhebuau v. Russ Bldg. Co. (Cal. Sup.) 258 P. 378. If the administratrix could not bind the estate by direct contract without approval by the court, of course she could not do so by any implied consent.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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92 Cal. App. 501

CITY OF LOS ANGELES v. DARMS et al.

WARDEN v. DANZIGER.

(Civ. 6339.)

District Court of Appeal, First District, Division 2, California. June 12, 1928.

1. Eminent domain 🔑158—Court in condemnation proceedings had jurisdiction to try title to entire parcel damaged by reason of taking portion thereof (Code Civ. Proc. § 1247).

Under Code Civ. Proc. § 1247, court in condemnation proceedings had jurisdiction to determine title to entire parcel of land, a portion of which was involved in condemnation proceedings, where different parties filed answer claiming ownership to entire parcel, and it became necessary under evidence to determine conflicting claims, because of finding that damages should be allowed for entire parcel for portion taken.

2. Appeal and error 🔑1039(1)—Judgment will not be reversed for defect in pleading, unless error results in miscarriage of justice.

Where a cause is tried without objection to sufficiency of pleadings, both parties assuming that the issues have been properly pleaded, judgment will not be reversed because of defect in pleading alone, unless error complained of is found to have resulted in a miscarriage of justice.

3. Municipal corporations 🔑550—Failure to comply with law requiring service of notice of sale for public improvement lien to be posted on premises held fatal (Deering's Gen. Laws, Act 8208, § 5, subd. (j).

Failure of holder of bond constituting a lien for public improvements to comply with Deering's Gen. Laws, Act 8208, § 5, subd. (j), requiring that notice be posted on the premises, *held* fatal to title claimed solely through deed issued under such statute.

4. Eminent domain 🔑262(5)—Failure of judgment quieting title against purchaser of bond constituting public improvement lien to require reimbursement did not require reversal under circumstances.

Failure of judgment in eminent domain proceedings, quieting title against purchaser of bond constituting a lien for public improvements to require reimbursement for purchase of bond, *held* not to require reversal, when issue was not raised in trial court, nor supported by any citation of evidence showing what was expended, or that such amount had not been repaid.

Appeal from Superior Court, Los Angeles County; Pearl E. Keeler, Judge.

Condemnation proceeding by the City of Los Angeles against Lida W. Darms, Grace P. Warden, Edith Wake Danziger, formerly Edith Wake Bishop, and others, wherein defendants Warden and Danziger filed adverse claims to portion of land. Judgment for plaintiff, awarding damages for taking of land and for defendant Danziger on issue as to title and defendant Warden appeals. Affirmed.

J. Everett Brown, of Los Angeles, for appellant.

Montgomery, Stick, Moerdyke & Gibson, of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued to condemn certain land for public purposes, a portion of which was claimed by defendants Warden and Danziger, the former as a purchaser of a bond which was a lien for public improvements, and the latter as owner by mesne conveyances. Judgment was in favor of the city, and, among other things, awarded damages for the taking of the land claimed by these two defendants in the sum of $353; damages to remainder of parcel by said taking, $94; and damages to improvements on the parcel, $252. By stipulation of counsel the issue as to the ownership of the land was specially set for trial, and special findings and judgment were made and entered, quieting the title to this parcel in defendant Danziger, subject to a lien thereon in favor of defendant Warden in the sum of $95.38. The defendant Warden has appealed on a typewritten record.

In her opening brief she advances two grounds for a reversal: That the court was without jurisdiction to try the issue of title to the entire parcel in a condemnation suit; and that the evidence does not support the finding that the party upon whom appellant served notice of sale was the occupant of the premises.

[1, 2] The first point is scarcely open to discussion on this appeal. Though the complaint of the city sought to condemn but a small portion of lot 4 (the property here in controversy), both appellant and defendant filed their answers, claiming ownership to the entire parcel. Under the evidence it became necessary for the court to determine these conflicting claims because it was found that damages should be allowed to the entire parcel for the portion taken. The jurisdiction of the court to hear and determine such conflicting claims is found in section 1247, Code of Civil Procedure. City of Los Angeles v. Pomeroy, 124 Cal. 597, 609, 57 P. 585. The fact that neither party filed a cross-complaint, or a traverse to the pleading of the other, is of no moment, as they stipulated before the hearing that the issue could be tried on the pleadings as they stood. Where a cause is tried without objection to the sufficiency of

the pleadings, both parties assuming that the issues have been properly pleaded, the judgment will not be reversed because of a defect in pleading alone, unless the error complained of is found to have resulted in a miscarriage of justice. Etienne v. Kendall (Cal. Sup.) 259 P. 752.

[3] The trial court found that the party upon whom appellant served notice of sale was not an occupant of the premises in dispute. The evidence is that the house rented to this party was located on an adjoining lot; that, though under a prior lease a garage located on lot 4 was rented with this house, this was not done when the house was rented on this occasion, but that the party served exercised no right of possession or occupancy of this garage, or any portion of the parcel in dispute. The property being unoccupied at the time, the statute under which the bond was issued (Deering's Gen. Laws, 8208, § 5, subd. (j) required that the notice be posted on the premises. This was not done. As appellant claimed solely through a deed issued under this statute, her failure to comply with these provisions resulted in a finding that she had no title.

[4] In her final brief appellant has raised for the first time the point that the judgment should have required respondent to reimburse appellant for her outlay in the purchase of the bond and that respondent's pleading is defective in that it fails to show a tender of this amount. This pleading was filed long before appellant's deed was recorded, and if appellant was entitled to any reimbursement she should have raised the issue in the trial court. The point is not supported by the citation of any evidence showing what appellant expended, or that she had not been repaid, and we are not required to search for error in the typewritten record, particularly in support of a point which is first raised in appellant's closing brief.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

92 Cal. App. 368

OSCAR KRENZ COPPER & BRASS WORKS, Inc., v. SHAMGOCHIAN et ux. *

(Civ. 6075.)

District Court of Appeal, First District, Division 2, California. June 2, 1928.

Hearing Denied by Supreme Court July 30, 1928.

1. Fraudulent conveyances 🔑300(5)—Evidence held to sustain finding that deed from husband to wife was given to defraud creditors.

Evidence *held* to sustain finding that husband's deed to wife of factory property was given without valuable consideration for purpose of defrauding creditors when husband was in contemplation of insolvency, in suit by judgment creditor to set aside deed.

2. Fraudulent conveyances 🔑249—Two and one-half years delay of judgment creditor before suing to set aside judgment debtor's deed as fraudulent did not constitute laches, where no prejudice was shown.

Two and one-half years delay of creditor after recovering judgment before commencing suit to set aside conveyance from judgment debtor to his wife as fraudulent did not bar recovery on ground of laches, where laches was not apparent on face of pleading, and no prejudice to defendants was shown.

3. Equity 🔑88—Laches must be pleaded and proved, where not apparent on face of pleading.

Where laches is not apparent on the face of the pleading, it is a defense that must be pleaded and proved like any other issue of fact.

4. Equity 🔑87(2)—Delay for time less than period of limitation does not amount to laches, unless the other party is prejudiced.

Delay for time less than period of limitation does not amount to laches, unless it occasions, or may be presumed to occasion, prejudice to other party.

5. Fraudulent conveyances 🔑310—Want of finding, in fact warranted by evidence, that wife participated in fraud, held not to preclude relief.

Evidence in creditor's suit to set aside conveyance from judgment debtor to wife as fraudulent sustained plaintiff's recovery, on ground that conveyance was without consideration and void as to the wife, notwithstanding failure of trial court to find that wife actually participated in fraud with full knowledge of circumstances.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Suit by the Oscar Krenz Copper & Brass Works, Inc., against M. G. Shamgochian, otherwise known as M. G. Zamgochian, also known as Maridos Shamgochian, also known as Madiros Zamgochian or M. Shamgochian, and wife, to set aside a deed to certain real property. Judgment for plaintiff, and defendants appeal. Affirmed.

Carl E. Lindsay and Lindsay & Conley, all of Fresno, for appellants.

E. A. Douthitt and Dudley D. Sales, both of San Francisco, and Theodore M. Stuart, of Fresno, for respondent.

NOURSE, J. Plaintiff sued the defendants as husband and wife to set aside as fraudulent the deed of the husband to his wife of certain real property in Fresno county Plaintiff had judgment, from which the defendants have appealed on a typewritten transcript.

In the early part of 1918 the defendant husband erected a factory at Manteca in which he installed certain machinery which

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★Hearing denied by Supreme Court.

he had purchased from plaintiff under a written contract under which he agreed to keep the machinery insured against fire. As an inducement for this contract this defendant then represented that he was the sole owner of the real property in suit and that it was clear of all indebtedness. The Manteca plant was destroyed by fire in 1918 and soon thereafter this defendant was arrested and charged with arson. Pending trial of the charge, and on August 28, 1918, this defendant voluntarily conveyed to his wife the property in suit, consisting of 58 acres of vineyard land of the estimated value of $60,000. In March, 1919, this defendant was tried and acquitted of the charge of arson and in August of the same year the insurance companies paid him $27,554.68 for the loss sustained in the fire, the adjustment having been made by a broker employed by this defendant immediately after the fire and given full authority by him to deal with his numerous creditors. This agent, with the sanction of this defendant, assured these creditors that their claims would be paid from the moneys received from the insurance, but, when this defendant received the moneys, he failed to make payment. In a suit upon the claim judgment was had by the plaintiff herein for the full amount of its claim and execution thereon was returned in the sum of $8.78, which was credited on the judgment.

[1] At the time of the execution of the deed to the property in suit the liabilities of the husband far exceeded his assets other than this particular property. There was no consideration for the transfer other than an indebtedness claimed to be owing the wife which defendants claim to have been $9,250. The net annual income from the property was estimated to be $9,000. The two defendants continued to live upon the property after the transfer; the wife claiming that she paid her husband $700 a year for his services in caring for the property.

The trial court found that the deed was voluntarily given, without valuable consideration, at a time when the husband was in contemplation of insolvency and with the purpose of defrauding his creditors; that by this conveyance he rendered himself insolvent; and that plaintiff was not barred by laches.

On this appeal the burden of appellant's attack is that these findings of the trial court are not sustained by the evidence. Though the appeal is presented on a typewritten transcript, the appellants have not printed the findings attacked or the evidence upon which they were made, as required by section 953c, Code of Civil Procedure. Estate of Berry, 195 Cal. 356, 358, 233 P. 330. The respondent has come to their assistance to some extent, printing some evidence in support of the findings attacked. The appellants told a fanciful tale of how the wife, a girl of 15 years, came from Armenia in 1907 with $3,000 in Turkish gold, which she carried on her person, of how she met and married her codefendant at Ellis Island, N. Y., and joined him in his tailoring shop near Boston, where she earned and saved some $4,800 in a period of four years. The stories of the investments of these moneys and of the purported assignment of a mortgage to her brother-in-law in 1918, which was shown from the records of the county recorder to have been fully satisfied and canceled in 1914, are of such a character that the trial court was fully justified in rejecting the appellants' testimony. We do not deem it necessary to copy into this opinion the conflicting testimony merely to say that it supports the findings. We are satisfied that the evidence and the inferences applicable fully support every finding under attack.

[2-4] It is argued that the action of respondent is barred by laches because it was not commenced until about 2½ years following the judgment on the machinery contract. Where, as here, laches is not apparent on the face of the pleading, it is a defense which must be pleaded and proved like any other issue of fact. "Delay for a time less than the period of limitation does not amount to laches, unless it occasions, or may be presumed to occasion, wrong or prejudice to the other party." Cohen v. Cohen, 150 Cal. 99, 105, 88 P. 267, 270 (11 Ann. Cas. 520). Appellants have failed to show any error here.

[5] It is argued that the conveyance is good as to the wife, even though made by her husband in contemplation of his insolvency. The argument is based upon the claim that the wife was a "bona fide" creditor of her husband and that the conveyance was made for a valuable consideration. It means little that the trial court did not find that the wife actually participated in the fraud with full knowledge of the circumstances. If the issue had been raised in that form, the finding would have of necessity been adverse to appellants. The trial court could well have found under the evidence that all the claims of indebtedness made by the wife were purely fictitious and that the conveyance was wholly without consideration.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

92 Cal. App. 793

PREMIER MACHINERY CO. (a Corporation), Plaintiff and Respondent, v. M. G. SHAMGOCHIAN, Otherwise Known as M. G. Zamgochian, Also Known as Maridos Shamgochian, Also Known as Madiros Zamgochian or M. Shamgochian and Sarah Shamgochian (His Wife), Defendants and Appellants.
(Civ. 6075.)

District Court of Appeal, First District, Division 2, California. June 2, 1928.

Appeal by defendants from a judgment of the Superior Court of Fresno County, S. L. Strother, Judge, in an action to set aside deed to certain real property. Affirmed.

Carl E. Lindsay and Lindsay & Conley, all of Fresno, for appellants.

E. A. Douthitt and Dudley D. Sales, both of San Francisco, and Theodore M. Stuart, of Fresno, for respondent.

PER CURIAM. On authority of Oscar Krenz Copper & Brass Works, Inc., a Corporation, v. M. G. Shamgochian et al. (No. 6075) 268 P. 488, the judgment is affirmed.

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92 Cal. App. 457

CHARLES BROWN & SONS v. WHITE LUNCH CO. (Civ. 6267.)

District Court of Appeal, First District, Division 1, California. June 9, 1928.

1. Contracts 🔑10(4)—Contract providing that, if hardware company bought stock in restaurant, it would buy supplies from company, lacked mutuality so far as executory.

Where hardware company contracted to purchase stock in restaurant providing that restaurant would purchase supplies from it, and hardware company was left free to terminate contract at will at any time and under no obligation to supply any goods to restaurant for any price at any time, *held* that contract, so far as it remained executory, was not binding for want of mutuality.

2. Sales 🔑1(3, 4)—Contract to purchase supplies from hardware company held unenforceable for uncertainty as to price and subject-matter.

Where hardware company contracted to buy stock in restaurant in consideration for restaurant's buying supplies from it, and goods to be ordered were not specified, no price fixed, or any standard agreed upon by which price could be fixed so that restaurant's liability could be determined in event of breach, *held* that such contract was unenforceable as indefinite and uncertain.

3. Contracts 🔑249—Unenforceable contract could not be rescinded.

In action to rescind contract between hardware company and restaurant, whereby hardware company agreed to purchase stock in restaurant in consideration for its promise to buy supplies from hardware company, because, after change in management, restaurant bought supplies in open market, *held* that, contract being unenforceable, there could be no rescission.

4. Sales 🔑106—Hardware company held precluded by laches from rescinding contract with restaurant, where it delayed action about two years after notice of breach (Civ. Code, § 1691).

In action to rescind contract by which restaurant promised that, in consideration for hardware company's purchasing stock in restaurant, it would buy supplies from hardware company, where hardware company had notice of breach about two years before bringing action to rescind, *held* that it was precluded by laches under Civ. Code, § 1691, providing rescission must be prompt.

5. Evidence 🔑413—In action to rescind contract providing restaurant would purchase supplies from hardware company, testimony of prices of supplies held inadmissible.

In action to rescind contract by which restaurant agreed to purchase supplies from hardware company in consideration of its purchasing stock in restaurant, exclusion of testimony regarding prices of supplies *held* proper, since, when an agreement is reduced to writing, it is considered as containing all terms of contract.

Appeal from Superior Court, City and County of San Francisco; Stanley Murray, Judge.

Action by Charles Brown & Sons against the White Lunch Company for rescission of a contract to purchase stock and for return of the purchase price. From a judgment of nonsuit, the plaintiff appeals. Affirmed.

Vogelsang & Brown, of San Francisco (L. Seidenberg, of San Francisco, of counsel), for appellant.

R. G. Hudson and H. S. Young, both of San Francisco, for respondent.

CAMPBELL, Justice pro tem. This is an action brought for the rescission of a contract and the recovery of the purchase price of certain stock of the defendant corporation purchased by the plaintiff.

The plaintiff is a corporation engaged in the hardware business in the city of San Francisco, and the defendant corporation is engaged in operating a chain of restaurants. The contract between the parties, which plaintiff seeks to rescind, is evidenced by two letters, one from the defendant to plaintiff, and the other from plaintiff to defendant. The letters are as follows:

"April 11, 1922.

"Messrs. Chas. Brown & Sons, San Francisco, Calif.—We are pleased to confirm herewith your purchase of $5,000 of our 8% preferred stock, payment to be made at the rate of $500.00 monthly for ten consecutive months. You are to receive interest on your payments at the rate of 6% per annum. The stock will be issued to you as soon as the same is paid in full. In turn, we will purchase from you such of your wares that you can supply and which we are in need of; in other words, we intend to give you all of our business that we possibly can. We feel assured that our relationship with you will be very satisfactory.

"Yours very truly,
"White Lunch Company,
"Z. W. White, President."

"San Francisco, April 12th, 1922.

"White Lunch Co., 122 Kearny St., San Francisco, Calif.—Gentlemen: Attention Mr. Z. W. White, President. In keeping with yours of the 11th instant we are pleased to inclose you herewith our check for $500.00 as first payment covering our purchase of $5,000.00 on your 8% preferred stock, and in consideration of which purchase it has been mutually understood and agreed upon between us that we are to enjoy your future purchases on such of our wares that you may be in need of, and which we can supply. Thanking you in advance, we are pleased to remain,

"Yours very truly,
"Chas. Brown & Sons,
"Per M. M. Brown."

The stock mentioned in the foregoing letters was transferred to plaintiff and fully paid for. For several months after the date of the letters Z. W. White continued to be president of the defendant corporation, and during such time the defendant corporation purchased all of its supplies, which plaintiff could supply, from plaintiff. About August or September, 1922, the officers and management of defendant corporation changed, L. E. Foster becoming its president. Thereafter defendant purchased its supplies in the open market—some being purchased from plaintiff and the rest elsewhere. In August, 1924, plaintiff demanded compliance with the promise contained in the letter from defendant corporation, and Mr. Foster, as president of the corporation, denied the existence of any contract to purchase supplies from plaintiff. On September 4, 1924, plaintiff delivered to defendant a written notice of rescission of the contract, and tendered the 500 shares of preferred stock held by it, and demanded return of the purchase price. Defendant refused the tendered rescission and to rescind the contract, whereupon plaintiff, on September 5, 1924, instituted this action.

At the conclusion of plaintiff's case, the defendant moved for a nonsuit on the following grounds: First, that these letters in evidence did not constitute a valid and enforceable contract which a court of equity will recognize, sanction, and enforce. Second, that plaintiff has slept on its right for so long a period of time after knowing that the contract was being breached that it cannot now come into a court of equity and receive relief of the character it seeks at the hands of a court of equity; in other words, its claim is so stale that a court of equity will not recognize, sanction, and enforce it for them. And, third, that the contract is so vague and uncertain that a court of equity will not and has not the right to enforce it and give it its sanction; that it is uncertain as to whether or not Charles Brown & Sons would be bound to sell any goods at any price, or would be bound to sell any goods unless the terms offered by the defendant were satisfactory to the plaintiff; the contract is silent as to goods; it is silent as to terms of credit; it is silent as to any price which was to be paid for the goods; that it does not appear from the pleadings or from the evidence in this case that any specific goods were to have been purchased, or any price agreed upon, or any terms of credit. The court granted the motion for nonsuit, and from the judgment entered thereon plaintiff has appealed.

The contract for the purchase of the stock was fully executed, while the alleged contract as to the purchase of supplies was executory, the consideration for which was the previously executed contract for the purchase of the stock. The alleged executory contract is embodied in the following excerpts from the two letters: Defendant's offer, "In turn, we will purchase from you such wares that you can supply and which we are in need of; in other words, we intend to give you all of our business that we possibly can." Plaintiff's acceptance is as follows: "And in consideration of which purchase it has been mutually understood and agreed upon between us that we are to enjoy your future purchases on such of our wares that you may be in need of and which we can supply."

[1] It will be noted that the executory contract imposes no burdens, promises, or restrictions upon the plaintiff. It was free to terminate the contract at will at any time, and it imposed no obligation to supply any goods to defendant for any price or at any time. It appears, therefore, that there exists no mutual obligation imposed by the writings, except as to the purchase of the stock by plaintiff, which was fully executed. Had plaintiff discontinued its business or refused to sell its wares to defendant, defendant would have been without a remedy. A contract which can be terminated at the will of one of the parties without liability for damages, so far as it remains executory, is not binding for want of mutuality. Fowler Utilities Co. v. Gray, 168 Ind. 1, 79 N. E. 897, 7 L. R. A. (N. S.) 726, 120 Am. St. Rep. 344.

[2, 3] The promise made by defendant was a promise to enter into future contracts for the purchase of supplies from plaintiff, which defendant might from time to time be in need of, and which plaintiff could supply. No goods to be ordered are specified, no price fixed, or any standard agreed upon by which the price would be fixed so that defendant's liability could be determined in the event of a breach by it of the contract. "Unless an agreement to make a future contract is definite and certain upon the subjects to be embraced therein, it is nugatory. Consequently, the acceptance of a proposition to make a

contract, the terms of which are to be subsequently fixed, does not constitute a binding obligation. The reason for this rule is that there would be no way by which the court could determine what sort of a contract the negotiations would result in; no rule by which the court could ascertain what damages, if any, might follow a refusal to enter into such future contract on the arrival of the time specified." 1 Elliott on Contracts, § 175. Only a valid and binding contract may be rescinded. "Loosely the term 'rescission' has been employed in a wide and generic sense. But it is not properly applicable to the undoing of anything except that which has been the subject of mutual agreement. * * * Again, before there can be any 'rescission,' properly so called, there must be a contract completely formed and in force, or at least provisionally binding on the parties." 1 Black on Rescission and Cancellation, 6. If the facts establish the nonexistence of the alleged contract sought to be rescinded, in that there was no meeting of minds, there can, of course, be no rescission. Hardison v. Davis, 131 Cal. 635, 63 P. 1005. In Jules Levy & Bro. v. A. Mautz & Co., 16 Cal. App. 666, 669, 117 P. 936, 937, the court says:

> "It is elementary in law that a contract of sale must be certain as to the thing sold and designate the price to be paid for it (Civ. Code, § 1729); and it is well settled that if an executory contract of sale is uncertain and incapable of being made certain in the essential particular of the price to be paid for the thing sold, neither of the parties can be held to its terms nor recover damages for its breach [citing authorities]. It is true, generally, that where no price is fixed in a contract for the sale of a commodity, the law, upon a delivery and acceptance of the thing sold, implies an understanding between the parties that a reasonable price is to be paid, and in such a case the contract will be deemed to be executed. * * * In the case at bar the prices to be paid for the goods which were to be purchased yearly by the defendant, for a period of five years, as well as the terms and conditions upon which the sales of said goods and merchandise were to be made, were not specified in the contract, but were, as indicated by the contract and the findings of the court below, to be ascertained and fixed from time to time by the future agreement of the parties. The due execution of a contract requires the assent of at least two minds to each and all of the essentials of the agreement; and it is only upon evidence of such assent that the law enforces the terms of a contract or gives a remedy for a breach of it."

See, also, Los Angeles Immigration Assn. v. Phillips, 56 Cal. 539; Breckinridge v. Crocker, 78 Cal. 529, 21 P. 179; 1 Elliott on Contracts, § 181.

The cases of Dickerman v. Ohashi Importing Co., 63 Cal. App. 101, 218 P. 458, and S. F. Bowser & Co. v. Marks, 96 Ark. 113, 131 S. W. 334, 32 L. R. A. (N. S.) 429, Ann. Cas. 1912B, 357, cited by appellant, in which it is said that, where the contract does not determine the amount of the consideration, the consideration must be what the goods are reasonably worth, are distinguishable from the present case, as in those cases the contract was for the purchase of a single commodity.

The only deduction that can be drawn from the failure of the correspondence to mention prices is that such prices were to be fixed by subsequent agreement when the goods were ordered. The testimony of Bernard C. Brown, president of the plaintiff corporation, and George W. Meierdierks, manager of the hotel and restaurant department of plaintiff corporation, confirms this. The former testified:

> "We asked him why he was not buying the goods from us. He said he could buy his glasses for less than we were offering them, and I told him that we would give him some prices from the East and also out of stock; that stock prices had one price and import had another, so we didn't have to handle them."

And the latter testified:

> "Q. How did you know that Mr. Russell had given an order for tumblers? A. Because he had taken the matter up with me and wanted to know in regard to what I could supply him this particular tumbler for."

[4] Furthermore, even though the letters constitute a binding contract, plaintiff would be precluded through laches from rescinding it, as the record shows that defendant purchased its supplies in the open market from October, 1922, until the commencement of the action on September 5, 1924. This was a breach of the claimed contract of which plaintiff had notice, as the testimony of Meierdierks, the manager of the department having charge of selling and supplying the goods to defendant, shows he had knowledge of the breach as early as January, 1923. Plaintiff therefore did not act with promptness in effecting a rescission. "To take advantage of this remedy he must act immediately when he discovers the facts that entitle him to rescind and he is aware of his right to rescission." Maginess v. Western Securities Corp., 38 Cal. App. 56, 175 P. 277; Civ. Code, § 1691.

[5] There is likewise no merit in appellant's contention that the court erred in excluding testimony as to conversations had regarding prices before the letters constituting the alleged contract were written. The judgment would not have been affected by such testimony, if admitted; moreover, the statement of counsel as to the purpose for which the testimony was offered shows that it was intended to prove some agreement as to price. As the writings constituting the contract were silent in this respect, the evidence was not admissible. As is said in Baume v. Morse, 13 Cal. App. 456, 458, 110 P. 350:

"No purchase price is named therein, and the description given is not sufficiently definite to justify a court of equity in enforcing the conveyance of any property. The offer to supply the other alleged terms of the contract by parol was properly denied by the trial court. * * * When an agreement is reduced to writing, the writing is to be considered as containing all the terms of the contract, and no other evidence of the terms of the agreement will be admitted."

We think the motion for nonsuit was properly granted, and the judgment is therefore affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

204 Cal. 446

HURTADO v. SAN DIEGO ELECTRIC RY. CO. et al. (L. A. 9431.)

Supreme Court of California. June 26, 1928.

1. Appeal and error 🔑1046(5)—Remark of court that evidence probably pertained to important matter, if error, held not to require reversal.

Error, if any, of trial court in allowing question in making remark that "it is probably an important matter," *held* not to require reversal, where defendants merely excepted, neither assigning remark as misconduct nor making any request for withdrawal, nor asking for any instruction to disregard.

2. Master and servant 🔑109—Employee, on truck carrying employees to and from work, held invitee as regards employer's liability for collision between truck and street car.

Plaintiff, as an employee of company, which was accustomed to transport employees to and from work on its trucks, *held* an invitee as regards liability of company for injuries received in collision between truck and street car.

3. Master and servant 🔑109—Employee on truck as invitee was entitled to use of reasonable care to avoid collision with street car.

Employee as invitee on truck colliding with street car was entitled to use of reasonable care on part of employer and its agent in operation of such truck to avoid the collision.

4. Trial 🔑133(6)—Misconduct of counsel in questioning juror as to codefendant's connection with insurance company held not reversible in view of court's instruction to disregard.

Misconduct of one defendant's counsel in questioning juror as to codefendant's connection with certain insurance company, implying that such company was an insurer of defendant, *held* not to require reversal, where trial court sustained objection, rebuked counsel, and instructed jury to disregard question.

Department 2.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Antonio R. Hurtado against the San Diego Electric Railway Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Jennings & Belcher, of Los Angeles, for appellant San Diego Gas & Electric Co.

Read G. Dilworth, of Coronado, V. F. Bennett, of San Diego, and Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for San Diego Electric Ry. Co.

Jas. E. O'Keefe and C. H. Van Winkle, both of San Diego, for respondent.

RICHARDS, J. This action was instituted by the plaintiff to recover damages from the two corporations, defendants, for personal injuries sustained by him on August 13, 1924, as a result of a collision between a truck of the defendant San Diego Consolidated Gas & Electric Company, of which corporation plaintiff was an employee, and upon which truck he was riding, and a street car operated by and on behalf of the San Diego Electric Railway Company upon and along certain streets in the city of San Diego. The trial of the action before a jury resulted in a verdict in favor of the plaintiff and against both defendants in the sum of $3,000, for which sum judgment was rendered and entered by the trial court. The defendants had appeared separately, and the contest before the trial court took the form of a three-cornered contest, wherein the plaintiff sought a verdict against each of the defendants, and wherein the defendants were in some aspects of the trial united in an endeavor to defeat the plaintiff's claim, and in other aspects of the trial were divided, each attempting to fix responsibility upon the other for the accident, or, in so far as the railway company was concerned, in an effort on its part to show that if it was to be held responsible, its codefendant was also jointly liable. The defendants separately made motions for a new trial, each of which was denied, and they have both perfected appeals, which by stipulation of all parties are presented in a single transcript on appeal.

[1] The first point upon appeal to be considered is that upon which the appellants agree in their assignments of error. One of the issues presented in the trial court was that of the seriousness of the plaintiff's injuries. The plaintiff having introduced his evidence touching that subject and having rested, the defendant gas and electric company placed upon the witness stand a witness named Ditommaso to testify with reference to the happening of the accident, in which he was also injured and taken to the same hospital to which the plaintiff, while unconscious from his injuries, had been carried. Upon cross-examination of this witness by plaintiff's counsel with relation to matters occurring at the hospital the witness was asked whether upon the morning following the accident the plaintiff was conscious or unconscious. Various objections were made to this question by both defendants, upon the ground that it was not proper cross-examination or proper rebuttal, and considerable argument ensued, at the conclusion of which the court allowed the question, and in so doing made the remark that while perhaps not proper rebuttal "it is probably an important matter, and I think it is within the discretion of the court to permit the testimony to be received." To the remark of the trial court that "it is probably an important matter," the defendants took exception and have assigned the remark of the court as misconduct and as prejudicial error. The objection to the offered evidence upon the ground that it was not proper cross-examination or proper rebuttal

may possibly have been a good objection, but the defendants do not urge in relation to the episode that objection, confining their assault to the merely casual and incidental remark of the court at the conclusion of the argument that "it is probably an important matter." It is not here contended that the matter to which the witness was permitted to testify was not an important matter, since it related to the length of time during which the plaintiff had remained unconscious after his injury. As such the plaintiff would have been entitled to make this proof as a part of his main case, and had he done so the jury would have been entitled to treat the evidence given as important. The force of the defendants' contention is expended upon the claim that this purely incidental remark of the court constituted a prejudicial interference with the functions of the jury in determining the importance to be given to this bit of evidence. The defendants at the time the remark of the court was made contented themselves with a mere exception, neither assigning it as misconduct nor making any request for its withdrawal, nor asking for an instruction to the jury to disregard it. For the foregoing reasons we are of the opinion that the error, if any, committed by the trial court, was not sufficiently prejudicial to justify a reversal of the case.

[2, 3] As to all other questions presented upon appeal the two appellants are in sharp disagreement, the appellant electric railway company uniting with the plaintiff in seeking to hold its codefendant jointly responsible with it for the plaintiff's injuries. The evidence in the case touching the occurrence of the collision is concededly sufficient to charge both defendants with some degree of negligence. It is the contention of the appellant gas and electric company, however, that the plaintiff, though one of its employees, and though riding upon one of its trucks at the time of the collision, was, in being upon its said truck, a mere licensee, and that hence as to him the degree of duty which it owed to its said employee as such mere licensee was too slight to justify its being held liable for the injuries which the plaintiff sustained by reason of the greater negligence of its codefendant which proximately caused the accident and the plaintiff's consequent injuries. The plaintiff and the appellant electric railway company unite in opposing this contention, and the facts of the case would seem sufficiently to sustain their view as to justify the trial court in charging the jury that if they found such facts to be true they should hold the defendant gas and electric company liable for the breach of the duty which it owed to the plaintiff as an invitee upon its truck at the time of the collision.

The facts with relation to this matter are these: The plaintiff was an employee of the appellant gas and electric company as a day laborer, in which capacity he had been in its employ for some time. The plaintiff's daily employment with the gas company began on each morning and ceased at 5 o'clock in the afternoon. The plaintiff, with other laborers of the gas company, was accustomed to ride from the plant of the corporation to the point where their daily work was to be done on one of its trucks which carried the tools and equipment for the day's work, and which regularly left the plant each morning carrying such of the laborers as lived near the plant or along the route, and at the close of the day left the place of work and carried its employees to or near to their respective homes. Such had been the regular custom in the use of said truck for a number of years, the company or its employees even going so far as to provide planks as seats for the use of its said employees in going to and from their work. Under such conditions we have no hesitation in holding that the plaintiff as an employee of said appellant gas and electric company was upon its said truck as an invitee at the time of the happening of the accident wherein he received his injuries, and that as such he was entitled to the use of reasonable care upon the part of his employer and its agent in the operation of said truck to avoid said collision. Said appellant concedes that if the plaintiff was such invitee the evidence of the negligence of its other employees, while meager, was probably sufficient to justify the jury in finding said appellant guilty of a degree of negligence which would render it liable with its codefendant for the plaintiff's injuries. We find no error, therefore, in the instructions of the court or in the finding of the jury in the foregoing regard.

[4] The next contention of the appellant gas and electric company is that the court committed as to it reversible error in refusing to declare a mistrial on account of certain alleged misconduct on the part of counsel for the railway company occurring during the examination of the jurors, the alleged misconduct consisting in a question asked of one of the jurors as to his connection with a certain insurance company, the implication of the question being that the said insurance company was an insurer of its codefendant the gas and electric company. The trial court promptly sustained an objection to the question, rebuked counsel for the railway company for his misconduct in asking it, and immediately and strongly charged the jury to disregard it. Under these conditions we are not disposed to hold, in the absence of any showing that the jury or any of its members disregarded the court's admonition, the misconduct of counsel for the railway company continued to be so prejudicial as to compel a reversal of the case.

The appellant gas and electric company makes the further contention that the trial court was in error in the giving of certain instructions which are set forth in detail in its brief. These instructions in the main relate to the question as to whether the plaintiff was an invitee or a mere licensee of said appellant at the time he received his injuries. Its codefendant joins with the plaintiff in the claim that the instructions of the trial court, both in the foregoing and in whatever other respects they are subjected to criticism, constitute when read as a whole a correct exposition of the law of the case. The instructions were very voluminous, as might well be expected from the three-cornered aspect of this controversy, and while instances may be found therein where the court did not in certain single instructions cover the entire situation to which such isolated instructions related, we are still of the opinion, upon a careful reading of the entire body of instructions, that the jury were not misled thereby to the prejudice of the appellant gas and electric company. The verdict of the jury was quite moderate in view of the extent and seriousness of the plaintiff's injuries; and while said injuries were not permanent, they were sufficiently severe and painful as to fully justify the jury's award, and to thus indicate that in making such award the jury was not materially influenced by the acts of misconduct and alleged errors of which the appellant gas and electric company complains.

The judgment is affirmed.

We concur: TYLER, Justice pro tem; SHENK, J.

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204 Cal. 454

GARRITY et al. v. MILLER et al.

(Sac. 4049.)

Supreme Court of California. June 28, 1928.

1. Equity ⟹219—Defense of laches may be raised by demurrer, where laches is apparent on face of complaint.

Defense that by reason of plaintiff's laches equitable relief may not be granted may be raised by demurrer, where laches is apparent on face of complaint.

2. Equity ⟹71(1)—Equity will not lend its aid in enforcement of stale demands.

Equity will not lend its aid in enforcement of stale demands, but will refuse to interfere where there has been gross laches in prosecuting rights, or where long acquiescence in assertion of adverse rights has occurred, especially where principal participants in transactions have died.

3. Trusts ⟹365(2)—Suit to enforce trust approximately 55 years subsequent to its inception, where all parties to original transaction were dead, held barred by laches.

Suit to enforce trust, commenced approximately 55 years subsequent to its alleged inception, where alleged trustees died many years after creation of alleged trust, and alleged original beneficiary died about 48 years subsequent to its alleged creation, and court could only arrive at respective rights of parties by going into an investigation of particulars of purchases and sales of property covering period in excess of 55 years, *held* barred by laches.

Department 2.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action to establish a trust by Thomas Garrity and another against Frank M. Miller, as administrator of the estate of Henry Jacob, deceased, and others. From a judgment of dismissal, after sustaining a demurrer without leave to amend, plaintiffs appeal. Affirmed.

Fern Rosenheim and Emma Tofanelli, both of San Francisco, for appellants.

H. R. Given, of Weaverville, for respondents.

SHENK, J. This is an appeal from a judgment of dismissal, after order made sustaining, without leave to amend, a demurrer to the second amended complaint. The plaintiffs are the sons and sole heirs of Elisa Jacob, deceased. By their complaint they sought the entry of a decree impressing a trust upon certain described real property, situate in Trinity county, title to which appeared in the names of Henry and John Jacob at the time of their respective deaths.

[1] The respondent Miller as administrator of the estate of each of said persons, interposed a demurrer, specifying, among other grounds, that the complaint fails to state a cause of action, and that by reason of plaintiffs' laches equitable relief may not be granted. That this defense may be raised by demurrer, where laches is apparent upon the face of the complaint, is now well settled in this state. Kleinclaus v. Dutard, 147 Cal. 245, 250, 81 P. 516; Wadleigh v. Phelps, 149 Cal. 627, 633, 87 P. 93; Marsh v. Lott, 156 Cal. 643, 646, 105 P. 968; Ewald v. Kierulff, 175 Cal. 363, 365, 165 P. 942; Hopkins v. Lewis, 18 Cal. App. 107, 113, 122 P. 433.

The action was commenced on January 20, 1920, and the second amended complaint, thereafter filed, sets forth a series of transactions covering a period of years extending from October 12, 1865, to November 28, 1918. It is therein averred, in substance, that on October 12, 1865, the mother of the plaintiffs, Elisa Jacob, deceased, intermarried with Barthel Jacob, deceased, a brother of Henry and John Jacob; that the marital status continued until May 28, 1891, at which time Barthel Jacob passed away. Elisa Jacob died on March 4, 1913. Proceeding, the complaint alleges that at the time of said marriage Elisa Jacob possessed in her own right certain described water rights and mining claims, patented and unpatented, situate in Trinity county; that Barthel Jacob and his brothers owned no property, and were without independent means at that time; that shortly after her marriage, and upon the representations of her husband and his brothers, Henry and John, Elisa Jacob transferred and conveyed, without consideration, to Henry Jacob all of her right, title, and interest in and to certain designated water rights; that the latter in turn, and in accordance with the agreement of the parties, conveyed said water rights to Barthel Jacob, husband of Elisa; that such transfers, though absolute in form, were understood by the parties to be upon trust for the benefit of Elisa Jacob; that continuously during the existence of the marital state Elisa Jacob permitted her husband to have full management and control of her separate property, all, however, for her asserted benefit; that in the year 1883 Barthel Jacob with the rents, issues, and profits of said separate property of Elisa Jacob purchased in his own name various other described water rights, promising that he would hold the properties in his name for her benefit; that from 1865 to 1891 Barthel Jacob, alone or in conjunction with his brothers, used and controlled all of said separate property and the additions thereto under the agreement to hold the same in trust for Elisa Jacob; that he undertook to and did perfect in his own name, but upon trust for Eliza Jacob, a patent to the "Garrity claim," which was thereafter designated and known as the "Barthel Jacob gold placer mining claim"; that on September 21, 1887, Barthel Jacob conveyed by deed to Henry and John Jacob the said mining claim; that the grantees gave no consideration therefor, and took the same with knowledge that the beneficial ownership was in Elisa Jacob; that with the rents, issues, and profits derived from said claim, and from the water rights theretofore transferred by Elisa Jacob, the Patterson and Low Bar mining claims were acquired, perfected, and developed by and in the names of Barthel and John Jacob; that on September 21, 1887, Barthel conveyed, without consideration, his interest therein to Henry Jacob, who took with full knowledge of Elisa Jacob's beneficial interest; that the Henry Jacob placer mine was likewise so acquired, the patent thereto issuing to Henry and Barthel Jacob; that the patentees thereafter conveyed and reconveyed certain interests therein to each other, all with the alleged consent of Elisa Jacob; that all of the property acquired by the three Jacob brothers in Trinity county was obtained through and by the use of Elisa Jacob's separate property, and the rents, issues, and profits therefrom and under the agreement to hold the whole thereof, together with the additions thereto, in trust, for the benefit of said Elisa Jacob; that in the year 1900, and at divers other times subsequent to the death of Barthel Jacob, Henry and John Jacob assured Elisa Jacob, in the presence of the plaintiffs, that she would receive the proceeds from the sale of any of said properties, and in the event said properties were not sold they would, by testamentary devise, appropriately transfer said properties to her; that subsequent to the death of Eliza Jacob similar assurances and promises were made to the plaintiffs; that Henry and John Jacob died intestate on June 2, 1917, and August 20, 1918, respectively; that on November 28, 1918, plaintiffs filed in the estate of John Jacob written protests and objections to the letting of the mining claims above referred to; that the estate of Barthel Jacob has never been probated; that the inventory and appraisement filed in the estate of Henry Jacob listed as assets of said estate certain specified interests in and to each of the properties above enumerated; that a similar claim of ownership was made in the petition for letters of administration filed in the estate of John Jacob; that, unless the equitable title of plaintiffs to the properties standing in the names of Henry and John Jacob be established by a decree of court, the plaintiffs will be deprived of their rightful inheritance. Substantially the same averments appear in the second count of the complaint; it being added, however, that the false and fraudulent representations of Barthel Jacob and his brothers served to induce Elisa Jacob to originally transfer away her separate property.

[2] In our opinion the foregoing allegations, taken in substance from the second amended complaint, show on their face such laches as will justify a court of equity refusing to enter upon an inquiry of the merits of the plaintiffs' claim. It is well settled that from considerations of public policy equity will not lend its aid in the enforcement of stale demands. The peace and convenience of society require that such demands be not encouraged. Emerson v. Kennedy Min. & Mill. Co., 169 Cal. 718, 723, 147 P. 939. This principle is well stated in Hammond v. Hopkins, 143 U. S. 224, 250, 12 S. Ct. 418, 427 (36 L. Ed. 134), where it is declared:

> "No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there have been gross laches in proscuting rights, or where long acquiescence in the assertion of adverse rights has occurred. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible."

Harrison v. Gibson, 23 Grat. (Va.) 212, 223, states that:

> "If, from the delay which has taken place, it is manifest that no correct account can be rendered, that any conclusion to which the court can arrive must at best be conjectural, and that the original transactions have become so obscured by time and the loss of evidence and the death of parties as to render it difficult to do justice, the court will not relieve the plaintiff. If, under the circumstances of the case, it is too late to ascertain the merits of the controversy, the court will not interfere, whatever may have been the original justice of the claim."

The doctrine has long since been recognized in this state, the leading case upon the subject being that of Kleinclaus v. Dutard, supra, which parallels in all material respects the present case. It was said in that case:

> "Following the maxim that equity aids the vigilant and not those who slumber on their rights, it has been universally declared that only conscience, good faith, and reasonable diligence can call a court of equity into activity, and that, entirely independent of any statutory period of limitations, stale demands will not be aided where the claimant has slept upon his rights for so long a time and under such circumstances as to make it inequitable to enter upon an inquiry as to the validity thereof. Where such is the condition, the demand is, in a court of equity, barred by laches. * * * Where the lapse of time in the assertion of the claim and the enforcement thereof, taken in connection with the circumstances disclosed, are such as to show inexcusable delay on the part of the claimant, considerations of public policy, and the difficulty of doing entire justice obtain, and are often sufficient to warrant a court of equity in declining, upon the ground of laches, to commence an investigation."

To the same effect, see Fleming v. Shay, 19 Cal. App. 276, 278, 125 P. 761; Elliott v. Clark, 5 Cal. App. 8, 10, 89 P. 455; Elliott v. Bunce, 10 Cal. App. 741, 744, 193 P. 897; Emerson v. Kennedy Min. & Mill. Co., supra. In the latter case it was declared:

> "The authorities support the proposition that lapse of time may be a good defense in equity, independently of any statute of limitations, and they show that the doctrine rests not alone upon laches; it is often put upon one or all of the following grounds, namely: First, that courts of equity must, for the peace of society and upon grounds of public policy, discourage stale demands by refusing to entertain them; second, that lapse of time will, if long enough, be regarded as evidence against the stale claim equal to that of credible witnesses, and which, being disregarded, would in a majority of cases lead to unjust judgments; third, that, after the witnesses who had personal knowledge of the facts have all passed away, it is impossible to ascertain the facts, and courts of equity will, on this ground, refuse to undertake such a task."

[3] In the present case the Jacob brothers, over a long period of years, dealt with the property in dispute as absolute owners. They developed and perfected the mining claims and water rights in their own names. They invested and reinvested the rents, issues, and profits therefrom in their own names and as they deemed best. They transferred the property so acquired, or interests therein, from one to another, without ever recognizing any other person as having an interest therein. They apparently kept no accounts and rendered none to any one. The alleged trustees died many years after the creation of the alleged trust, and the alleged original beneficiary, Elisa Jacob, died about 48 years subsequent to its alleged creation. This action to enforce the trust was commenced approximately 55 years subsequent to its alleged inception. From the whole complaint it is apparent that the court could only arrive at the respective rights of the parties by going into an investigation of the particulars of purchases and sales of property covering a period in excess of 55 years. All the parties to the original transaction, out of which plaintiffs' alleged claim arose, being dead, it is manifest that it would be practically impossible for a court at this late day to do justice as between the parties.

We conclude, therefore, that the trial court was justified in rendering the judgment of dismissal. We have examined the authorities cited by the plaintiffs, and find nothing therein that would warrant a different conclusion on the record before us.

The judgment is affirmed.

We concur: RICHARDS, J.; TYLER, Justice pro tem.

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204 Cal. 381

HUGILL v. KEENE et ux. (L. A. 9300.)

Supreme Court of California. June 19, 1928.

1. Equity 🔑87(2)—Mere delay in suing for less than period of limitation is not laches, in absence of prejudice.

Mere delay in bringing action for time less than period of limitation does not amount to laches, in absence of prejudice to opposite party.

2. Appeal and error 🔑991—Contracts 🔑270(2)—Whether defrauded party rescinded contract promptly depends on circumstances, and is primarily for trial court.

Whether defrauded party rescinded contract promptly depends on the circumstances of each particular case, and is a question primarily for the trial court.

3. Limitation of actions 🔑100(6)—Suit to rescind contract, instituted within three years after purchaser discovered falsity of vendor's representations, held not barred by limitations (Code Civ. Proc. § 338, subd. 4).

Where purchaser did not discover falsity of vendor's representations until after March 14,

1922, action for rescission of contract, instituted in 1924, within three-year period prescribed by Code Civ. Proc. § 338, subd. 4, was not barred by limitations.

Department 1.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Grace Leslie Hugill against A. M. Keene and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Dorsey & Campbell, of Bakersfield, for appellants.

Alfred Siemon, Paul F. Garber, and Siemon & Garber, all of Bakersfield, for respondent.

PRESTON, J. Appeal from judgment for plaintiff in an action to rescind the purchase of 10 acres of land upon the ground of fraud and misrepresentation, and to recover the purchase price of $1,000 paid therefor. The several contentions made by appellants involve only questions primarily for the trial court, and as, in our opinion, the evidence warrants no conclusion other than that reached by said court and amply supports the findings and judgment, our consideration of the case compels a resolution of all of said questions in favor of respondent.

Briefly, the facts, as shown and found, are: In 1919 defendant A. M. Keene sold plaintiff said property after she had been led to believe by false representations that it was of the character of land theretofore exhibited to her, located in an oil-producing field, and that it was situated in or near said oil field. Said defendant, in executing and recording the conveyance to plaintiff, knew that the property was located at least 5 miles from the land shown to her; that it was not oil producing, and that within 2½ miles thereof no oil had ever been discovered or exploration for oil development made. In 1922 said defendant paid plaintiff the sum of $151, falsely represented to be dividends under a trust agreement which plaintiff had also been induced to sign, transferring said property to a trust company for development and improvement purposes. In short, without further detailing the testimony, it shows clearly that, by various false and fraudulent representations, plaintiff was deceived and induced to pay said defendant the sum of $1,000 as a part of a scheme or plan to cheat and defraud her. Rescission of the entire transaction was thereafter attempted, but failed because of the attitude of said defendant, and this action was finally instituted in 1924.

Appellants' main attack is directed against the sufficiency of the evidence to support the findings and judgment, but such contention, as above stated, we find to be without merit, as the record contains competent evidence sufficient to support each and every finding made.

[1] Appellants urge also that the court failed to find upon the material issue of laches, and they likewise plead the statute of limitations. Upon the question of laches, the court specifically found "that, within a reasonable time after her discovery of the falsity of said representations and of the fraud and deceit that had been practiced upon her, * * * plaintiff notified defendant * * * that she rescinded said agreement of purchase. * * *" As conclusions of law, the court further found that plaintiff's rescission was made within a reasonable time after her discovery of the falsity of said representations, that she commenced her action within a reasonable time thereafter, and that her cause of action was not barred by the provisions of section 338, subd. 4, of the Code of Civil Procedure, or at all. Thus, not only did the court definitely find upon the issue of laches, but the record shows such findings to be justified. "Mere delay in bringing an action for a time less than the period of limitation does not amount to laches. There must be also present the element that the delay has been to the prejudice of the opposite party." Victor Oil Co. v. Drum, 184 Cal. 226, 242, 193 P. 243, 250. Here the court found that defendants suffered no prejudice on account of any delay of plaintiff in rescinding said agreement.

[2] Whether or not a defrauded party has rescinded promptly depends upon the circumstances of each particular case, and is a question primarily for the trial court. French v. Freeman, 191 Cal. 579, 589, 217 P. 515. "Whether or not the plaintiffs have been guilty of laches will have to be determined by the evidence adduced at the trial. Each case where laches is depended upon must rest upon its own facts. It is difficult to state as a general proposition what period will bar relief from consequences of fraud, and there is wide scope for the exercise of the discretion of the chancellor." Dufour v. Weissberger, 172 Cal. 223, 225, 155 P. 984, 985; 10 Cal. Jur. p. 526, par. 64; Newport v. Hatton, 195 Cal. 132, 147, 231 P. 987. No abuse of discretion by the trial court is shown in this case.

[3] Section 338, subd. 4, of the Code of Civil Procedure, provides a period of three years within which an action for relief on the ground of fraud or mistake shall be commenced, "the cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." Here the court found that the plaintiff did not discover the falsity of the representations which had been made to her by said defendant until after March 14, 1922. This action was instituted in 1924, well within the period prescribed by the statute; hence their plea of the statute of limitations cannot avail appellants.

Numberless authorities may be found upholding the conclusions reached herein, but the plain facts of this case speak for themselves, and we do not deem that the matter warrants further discussion.

The judgment is affirmed.

We concur: CURTIS, J.; SEAWELL, J.

COLEY v. HECKER et al. (Sac. 3992.)★

Supreme Court of California. June 20, 1928.

Hearing Granted in Bank July 19, 1928.

1. Appeal and error 🔑916(3)—Allegations of complaint must be taken as true on appeal from order denying demand for change of place of trial.

On appeal from order denying demand for change of place of trial, allegations of complaint must be taken as true.

2. Libel and slander 🔑139—Owner of slandered title may sue in county where realty is situated as involving determination of interest in property and injury to property (Code Civ. Proc. § 392).

Under Code Civ. Proc. § 392, owner of slandered title may bring action in county where real property is situated on theory that action is one in which determination of owner's right or interest therein is properly adjudicated, and since slander of title is injury to real property.

3. Venue 🔑5(4)—Venue of action to recover damages for filing judgment after obtaining stay bond on appeal and to remove lien created held properly brought in county of realty (Code Civ. Proc. §§ 392, 674).

Where defendant filed abstract of judgment after enforcement of judgment had been stayed by giving of undertaking on appeal prior to filing judgment which became lien on realty of plaintiff in county of realty under Code Civ. Proc. § 674, action for damages for slander of title by filing of judgment, essence of which was the removal of lien, was properly brought in county in which realty was situated under section 392.

4. Quieting title 🔑50—Damages for injury to realty held incident to action to remove cloud wrongfully cast on property by filing judgment after enforcement was stayed.

Damages for injury to real property are incident to action to remove cloud cast on plaintiff's property by filing of abstract of judgment, enforcement of which had been stayed by giving of undertaking on appeal prior to filing of judgment; damages being proximate result of alleged wrongful act.

5. Action 🔑53(1)—Action for damages for malicious conduct is not split because dual relief may be properly or improperly sought.

That damages are demanded for maliciously doing act from which injury is necessary consequence does not split action into separate causes of action merely because dual relief may be properly or improperly sought, especially in actions sounding in trespass.

6. Libel and slander 🔑130—"Slander of title" includes both spoken and written means by which right of property may be invaded.

Term "slander of title" includes both spoken and written means by which right of property may be invaded, and right of action exists, irrespective of means by which title is traduced.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Slander of Title.]

7. Libel and slander 🔑130—Property right may be invaded by language concerning it, and such language is actionable.

Right in property may be invaded by language concerning property, and, when invasion occurs, language which affects property is actionable.

8. Venue 🔑401(5)—"Injury to property," action for which may be brought in county in which property is situated, is not limited to physical injury to realty (Code Civ. Proc. § 392).

Under Code Civ. Proc. § 392, term "injury to property," action for which may be brought in county in which real property is located, is not limited to physical interference with or physical injury to real property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Injury to Property.]

9. Trespass 🔑10—Trespass to realty may be committed by indirect injuries as well as by direct and forcible injuries.

Trespass to realty may be committed by consequential and indirect injuries as well as by direct and forcible injuries.

10. Libel and slander 🔑130—Libel to property by malicious recording of judgment held continuing, permanent notice to world of judgment lien against property.

In action involving libel of title to property by malicious recording of abstract of judgment falsely asserting interest in property and decreasing its value, libel constituted continuing, permanent notice to world that judgment lien rested on property, and was communicated to entire purchasing public.

11. Libel and slander 🔑139—Petition for damages by malicious recording of judgment held to state action for slander of title and not abuse of process.

Petition to recover damages for malicious recording of abstract of judgment falsely asserting interest in property after enforcement of judgment had been stayed by giving undertaking on appeal *held* not to state action for abuse of process rather than slander of title, and did not require venue of action in county of defendant's residence rather than in county in which property was located.

Department 1.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by J. A. Coley against Barbara Hecker and another. From an order of the

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★Superseded by opinion 272 P. 1045.

Superior Court of San Joaquin County denying demand for change of place of trial, defendants appeal. Affirmed.

Dean Cunha, of San Francisco, for appellants.

George F. McNoble, Stanley M. Arndt, and McNoble & Arndt, all of Stockton, for respondent.

SEAWELL, J. This appeal is from an order denying the demand of appellants for a change of the place of trial from the county of San Joaquin, in which county the action was commenced, to the place of the residence of the respective appellants, to wit, the city and county of San Francisco. It is the contention of respondent that the action is one to remove a cloud upon his real property and for the determination of an interest in said real property, situate in said county of San Joaquin, and that the venue is, under the provisions of section 392, Code of Civil Procedure, where said real property is situated.

The only papers offered upon the hearing in support of the motion were the complaint and the demurrers of the respective appellants, general and special.

[1] In considering the appeal, the allegations of the complaint must be taken as true. The allegations of the complaint are to the effect that respondent was the owner of a large number of lots, pieces, and parcels of land situate in said county of San Joaquin; that on May 18, 1925, and while he was and continued to be such owner, one Barbara Hecker recovered in the superior court of the city and county of San Francisco a judgment in the sum of $12,925.73 and costs against him and his cosurety, J. L. Craig, upon an appeal bond jointly executed by them, with one Walter F. Hogan as principal. On May 19, 1925, respondent and said Craig took an appeal from said judgment by filing in the office of the county clerk of the city and county of San Francisco a notice of appeal, and entering into a written undertaking on appeal in the sum of $26,000 to stay the execution of said judgment with two sureties, and on said day notified appellants herein that said undertaking had been filed. On May 21, 1925, said appellants served upon respondent, J. A. Coley, and his cosurety, J. L. Craig, notice of exception to said sureties. Five days thereafter, to wit, May 26, 1925, said respondent, Coley, and Craig served upon appellants notice of justification of sureties, and filed said notice on the same day in the office of the county clerk of said city and county of San Francisco. The time therein fixed for justification was May 28, 1925. On the day last above mentioned one of the original sureties and a third person, who was substituted in place of the other original surety, appeared and justified before a judge of the superior court of said city and county of San Francisco upon a written undertaking, as required by law, in the sum of $300 for costs, and in more than double the amount named in said judgment, to wit, the sum of $26,000. Said undertaking was then and there, in the presence of Harry I. Stafford, the agent and attorney for appellant Barbara Hecker, regularly approved by said judge of the superior court. Said appellants were, on said May 28, 1925, regularly notified that said undertaking staying execution had been filed, and that said sureties had justified, and that said bond had been approved by said judge of the superior court.

It is next alleged that on the day following the filing of said stay bond, to wit, May 29, 1925, appellants, acting maliciously, and with the evil purpose of vexing and annoying respondent, and slandering the title to all lands owned by him in the county of San Joaquin, and clouding the title thereto, recorded in the office of the county recorder of San Joaquin county an abstract of judgment in said action, well knowing that said abstract of judgment was inoperative, and of no legal effect, by reason of the filing of said undertaking in said city and county of San Francisco, and that said appellants well knew said abstract of judgment, when filed by them, would be a cloud upon, and a slander against, all the lands owned, or which might thereafter be owned, by respondent situate in said county of San Joaquin. It is further alleged that the recordation of said abstract of judgment decreased the value of said real property and rendered it unmarketable to the damage of respondent in the sum of $26,000.

As an additional damage, respondent alleged that appellants, in recording said abstract of judgment, were moved by malice and a desire to oppress him, and as a penalty therefor he prayed for punitive and exemplary damages in the sum of $25,000. The prayer of the complaint is that appellants be required to set forth the nature of their claims; that it be decreed and adjudged that appellants have no interest or estate in said lands situate in San Joaquin county, and that respondent's title be decreed to be valid in all respects; that appellants be enjoined from asserting any title thereto adverse to respondent; that the recordation of said abstract of judgment recorded in the county of San Joaquin be canceled, and declared null and void, and for general relief.

The first and principal point presented by appellants is that, respondent having joined a real and personal action, to wit, an action to quiet title to real property with an action to recover for slander of title, did thereby lose his right to hold the case in the county where the real property was situate. This contention is based upon the claim that an action for the recovery of damages for slander of title sounds in personal action, and does not bring the venue within the purview of section 392, Code of Civil Procedure. Said section provides:

"Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated subject to the power of the court to change the place of trial, as provided in this code:

"1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property; * * *

"3. For the foreclosures of all liens and mortgages on real property."

[2, 3] We think the language of the section clearly justifies the construction that the owner of the slandered title is given the right to bring and maintain the action in the county where the real property is situated, upon the theory that the action is one in which the determination of the owner's right or interest therein is properly adjudicated, and for the additional reason that slander of title is an injury to real property. It is difficult to discern a single consideration which may be assigned as the legislative reason for the adoption of the Code section as to the venue of actions affecting the ownership of an interest in real property that may not with equal force be applied to actions to recover damages for injury for the false and malicious disparagement of the owner's title by another, a wrong which has by use become a recognized phase of the law known as "slander of title." By the filing of the abstract of judgment, duly certified by the county clerk of the city and county of San Francisco, said judgment became a lien upon all the real property of the respondent, not exempt from execution, situate in said county of San Joaquin. Section 674, Code Civ. Proc. The enforcement of the judgment had been stayed by the giving of an undertaking on appeal prior to the time said abstract of judgment was filed by appellants, a fact, according to the allegations of the complaint, well known to them, and which was not stated in said abstract of judgment. Prima facie a lien exceeding the sum of $26,000 at once fastened itself upon respondent's San Joaquin county real property. As another ground supporting the intention of the Legislature to cover by said section 392, supra, and fix the venue of all actions wherein title to real property may be affected, it is provided that an action to foreclose liens upon real property must be tried in the county in which the real property is situate. To remove the lien, which constitutes the essence of the injury complained against, the venue of the action would necessarily be in the county in which the real property affected thereby is situate.

[4, 5] Damages for injury to the real property are but an incident to the action to remove the cloud wrongfully cast upon respondent's real property by the filing of said abstract of judgment. It is the proximate result of an alleged wrongful act. The fact that damages are demanded for maliciously doing an act from which an injury is the necessary consequence does not split the action into two separate causes of action merely because dual relief may be properly or improperly sought. And this is especially true where the cause of action sounds in trespass. Gomez v. Reed et al., 178 Cal. 759, 174 P. 658.

[6, 7] The phrase "slander of title" is a figure of speech in which the title is personified. In the instant case, the phrase seems to be an anomaly as applied to a situation which, strictly speaking, is a libel upon the title, inasmuch as the damage was accomplished by the recordation of a written document, and no spoken words were uttered. However, the term "slander of title" includes both spoken and written means by which the right of property may be invaded and a right of action exists, irrespective of the means by which the title is traduced. This is so because a property right has been invaded—an injury to real property has been sustained. "Persons may have a right in or to a thing—the right of property—and this right may be invaded by language concerning the thing. When this invasion occurs, the language which affects a thing is actionable." Edwards v. Burris, 60 Cal. 157, and authorities cited; Fearon v. Fodera et al., 169 Cal. 370, 148 P. 200, Ann. Cas. 1916D, 312.

[8] It is appellants' contention that, by the term "injury to property," as used in section 392, supra, it was intended to include only physical interference with, or physical injury to, real property, such as waste, or some sort of physical trespass committed upon the lands, and that the term was not intended to be as broadly applied as its meaning would seem to imply. In addition to the construction which we feel constrained to place upon said section, and which is supported by the construction given to practically the same language by the Supreme Court of Louisiana in Labarre v. Burton-Swartz, etc., Co., 126 La. 982, 53 So. 113, to the effect that slander of title is an actual intrusion upon one's property, and is in the "nature of a trespass, a real action to protect title," our conclusion is further fortified by eminent authority holding that a libel written or published in disparagement of title is in the nature of an action of trespass on the case. "The term 'injury to real property' is in itself a wider and less technical term than 'trespass to real property.' As applied to questions of venue, it has been declared to embrace every wrong which in legal contemplation is an injury to real property, not only the direct and forcible injury, but consequental injuries, and threatened injuries to land, and even a mere nonfeasance, as permissive waste." 40 Cyc. 74; 17 R. C. L. 454.

[9] The trend of decisions of this court is generally in accord with the doctrine, whenever the question has come before it, that trespasses may be committed by consequen-

tial and indirect injuries as well as by direct and forcible injuries. Appellants cite Monk v. Ehret, 192 Cal. 186, 219 P. 452, as a case supporting by analogy the view that the term "injuries to real property" should be interpreted as affecting a physical injury to real property only. Monk v. Ehret had to do largely with "injuries to person," considered with reference to a Code amendment adopted to meet a situation brought about by the increasing use of motor vehicles, as in said case pointed out, and was intended to apply to a trespass based upon false imprisonment. We are satisfied that the Monk Case is not in conflict or inconsistent with the conclusion reached in the instant case.

[10] Burkett v. Griffith, 90 Cal. 532, 27 P. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151, liberally quoted from by appellants, cannot be regarded as an authority ruling the facts of the instant case. In Burkett v. Griffith, supra, the slander consisted of false and malicious statements made by the defendant concerning certain property of the plaintiff. It is therein said that:

> "In order to show that the words uttered have caused injury to the plaintiff, it is generally necessary to aver and show that they were uttered pending some treaty or public auction for the sale of the property, and that thereby some intending purchaser was prevented from bidding or competing. * * * If the plaintiff has merely a general intention to sell, or if the words uttered do not reach any intending purchaser, or if they do not prevent any sale, * * * the plaintiff does not suffer any damage from their utterance."

There the words were merely spoken and were transitory, but in the instant case the libel was recorded in the office of the county recorder where the land was situate, and constituted a continuing, permanent notice to the world that a judgment lien to the extent of more than $12,000 rested upon respondent's real property. In the instant case the libel or slander was communicated to the entire purchasing public. The allegation of the complaint that the malicious recording of said abstract of judgment falsely asserting an interest in said property decreased the value of said real estate and rendered it less marketable is obviously true.

[11] Appellants further contend that the recording of the abstract of judgment, if it gives rise to any cause of action, is one for malicious abuse of process, and consequently is a personal action, the venue of which is at appellants' place of residence. We think there is no merit in the contention that the facts alleged state an action for the abuse of process rather than slander of title. It was the filing, maliciously and falsely, of a document which clouded the title of respondent that caused the injury. The effect would be the same had said document been a forged deed, rather than an unauthorized abstract of judgment. In either event, no question of abuse of process would be involved.

The order is affirmed.

We concur: CURTIS, J.; PRESTON, J.

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204 Cal. 452

WAGNER v. ULRICH et al. (L. A. 9118.)

Supreme Court of California. June 27, 1928.

Homestead 🔑197—Action to quiet title held proper method of testing sufficiency of homestead declaration, where value of entire land is within statutory limitation (Civ. Code, §§ 1237–1261).

Where defendant in action filed declaration of homestead, *held* that an action to quiet title by purchaser at constable's sale pursuant to execution to satisfy judgment against such defendant was proper method of testing sufficiency of declaration as to portion of land not used as homestead and claimed to have been improperly included in declaration of homestead, where value of entire land is within statutory limitation; remedy prescribed by Civ. Code, §§ 1237-1261, not being exclusive.

Department 2.

Appeal from Superior Court, Los Angeles County; Percy S. King, Judge.

Action to quiet title by H. F. Wagner against Harry F. Ulrich and others. From a judgment, defendants appeal. Affirmed.

W. T. McNeely and Walter Eden, both of Los Angeles, for appellant California Title Ins. Co.

W. T. McNeely, of Los Angeles, for appellants Harry F. Ulrich, Doris E. Ulrich, and Security Trust & Savings Bank.

C. L. Kilgore, of Los Angeles, for respondent.

SHENK, J. The action in which this appeal is prosecuted was instituted for the purpose of quieting title in the plaintiff to the real property described in the complaint.

The plaintiff purchased the property at a constable's sale held in December, 1922, pursuant to execution issued in January, 1922, to satisfy a judgment theretofore, and in December, 1921, rendered against the defendant Harry F. Ulrich. The action in which said judgment was rendered was commenced in the justice's court of Los Angeles township on November 5, 1921. On November 25, 1921, the defendants Ulrich filed a declaration of homestead on said real property. The evidence disclosed that at the time of the declaration there were two houses on the land described therein—one occupied by the defendants Ulrich as a dwelling, and the other leased by them to one Courter. The total value of all the real property described in

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the declaration was not over $5,000. The trial court found that the portion of said property leased to the tenant was not subject to the declaration of homestead, and gave judgment quieting title in the plaintiff to that portion only. Judgment was entered for the defendant Harry F. Ulrich as to that portion of the property occupied by the defendants Ulrich as a dwelling at the time of the declaration.

Appellants contend that the action to quiet title was not the proper remedy, but that the exclusive remedy is prescribed by sections 1237 to 1261 of the Civil Code. It is not questioned that the declaration of homestead was valid to the extent of the dwelling found to have been occupied by the Ulrichs at the time of the declaration, together with the portion of the land used in connection therewith, and we think the sufficiency of the declaration may be tested as to the portion of the lot not so used in a quiet title proceeding. The sections of the Civil Code relied upon are applicable to cases where land alleged to be of a value in excess of the statutory amount has been attempted to be impressed with a homestead and it is sought to subject the excess to a levy of execution. But said sections of the Code would seem to have no application to cases such as the present one, where a portion of land, the whole of which is valued within the statutory limitation, is claimed to have been improperly included in a declaration of homestead, and is therefore exempt from execution. The distinction between these two classes of cases indicates the reason why our courts have in numerous instances entertained causes and proceedings apart from those prescribed in the Code sections to determine what portion of the land described in the declaration of homestead is needed for the convenient use of the declarant and what portion thereof is excess land. See Gregg v. Bostwick, 33 Cal. 220, 91 Am. Dec. 637; Mann v. Rogers, 35 Cal. 316; Tiernan v. His Creditors, 62 Cal. 286; Laughlin v. Wright, 63 Cal. 113; Maloney v. Hefer, 75 Cal. 422, 17 P. 539, 7 Am. St. Rep. 180; Tromans v. Mahlman, 111 Cal. 646, 44 P. 327; In re Ligget, 117 Cal. 352, 49 P. 211, 59 Am. St. Rep. 190; Guernsey v. Douglas, 171 Cal. 329, 153 P. 227; Lorenz v. Hunt (Cal. App.) 266 P. 617; 13 Cal. Jur. pp. 464, 465.

Appellants also claim that the liens of a deed of trust and a mortgage in favor of defendants title company and bank were and are prior to the lien of the plaintiff. In other words, they contend that the evidence does not sustain the finding of the trial court that their liens were subsequent, because, it is insisted, the deed of trust and the mortgage were a continuation of previous liens which had attached prior to the creation of plaintiff's lien. On the state of the record we are concluded on this point by the finding of the trial court which we deem supported by the evidence. The last point raised is that the levy and subsequent sale were irregular because of certain erroneous recitals of dates in the return and in the certificate of sale. An examination of the record does not disclose any error or irregularity sufficient to invalidate the proceedings.

The judgment is affirmed.

We concur: RICHARDS, J.; TYLER, Justice pro tem.

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204 Cal. 439

CURTIS v. THAXTER. (L. A. 9491.)

Supreme Court of California. June 26, 1928.

1. Usury 🔑49—Provision of note for maximum rate of interest and for addition to principal if unpaid violates statute (Usury Law, § 2).

Provision of note for maximum rate of interest allowed by Usury Law, § 2 (Deering's Gen. Laws 1923, Act 3757), and for payment of interest quarterly and addition to principal if not paid, violated such section.

2. Usury 🔑111(1)—It is not necessary to plead usury, where face of contract shows usurious character.

It is not necessary to plea usury, where contract shows its usurious character on its face, and it is court's duty sua sponte to deny any interest.

Department 1.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Emma F. Curtis against Laurie E. Thaxter, to foreclose a mortgage and recover on note. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Hugh Gordon, of San Francisco, for appellant.

George M. Harker, of Los Angeles, for respondent.

PRESTON, J. This is an action to recover upon a promissory note and to foreclose the mortgage securing it; default having been made in the payment of both principal and interest. The terms of the note, so far as here material, are as follows:

> "* * * I promise to pay * * * three thousand * * * dollars with interest from date until paid at the rate of twelve per cent. per annum; payable quarterly. Should the interest not be so paid, it shall become a part of the principal, and thereafter bear like interest as the principal. * * *"

The answer admitted the principal indebtedness, but denied any liability for interest.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Judgment of foreclosure, however, went for plaintiff in an amount which included both said principal sum of the note and interest thereon at 12 per cent. per annum compounded quarterly to date of trial.

Allowance of usurious interest is the only error claimed. In other words, the question is: Does the provision in the note for payment of interest quarterly at the maximum legal rate, and compounded if not so paid, render said interest usurious, void, and forfeited by virtue of section 2 of the Usury Law (Act 3757, Deering's Gen. Laws, 1923, Part 1, p. 1384)?

Section 2 of said statute reads in part:

> "No person * * * shall directly or indirectly take or receive * * * any greater sum * * * for the loan * * * of money * * * than at the rate of twelve dollars upon one hundred dollars for one year. * * * Any agreement or contract of any nature in conflict with the provisions of this section shall be null and void as to any agreement or stipulation therein contained to pay interest and no action at law to recover interest in any sum shall be maintained and the debt cannot be declared due until the full period of time it was contracted for has elapsed."

[1, 2] Several opinions have recently been handed down by this court upholding the constitutionality of the Usury Law (In re Washer, 200 Cal. 598, 254 P. 951) and construing the above and other provisions of it. The very question here presented is determined in and controlled by the case of Haines v. Com. Mtg. Co., 200 Cal. 609, 624, 254 P. 956, 255 P. 805, 53 A. L. R. 725, wherein it is held that a contention that, as long as the limit of the rate of interest is maintained at 12 per cent. per annum, the compounding of the interest, if not paid at the time provided for, should be allowed, is in the teeth of the statute itself, and cannot be maintained. It is not even necessary to plead usury where the contract shows on its face its usurious character. Under such circumstances it is the duty of the court sua sponte to deny any interest. Wallace v. Zinman, 200 Cal. 585, 589, 254 P. 946. These rulings have been reannounced in English v. Culley (Cal. App.) 259 P. 355, where facts similar to those of the instant case are presented. See, also, Verbeck v. Clymer (Cal. Sup.) 261 P. 1017, and Blodgett v. Rheinschild, 56 Cal. App. 728, 206 P. 674. Admittedly the enforcement of this rule may work a hardship but the answer is that the plain reading of the statute compels such interpretation thereof.

The judgment is modified to exclude the allowance of any interest. The second paragraph thereof is hereby stricken out and a new provision is inserted in its stead to read as follows:

> "Now therefore it is ordered, adjudged, and decreed that the plaintiff have judgment against defendant Laurie E. Thaxter for three thousand (3,000) dollars and costs of suit and of sale of the property hereinafter described."

And the fifth paragraph thereof is likewise hereby stricken out and a new provision is inserted in its stead to read as follows:

> "2. That the sum of three thousand dollars ($3,000) to the plaintiff and plaintiff's further costs of suit amounting to fourteen dollars ($14.00)."

As so modified, said judgment is affirmed.

We concur: CURTIS, J.; SEAWELL, J.

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204 Cal. 424

BROWNE v. T. J. LAWRENCE CO. et al.

(L. A. 9473.)

Supreme Court of California. June 25, 1928.

1. Appeal and error 🔑907(3)—On appeal on the judgment roll alone finding is deemed supported by evidence, unless contrary is conclusively shown by judgment roll.

On appeal on judgment roll alone finding that plaintiff received nothing of value under agreements sought to be canceled must be deemed supported by evidence, unless contrary is conclusively shown by judgment roll itself.

2. Vendor and purchaser 🔑341(2)—No offer to return everything of value need be alleged or proven when nothing of value was received (Civ. Code, § 1691, subd. 2).

When nothing of value has been received, it is unnecessary, in action to cancel agreements and recover partial payments, to allege or prove an offer to return everything of value, and Civ. Code, § 1691, subd. 2, does not apply.

3. Judgment 🔑194—Trial 🔑397(1)—Vendor and purchaser 🔑341(4, 6)—Court should have made findings and judgment on issues raised by cross-complaint seeking determination of interests under earlier agreements.

In action to cancel agreements to purchase land and recover partial payments, where cross-complaint sought determination of parties' interests in land covered by earlier agreement, court should have made findings and rendered judgment on issues joined thereon.

4. Appeal and error 🔑1178(6)—Case will not be remanded for further proceedings respecting cross-complaint, when plaintiff disclaims and consents to modification.

In suit to cancel agreements to purchase lots and recover partial payments, where cross-complaint sought determination of parties' interests in lots covered by earlier agreement, and answer admitted plaintiff claimed such interest, but on appeal plaintiff disclaimed any interest, and consented to modification of judgment, case would not be remanded for want of findings or judgment on such issues.

Department 2.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Mayme C. Browne, a married woman, against the T. J. Lawrence Company and another, to cancel agreements to purchase real property and to recover partial payments made thereon. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Moote & Patterson and Noren Eaton, all of Los Angeles, for appellants.

Mart Coles, of Los Angeles (Wm. G. Randall, of Los Angeles, of counsel), for respondent.

SHENK, J. This is an appeal from a judgment for the plaintiff in an action wherein the plaintiff sought to cancel certain agreements to purchase real property and to recover partial payments on the purchase price made thereunder.

On January 18, 1924, the plaintiff entered into two agreements in writing with the defendant T. J. Lawrence Company, whereby the latter agreed to reserve for the plaintiff, at a specified purchase price, lots 96 and 97 of tract No. 7888, Pacific Gateway tract, a subdivision then being formed. These agreements were preliminary and it was understood that final contracts of purchase and sale were to be signed later. Pursuant to these preliminary agreements the plaintiff made payments on the purchase price of the lots described therein. In March, 1924, the defendant Lawrence Company presented to the plaintiff the final agreements to purchase, which the plaintiff signed, and pursuant to which she continued to make payments on the purchase price up to a total of $1,312.50 in the belief that she was paying for and acquiring lots 96 and 97 of tract No. 7888. Thereafter the plaintiff discovered that the agreements to purchase signed in March described lots 96 and 97 in tract No. 5498, Pacific Gateway Tract, instead of lots 96 and 97 in tract No. 7888 as described in the preliminary agreements. The plaintiff brought this action for cancellation of the contracts and the return of the moneys paid thereunder. The plaintiff had not yet received any title under the contracts, nor had she entered into possession.

The trial court found that the lots described in the contracts of sale were not the same lots described in the preliminary agreements; that no consideration passed to the plaintiff for the moneys paid to the defendant; and rendered judgment canceling the contracts and for the repayment to the plaintiff of the sums paid thereunder. From this judgment, the defendants have appealed on the judgment roll alone.

[1, 2] It is the contention of the defendants that the complaint and findings are insufficient because the plaintiff's notice and demand alleged and found to have been given to and made upon defendants prior to the commencement of the action did not contain an offer to return everything of value which the plaintiff received under the contracts. The court found that the plaintiff received nothing of value from the defendants on account of the money paid by her. On an appeal on the judgment roll alone that finding must be deemed supported by the evidence, unless the contrary is conclusively shown by the judgment roll itself. When nothing of value has been received, it is well settled that it is unnecessary to allege or prove an offer to return everything of value, and the rule laid down in subdivision 2 of section 1691 of the Civil Code does not apply.

It is contended, however, by the defendants that the judgment roll on its face shows that the plaintiff had received something of value from the defendants for the payment of her money. This contention is based on the following condition of the record: In addition to their answer the defendants filed a cross-complaint against the plaintiff wherein it was alleged that the defendant bank was and is the owner in fee and entitled to the possession of lots 96 and 97 of Pacific gateway tract No. 5498, and that the plaintiff claimed some interest in and to said lots adverse to the defendants, which claim was without right. The cross-complaint prayed that the plaintiff be required to set forth her interest in said property; that the rights of the parties be determined; and that it be decreed that the claims of the plaintiff are without right. The plaintiff filed an answer to this cross-complaint wherein she admitted an interest in said lots in tract No. 5498 by virtue of the agreements of March 4, 1924, and prayed that the defendants take nothing by their cross-complaint. In the absence of any record of the evidence taken at the trial, we are not prepared to say that the admission of the plaintiff in her answer to the cross-complaint would conclusively rebut and overthrow the finding of the court in the main action that the plaintiff had received nothing of value for the money she had paid to the defendants.

[3, 4] The trial court made no finding or judgment on the issues joined on the cross-complaint, which, of course, was an independent cause of action. We think the court should have done so. Findings on those issues would seem to be required in order to terminate this litigation, if it were not for the fact that the plaintiff now disclaims any interest in said lots and consents that the judgment be modified accordingly. Under these circumstances it would be useless to remand the cause for further proceedings.

It is therefore ordered that the judgment of the trial court herein be modified by adding thereto the following:

"It is further ordered, adjudged, and decreed that the plaintiff has no right, title, or interest in and to lots 96 and 97 of Pacific Gateway tract No. 5498, as per map of said tract recorded in Book 90 at pages 10 and 11 of Maps, in the office of the county recorder of Los Angeles county, and she is forever barred from asserting any claim or title thereto whatsoever."

As so modified, the judgment is affirmed.
We concur: RICHARDS, J.; TYLER, Justice pro tem.

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204 Cal. 427

PACIFIC INDEMNITY CO. v. INDUSTRIAL ACC. COMMISSION et al.

(S. F. 12794.)

Supreme Court of California. June 26, 1928.

1. Master and servant 🔑405(5)—Evidence held to support finding in compensation proceeding that mother was wholly dependent on deceased son (Workmen's Compensation Insurance and Safety Act).

In a mother's proceeding, under the Workmen's Compensation Insurance and Safety Act (St. 1917, p. 831), to recover compensation for the death of her son, evidence *held* to support finding that she was wholly dependent on him and that another son contributed nothing to her support.

2. Master and servant 🔑405(5)—Commission held justified in disregarding small amount received by petitioner in determining dependency (Workmen's Compensation Insurance and Safety Act).

In mother's proceeding, under Workmen's Compensation Insurance and Safety Act (St. 1917, p. 831), for compensation for death of her son, where evidence showed that apartment house proprietor allowed the mother a "little" for showing people rooms until he could get somebody to manage the place, the commission was justified in disregarding the amount received, in determining question of dependency, as inconsequential and temporary.

3. Master and servant 🔑416—Finding that payment based upon earnings of $5 a day for six days a week held sufficient (Workmen's Compensation Insurance and Safety Act).

In proceeding for compensation for death, under Workmen's Compensation Insurance and Safety Act (St. 1917, p. 831), finding of Industrial Accident Commission that payments therein specified were based upon earnings of $5 a day for six days a week, was sufficient finding as to earnings.

4. Master and servant 🔑405(6)—Stipulation held to support finding as to average weekly earnings (Workmen's Compensation Insurance and Safety Act, § 12 [a] [1]).

In workmen's compensation proceeding, stipulation that deceased's average earnings were $5 a day for six days a week was sufficient to support finding as to his average weekly earnings, though there was no evidence that he had worked in the same employment for 260 days as provided by Workmen's Compensation Insurance and Safety Act, § 12 (a), (1), (St. 1917, p. 831).

5. Master and servant 🔑391¼—Industrial Accident Commission was without authority to allow interest on unpaid portions of award (Workmen's Compensation Insurance and Safety Act).

In compensation proceeding under Workmen's Compensation Insurance and Safety Act (St. 1917, p. 831), portion of award allowing interest on unpaid portions was outside authority of the commission.

In Bank.

Proceeding under the Workmen's Compensation Insurance and Safety Act by Mrs. Minnie Jaynes, claimant, to recover compensation for the death of her son, John Jaynes, opposed by the Pacific Indemnity Company, insurance carrier of the Page Modern Garage, employer. Compensation was awarded by the Industrial Accident Commission of the State of California, and the insurance carrier brings certiorari. Award affirmed in part, and annulled in part.

Cooley, Crowley & Gallagher, of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

CURTIS, J. This is a proceeding to review an award of the Industrial Accident Commission in favor of Mrs. Minnie Jaynes, the mother of John Jaynes, who met his death while in the employ of the Page Modern Garage. The petitioner was the insurance carrier of the employer. The award was based upon the finding of the commission that said John Jaynes left surviving him his mother, who was wholly dependent upon him. The amount of the award, aside from burial expense, was $4,446, payable $5.29 forthwith and the further sum of $18.52 per week, beginning September 8, 1927, and continuing until the whole of the award shall have been paid. It is further provided in the award that all payments shall bear interest from the date of the award until paid, or until the date at which payments become due.

Petitioner attacks the award upon three grounds: First, that there is no evidence to justify the finding of the commission that the applicant, Mrs. Minnie Jaynes, was wholly dependent for her support upon the deceased; second, insufficiency of the findings to support the award; third, that the commission exceeded its jurisdiction in allowing interest upon the deferred payments.

[1] First. In support of its claim that

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

there is no evidence to support the finding of the commission that Mrs. Jaynes was totally dependent upon the earnings of her deceased son, petitioner relies upon certain evidence to the effect that Mrs. Jaynes was, at the time her said son was injured, receiving support from another of her sons, who was residing with her at said time, and also upon certain evidence that she was receiving compensation as manager of the apartment house in which she and her two sons were residing as tenants. The household of Mrs. Jaynes at the time of her son's injury consisted of herself and her two sons, John, aged 27 years, and Herman, aged 22 years. The evidence shows that John was at the time he received the injury which caused his death receiving in wage $5 per day, and that he worked six days a week. After taking out a few dollars each week for personal expenses he turned the balance of his wages over to his mother for the support of the family household. The amount thus paid his mother is shown by the evidence to be approximately $25 per week. The other son, Herman, had been out of employment since May 7, 1927, and only secured a position on August 14, 1927. The date upon which John Jaynes received his fatal injury was September 3, 1927. He died two days later. Herman Jaynes testified that he had contributed nothing to his mother's support during the time he was out of employment, which was from May 7th to August 14, 1927, and that since securing employment, on account of a number of unsettled accounts owing to other persons, he had not contributed anything toward his mother's support. As to the amount contributed by Herman before losing his position in May, 1927, the evidence shows that he paid to his mother only about $6 per week, which amount would not more than pay for his own board and room. We think the commission was justified in concluding that Herman was not at the time his brother John was injured contributing anything to his mother's support.

[2] As to petitioner's contention that Mrs. Jaynes was receiving compensation as manager of the apartment house in which she and her sons resided, there is but little if any evidence to support such a claim. The evidence shows that the apartment house had recently changed hands, and that Mrs. Jaynes was showing people the rooms therein for the new proprietor until he could get somebody to manage the place for him, for which services she was allowed a "little"; the evidence does not show the exact amount. The commission undoubtedly considered this amount inconsequential, and the duration of such employment but temporary. Under such conditions, it was justified in disregarding the amount so received in determining the question of the total dependency of Mrs. Jaynes. Peterson v. Industrial Acc. Com., 188 Cal. 15, 204 P. 390.

Petitioner further claims that Mrs. Jaynes testified that the family expenses amounted to $132 to $146 per month, and that she only received $25 per week from her son John. From this evidence petitioner contends that it conclusively appears that she was not totally dependent upon her son John for support. In the first place, these items of expense were only given approximately by her. In the second place, they include the support of her son Herman. If we deduct from the total amount of the household expenses as given by her the reasonable cost of board and room rent for Herman, the difference is not far from the amount contributed by John during his lifetime toward the support of the household. There is no merit, we think, in this contention of petitioner.

[3] Second. Petitioner contends that there is no finding by the commission as to the average annual earnings of the deceased, and that without such a finding the award cannot be sustained. Finding 3 of the commission is as follows:

> "The employee left surviving him, and wholly dependent upon him, Minnie Jaynes, his mother, who is entitled to a death benefit of $4,446.00, payable at the rate of $18.52 per week, together with an award for $150 burial expense payable direct to Barry & McDonnell, and that said burial expense has been paid by the insurance carrier. *The payments herein mentioned are based upon earning of $5 a day for employment six days a week.* Amount accrued to and including September 7, 1927, (2/7 week) is the sum of $5.29."

By the italicized portion of this finding shown above the commission evidently intended to fix the average weekly earnings of the deceased. While the finding is not clear or as explicit as it might be, yet we think it is sufficient for the purpose intended. Having found the average weekly earnings of the deceased, it was simply a matter of computation under the provisions of the "Workmen's Compensation Insurance and Safety Act" (St. 1917, p. 831) to ascertain his average annual earnings. The basic fact, therefore, for determination by the commission, was the average weekly earnings of the deceased, and, having found that fact, the commission could and did compute the amount of the award based upon said average weekly earnings.

[4] Petitioner contends that there was no evidence to support the finding of the commission as to the average weekly earnings of the deceased. It is true that there is no evidence that deceased worked in the same employment as that followed by him at the time of his injury for the period of 260 days, as provided by section 12 (a) (1) of said act but it was stipulated by the parties to the proceeding before the commission that the average earnings of the deceased were $5 per day, working six days per week. This

stipulation, we think, was sufficient to support the finding of the commission as to the average weekly earnings of the deceased.

[5] Third. That portion of the award allowing interest on the unpaid portions of the award is without the authority of the commission. Pacific Indemnity Co. v. Industrial Acc. Com. (Cal. Sup.) 261 P. 987. It should, therefore, be annulled.

The award, excepting that portion thereof calling for interest, is affirmed. The order providing for payments of interest on the award is annulled.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; TYLER, Justice pro tem.; SEAWELL, J.; PRESTON, J.

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204 Cal. 441

GUILLOZ v. PARKINSON. (L. A. 9401.)★

Supreme Court of California. June 26, 1928.

Hearing Denied in Bank July 26, 1928.

1. Appeal and error 🔑1011(1)—Supreme Court will not resolve conflict in evidence.

Where evidence was conflicting in trial court, it is not for Supreme Court to resolve such conflict.

2. Trusts 🔑44(1)—Evidence held to support finding that defendant did not hold devised property in trust for plaintiff under promise to testator and partial performance.

In action to have it declared that defendant held title to certain real property devised to her as trustee of and for plaintiff, by reason of alleged promise to testator to convey such property to plaintiff and partial execution of such trust, evidence *held* sufficient to support findings for defendant.

3. Courts 🔑18—State courts may in proper case render judgment in personam, and control acts of parties regarding property outside jurisdiction of state.

State court *held* to have power in proper case to assume jurisdiction and render judgment in personam, and control acts of parties in regard to properties outside jurisdiction of state.

4. Courts 🔑17—Adjudication of status of res is determinable in forum of situs of property.

Adjudication of status of res is question determinable in forum of situs of property.

5. Appeal and error 🔑1071(2)—Court's conclusion that it was without jurisdiction to adjudicate parties' rights in land outside state held not prejudicial error.

Court's conclusion that it had no jurisdiction to adjudicate with respect to rights of parties in property outside state *held* not prejudicial error, in view of what was actually and properly decided by court.

Department 2.

Appeal from Superior Court, Los Angeles County; George H. Thompson, Judge.

Action to establish a trust, brought by Jessie Guilloz against Ida J. Parkinson. Judgment for defendant, and plaintiff appeals. Affirmed.

E. J. Miller, of Los Angeles, for appellant.

Stewart & Stewart, of Los Angeles, for respondent.

SHENK, J. The plaintiff is the daughter, and the defendant is the sister, of Charles A. Parkinson, who died testate on April 7, 1921, in the county of Los Angeles. The will of the decedent, bearing date March 18, 1921, was admitted to probate on the 9th day of the following May. The decedent left as heirs at law his widow, who resided in Michigan, two sons, and the plaintiff. The will acknowledged the marital relationship of the testator, made certain bequests to his children, and designated the defendant herein as the residuary legatee and devisee. Certain real estate located in Fresno, Hollywood, and in the city of Detroit had been acquired by the decedent, and at the time of his death the title to the Fresno and Detroit properties stood of record in the name of the defendant, and the title to the Hollywood property stood in the name of the decedent.

In connection with the purchase of the Hollywood property the escrow instructions provided for the transfer of the title thereto to Charles A. Parkinson and Ida J. Parkinson as tenants in common, but through some inadvertence the deed signed by the grantors was in form a grant deed, with Charles A. Parkinson named as the sole grantee. Before this deed was recorded the same was altered by the notary, who took the acknowledgment of the grantors, without the latter's consent, so as to cause the grantees therein to appear as provided for in the escrow instructions. The defendant herein brought an action to have said deed reformed, so as to conform to the escrow instructions; but she was unsuccessful in that litigation. The court decided in that case that the plaintiff therein, the defendant herein, was entitled to no legal or equitable relief with reference to said deed, so as to give her any right, title, or interest in or to said property. The effect of that litigation was to cause the Hollywood property to be inventoried in the estate of the decedent. In the course of probate it was sold, and the defendant herein became the purchaser for cash.

The plaintiff, joining with others interested, commenced a proceeding to revoke the probate of the will of the decedent, on the ground that the same was void, as having been procured through the exercise of undue influence on the mind of the testator by the defendant herein. This contest resulted in the denial of any relief to the contestants, and the order refusing to revoke the probate of the will was affirmed on appeal. Estate

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★Hearing denied in bank.

of Parkinson, 190 Cal. 475, 213 P. 259. An order of the probate court granting to the surviving widow a family allowance was also affirmed on appeal. Estate of Parkinson, 193 Cal. 354, 224 P. 453.

Under date of April 19, 1921, the defendant executed a deed quitclaiming to the plaintiff all of her right, title, and interest in and to the Detroit property. Later on the defendant brought an action against the plaintiff in Wayne county, Michigan, to have it declared that said deed was and is void, and that action is still pending.

Following the affirmance by this court in February, 1923, of the order refusing to revoke the probate of said will, the plaintiff brought the present action to have it declared that, notwithstanding the residuary clause in said will, vesting title in the defendant to the real propery of the decedent's estate, the defendant is holding the title to all of said real property as trustee of and for the plaintiff, by reason of an alleged promise on the part of the defendant to the testator to convey said real property to the plaintiff, a partial execution of that trust by the quitclaim deed to the plaintiff of the Detroit property, and a subsequent renunciation of said trust relationship by the commencement of the action in Michigan and the assertion by the defendant of ownership in and to all of said real property. The plaintiff in this action prays that all of said real properties be impressed with the alleged trust, that instruments be executed by the defendant conveying title thereto to the plaintiff, and that the defendant be restrained from prosecuting said suit to set aside the deed in Detroit. After a protracted trial on the merits, the court found against the plaintiff on all of the material issues, and rendered judgment accordingly. From that judgment this appeal is taken.

[1, 2] The greater part of the voluminous briefs of the plaintiff constitute an argument as to the weight of the evidence bearing upon the issue of the alleged trust relationship. The trial court permitted wide latitude in the introduction of eidence and was painstaking in the consideration of the case. The record discloses inconsistencies in the statements of witnesses for both parties. However, the evidence was conflicting, and it is not for this court to resolve the conflict. In order to do so would require us to judge of the credibility of the witnesses. A survey of the record discloses that there is sufficient evidence to support the findings. The validity of the will has been conclusively established. As to the Hollywood property there is no contention that the purchase thereof by the defendant was irregular, or that full value was not paid therefor or that the purchase price was not paid into the estate. The judgment in the reformation suit did not purport to adjudicate the rights of the defendant thereto under the will. Under the facts as found by the court and otherwise disclosed by the record, the purchase of that property by the defendant was consummated in order to pay the costs of administration and of litigation in which the estate had become involved.

The defendant has title to the Fresno property, either by the sheriff's deed to her, following the assignment of the certificate of sale to her by the decedent, or under the terms of the residuary clause in the will. As to the Detroit property the court found that the defendant originally acquired title thereto as security for the repayment of money advanced to the decedent by the defendant, and that after repayment had been made the record title was continued in the defendant by the decedent until his death, for the express purpose of defrauding his wife. The court further found that it is not true that the defendant held title to any of the property of the decedent by or through any fraud practiced or committed by her.

Both parties to this case appear to concede that the title to that property was continued in the defendant for the purpose of defrauding the wife of the decedent. The court found, however, that the continuation of this record title in the defendant was not because of her wish or desire. The record supports the conclusion that the decedent, by instruments executed by the defendant in 1905, had it within his power to cause the transfer of the title to said property to himself at any time before his death.

[3-5] As to the controversy over this Detroit property, the trial court found and concluded that at the time of the death of the decedent the same became a part of his estate. Notwithstanding this finding, the court further concluded that it had no jurisdiction to adjudicate with respect to the rights, if any, of the plaintiff and the defendant therein arising out of any transactions between them, and held that the parties must seek their remedy by the litigation in the courts of the state of Michigan. Taken alone and without qualification, the latter conclusion might well be questioned, as the court would have the power in a proper case to assume jurisdiction and render judgment in personam, and control the acts of the parties in regard to properties outside the jurisdiction of California. Title Insurance Co. v. California Development Co., 171 Cal. 173, 152 P. 542.

The conclusion of the court that it had no jurisdiction to adjudicate with respect to the rights of the parties hereto in the Detroit property must be considered in the light of the finding and conclusions of the court, elsewhere expressed, that the defendant did not take or hold said property as trustee for the plaintiff's benefit. As we read the record, the court merely concluded that it should not render a judgment in personam the effect of which would be to determine the litigation pending in Michigan for the annulment and cancellation of the deed filed of record in that state and thus directly adjudicate the status of the res, a question determinable in the forum of the situs of the property. If the ruling of the trial court be of broader significance than that here indicated, we cannot say, under the circumstances here shown, that the ruling was prejudicial to the appellant in view of what was actually and properly decided by the trial court.

Other points made by the parties need not be discussed.

The judgment is affirmed.

We concur: RICHARDS, J.; TYLER, Justice pro tem.

204 Cal. 391

HORAN v. VARIAN et al. (L. A. 8700.) ★

Supreme Court of California. June 22, 1928.

Rehearing Denied July 19, 1928.

1. Trusts 🔑372(3)—Evidence held to show that defendant did not hold legal title as trustee for equitable owner after execution by owner of instrument confirming title in defendant.

Evidence, in action for partition, *held* to show that defendant M. did not, on and after execution by P., the equitable owner, of written instrument confirming absolute title in M., hold legal title to property as trustee for P.

2. Attachment 🔑308(4)—Evidence held not to show that conveyance to defendant by trustee was prior to attachment levy.

In action for partition of realty, evidence *held* not to sustain claim of defendant that deed to defendant from one holding as trustee of equitable owner under which defendant claimed undivided interest in realty, though unrecorded, was delivered prior to attachment levy.

3. Attachment 🔑63—Property owned by debtor, but standing in name of another, may be attached at suit of creditor (Code Civ. Proc. § 542, subd. 2).

Under Code Civ. Proc. § 542, subd. 2, property standing in the name of one person, but owned by the debtor, may be attached at the suit of a creditor.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action in partition by Thomas J. Horan against Mary A. Varian, H. M. Driscoll, R. McColgan, and others, in which H. M. Driscoll filed a cross-complaint. From the decree, McColgan appeals. Modified, and, as modified, affirmed.

Superseding opinion in 265 P. 263.

George D. Collins, Jr., of San Francisco, for appellant.

Loyd Wright, of Los Angeles, and Ford, Johnson & Bourquin, of San Francisco, for respondent H. M. Driscoll.

PRESTON, J. This is an appeal by one defendant from a portion of an interlocutory decree in partition. The contest is really a claim of priority between appellant and respondent Driscoll in and to a portion of the fund arising from a sale of the property for partition. The story opens with the death intestate and without issue of Sabina A. Lanon, leaving a considerable estate in Los Angeles county. A contest arose as to the persons who were entitled to inherit said estate under the laws of California. An impostor, Kyle, who claimed to be decedent's son, asserted the right to inherit the whole thereof; other claimants were Mary A. Varian, a sister, and Mark Edward James Horan, John P. Horan, and Thomas J. Horan, nephews.

In October, 1921, one W. C. Cox of Chicago, known as a "lost heir hunter," secured from said sister and from two of said nephews an assignment of a one-third interest in and to their respective portions of said estate, upon the consideration that he should employ and pay attorneys and bear the other expenses necessary to establish their heirship thereto. Said persons executing this conveyance claimed a $\frac{45}{64}$ interest in said estate. On November 25, 1921, said Cox assigned his right in said conveyances to one E. A. Platt, also an "heir hunter," who was to carry out the covenants made with the said claimants with respect to the establishment of their heirship to said estate, said Cox upon distribution to receive one-third of the third transferred to him by said claimants, or $\frac{5}{64}$ of said estate. Platt thereupon employed attorneys George K. Ford and Lloyd Wright to wage the legal battle necessary to establish the rights of said claimants. The fee of said attorneys was to be a contingent percentage of said estate so recovered by them. They did successfully rout as an impostor the said Kyle, and established the claim of these assignors as heirs to said estate, but their fees were not paid, and their claim for them is the basis of the litigation out of which has grown the present appeal; said attorneys having assigned their respective interests for collection to respondent H. M. Driscoll.

During the pendency of said litigation in said estate, Platt removed to Paris, and remained there at all times herein, leaving not only the above-mentioned attorneys' fees unpaid, but other creditors as well, among whom was appellant McColgan. Looking to payment of their claims against Platt and acting together, McColgan and Ford induced Platt to execute a general power of attorney, prepared by said Ford, to said McColgan, the idea evidently being to dispose of the Cali-

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★Rehearing denied.

fornia property of Platt, including that to be derived from said estate, and to pay the said attorneys' fees, the claim of McColgan against Platt, and perhaps other creditors. Acting in apparent harmony, McColgan, as attorney in fact, conveyed the interest of Platt in the above-mentioned estate to one Russell, who paid nothing for the transfer, claimed no interest in the property, and who, of course, was merely acting as intermediary or trustee for the better handling of the property to which Platt had title.

Distribution of said estate was applied for and the Cox-Platt interest therein, to wit, 15/64 thereof, was distributed to said Russell. The date of the transfer to Russell was June 29, 1922; the date of the decree of distribution was September 7, 1922. Following the distribution of said interest to Russell, Cox received from him on October 20, 1922, in settlement of his claim, a conveyance of 5/64 interest in said real property. About April 20, 1923, Russell, at the instance of Ford and McColgan, instituted a partition proceeding touching the real property distributed in said estate. Prior thereto, however, and on November 14, 1922, H. M. Driscoll, assignee of Ford and Wright above mentioned, commenced an action in the superior court of the state of California against said heirs who made assignments to Cox and also against Platt, for the sum of $8,000, together with interest, as attorneys' fees in said estate matter, and caused to be issued on said day a writ of attachment which was duly levied upon the property of said Platt remaining in the name of Russell, to wit, 5/27 interest in said real property, the subject of the decree of distribution in said estate. Ford testified that this suit and attachment was with the consent and at the suggestion of appellant McColgan, in order to prevent other creditors from levying attachments thereon. It is certain that all the parties were friendly and co-operating at this time and for several months thereafter.

Following this event, however, on the 11th day of June, 1923, Thomas J. Horan, the nephew who did not join in the transfer to Cox and one of the established heirs of said estate, began the present proceeding in partition, making said Russell, said Cox, said Driscoll, said McColgan, and others, defendants herein. The record shows that friendliness and co-operation still obtained between Ford, McColgan, and Platt during the settlement of the issues in this present partition proceeding. However, in the fall of 1923 something came over the spirit of the dreams of McColgan, for on January 9, 1924, we find him therefor bearing date of September 28, claim to all of the property left standing in the name of Russell. In confirmation of such claim, he produced a deed from Russell to him therefore bearing date of September 28, 1922, but not filed for record until August 20, 1923. Relying upon said deed, McColgan asserts that this property derived from the estate of Lanon, to wit, a 5/27 interest therein, belongs to him free of any claim under said attachment levied in the said Driscoll action. He refused to treat further with the hired servants who made the realization of the fund possible. The law of California gives the attorneys no right to assert a lien upon the fund realized for the value of their services in connection therewith; hence Ford and Wright rely upon the efficacy of the attachment to hold their priority over the McColgan deed.

The court in this connection found that Russell took said deed from Platt without consideration, and as the trustee of said Platt, who, at the time of the levy of said attachment, was the owner of the equitable title in and to said real property so conveyed, and further found that the deed to McColgan, although executed prior to the levy of said attachment, was not delivered until subsequent thereto. The interlocutory decree followed this finding, but the findings and judgment went further than this, in that the court found that McColgan also took said deed as trustee of the legal title for Platt. The finding in this latter behalf is as follows:

> "Seven. That the defendant Lyman Russell was at the time of the commencement of said action the holder of the legal title as tenant in common of an undivided 10/64 interest in said property; that, prior to the time of the commencement of the above-mentioned action, said Lyman Russell signed and acknowledged and, after the commencement of said action, delivered a certain deed wherein and whereby said Lyman Russell conveyed the legal title to said undivided 10/64 interest in and to said property to defendant R. McColgan, who acquired and holds said undivided 10/64 interest in and to said property as the trustee of a constructive trust in favor of said Eugene A. Platt, and not otherwise; and that said Eugene A. Platt was at the time of the commencement of said action, since has been, and is now, the owner and seized in fee-simple absolute as a tenant in common of said undivided 10/64 interest in and to said property. In this connection the court further finds that all of the allegations of the first and second separate defenses contained in the amendment to the answer of the defendant H. M. Driscoll and all of the allegations of the first and second counts of the cross-complaint of defendant H. M. Driscoll against defendant R. McColgan herein are true."

The portion of the pleadings adopted by the findings as far as here material is as follows:

> "* * * That prior to said November 14, 1922, without instructions from, notice to, consent of, valuable or any consideration to, or thereafter or at all, reporting the same to said Eugene A. Platt, said R. McColgan, as said attorney in fact for said Eugene A. Platt, made, executed, and delivered an assignment and transfer, whereby said Eugene A. Platt, by and through his said attorney in fact, assigned and transferred the legal title to said undivided 5/18

interest in and to said property to Lyman Russell; that said undivided 5/18 interest in and to said property thereafter and at the time said attachment was levied, as aforesaid, stood of record in the name of said Lyman Russell. * * *"

[1] Appellant at this point insists that there is no warrant in the evidence for a finding that he held the legal title to said property as trustee for the equitable owner, Platt. He contends that the evidence not only shows no fact warranting such a conclusion, but shows affirmatively that Platt, on the 11th day of April, 1924, executed a written instrument confirming the absolute title in him. From the evidence we must conclude that the findings and judgment are too broad in this respect and that appellant, at least on and after April 11, 1924, did not hold the legal title as trustee for Platt, but held same in his own right.

[2] It is next contended by appellant that the evidence does not furnish support for the finding that, when the attachment was levied to wit, November 14, 1922, the property was owned by Platt and stood in the name of Russell but appellant insists that the deed to him though unrecorded was nevertheless delivered at or about the date it bears which said date antedates the attachment levy. We do not so view the evidence. When it is borne in mind that the power of attorney was prepared by Ford while acting in conjunction with appellant for the purpose of getting themselves in a position to realize upon the property interest of Platt in order to pay Ford and his associate their attorneys' fee and to pay appellant his claim against Platt the significance of further facts clearly appears among which are the following: (1) The transfer from Platt to Russell was made in furtherance of the purpose above noted; (2) the property in the Lanon estate was distributed in the name of Russell; (3) after the date of the deed to appellant and date of delivery thereof as claimed and after the levy of attachment both Russell and appellant claimed the legal title to be in Russell and Russell thereafter made a deed of Cox's interest in said property to him; (4) after the claimed date of delivery of said deed appellant Ford and Russell caused a partition suit to be filed in which Russell was named as owner of said property and made plaintiff in said action, verifying under oath the allegation that he was on such date the owner thereof; (5) the testimony of Ford was that appellant admitted to him that said property stood in the name of Russell, and, while so admitting, advised him to file the attachment suit here under consideration for the purpose of protecting the property against the claim of creditors other than themselves; (6) for almost a year after the levy of said attachment said attorneys and appellant remained on friendly relations, appellant using Mr. Bourquin, an associate of Ford, as his own attorney in filing an answer in the present partition proceeding, in which no denial whatever was made of the validity and integrity of the attachment.

These and other facts in the record well warranted the court in disregarding the positive swearing of Russell and appellant as to the date of delivery of said deed. Indeed, the domination of Russell by appellant and his repeated refusal, until compelled to do so, to answer questions pertaining to the date of delivery of said deed, while acting under the instructions of appellant's attorney at the time, furnish still further grounds for disregarding such testimony altogether. The case seems clearly to be one where appellant saw what he believed was a chance to pay himself at the expense of attorneys Ford and Wright, whose labors produced the fund which he wants decreed to him. Appellant, tiring of riding side by side with his fellow creditors, maneuvered with "spur and rein" to lead, and it is but a just decree of fate and law if he now finds himself riding in the rear.

[3] Property standing in the name of one person, but owned by the debtor, may be attached at the suit of the creditor. Section 542, subd. 2, Code Civ. Proc.; Brown v. Campbell, 100 Cal. 635, 35 P. 433, 38 Am. St. Rep. 314; Bank of San Francisco v. Pike, 53 Cal. App. 524, 200 P. 752; 23 C. J., p. 344.

The court held the attachment lien valid, and reserved for future action the proceeds of sale of the property interests here in dispute. This was proper. If a judgment is obtained in the attachment proceedings, the court can subject all or so much of this fund as may be necessary to the discharge of such judgment. In view of the possibility of the attachment proceedings failing to absorb all the Russell-Platt-McColgan interest in said fund, it is proper that the interlocutory decree be modified so as to secure to appellant any surplus remaining.

Accordingly, paragraph 7 of said interlocutory decree is hereby stricken out, and a new provision is inserted in its stead to read as follows:

"7. That the defendant R. McColgan is the owner, as a tenant in common, of an undivided 10/64 interest in and to said property, subject, however, to the lien of attachment of the defendant H. M. Driscoll in that certain action entitled 'H. M. Driscoll, Plaintiff, v. Mary A. Varian, John P. Horan, Mark Edward James Horan and Eugene A. Platt, Defendants,' pending in the superior court of the state of California in and for the county of Los Angeles, register No. 113617,"

—and paragraph 9 of said interlocutory decree is also hereby stricken out and a new provision inserted in its stead to read as follows:

"9. That the interests of said Mary A. Varian, Thomas P. Horan, Mark Edward James Horan, Eugene A. Platt, and R. McColgan are subject to the lien of attachment of the defendant H. M. Driscoll in that certain action entitled 'H. M. Driscoll, Plaintiff, v. Mary A. Varian, John P. Horan, Mark Edward James Horan, and Eugene A. Platt, Defendants,' pending in the superior court of the state of California in and for the county of Los Angeles, register No. 113617."

The other questions discussed in the briefs are not considered, as under the holding here made they are immaterial. The interlocutory decree as modified is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.

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204 Cal. 408

BAIRD et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 12224.)

Supreme Court of California. June 25, 1928.

1. Judgment ⚷948(½)—Plea of res judicata in and of itself is insufficient to oust court of jurisdiction.

While res judicata must be affirmatively relied on and shown in evidence to be available, and in some cases must be pleaded, the plea in and of itself is not sufficient to oust the court of jurisdiction.

2. Prohibition ⚷5(3)—Prohibition held not to lie to prevent further proceedings upon petition for distribution on ground former judgment was res judicata.

Prohibition *held* not to lie to prevent further proceedings upon a petition for distribution on ground that former judgment, entered in obedience to mandate of Supreme Court on similar petition, was res judicata, which contention was denied by claimant to estate, since question of res judicata was for determination of the trial court.

3. Prohibition ⚷17—Objection to jurisdiction should be urged and overruled by trial court before applying for prohibition.

Ordinarily objection to jurisdiction should be urged before trial court and overruled before applying for prohibition.

In Bank.

Application for writ of prohibition by Veronica C. Baird and others, prayed to be directed to the Superior Court in and for the City and County of San Francisco, and another. Writ denied.

Superseding opinion in 255 P. 820.

Karl C. Partridge, of San Francisco, for petitioners.

R. P. Hinshall, Robert R. Moody, C. M. Fickert, and E. A. Cunha, all of San Francisco, for respondents.

PRESTON, J. This is an application by Veronica C. Baird, Benjamin H. Baird, and Thomas R. Baird, who are named as devisees and legatees in the will of David J. Baird, deceased, against the superior court of the city and county of San Francisco, to restrain further proceedings by one David Jennings Baird, by his guardians, on a petition filed by him on the 28th day of August, 1926, asking for final distribution to him as the pretermitted son and heir at law of all of the estate of said David J. Baird, deceased, and demanding that said superior court strike his petition from the proceedings in said estate, and that said court be enjoined from further proceeding in the matter of hearing said petition. This is another effort to test the right of David Jennings Baird to share in the estate left by his father, David Jennings Baird, deceased, and it marks about the eighth proceeding in said estate to reach this court. The claim of this son to succeed to the estate of his father has been the subject of judicial controversy for a period of twenty years. The history of said proceedings as noted upon the records of this court will be found as follows: Estate of Baird, 173 Cal. 617, 160 P. 1078; Id., 181 Cal. 742, 186 P. 351; Id., 182 Cal. 338, 188 P. 43; Id., 193 Cal. 225, 223 P. 974; Id., 195 Cal. 59, 231 P. 744; Id., 198 Cal. 490, 246 P. 324; Baird v. Superior Court, No. 11141, prohibition denied May 1, 1924; Baird v. Superior Court, No. 11192, prohibition denied June 19, 1924.

David J. Baird died on November 25, 1908, leaving a will in which he neither provided for nor mentioned the minor, David Jennings Baird. On April 27, 1914, the said minor, by his guardian, filed a petition for partial distribution of the estate of the decedent, in which he alleged that he was the son of decedent and his heir by adoption and legitimation complying with all the requirements of section 230 of the Civil Code. His claim was opposed by the mother, brothers, and sister of decedent. This petition was heard by the court sitting without a jury and decided adversely to the claimant upon the issues of adoption. The order denying the petition was reversed by this court on appeal because of the refusal of the probate court to grant a jury trial on said issues of adoption. Estate of Baird, 173 Cal. 617, 160 P. 1078. Later a jury trial was had, and the matter came before this court upon an appeal from an order distributing the entire estate of decedent to the claimant pursuant to special verdicts of the jury on the issues of adoption. This court reversed the lower court, holding that the evidence was insufficient to support the finding that decedent had adopted said minor child (Estate of Baird, 182 Cal. 338, 188 P. 43), and a second jury trial was had, which resulted as in the previous case in special verdicts favorable to the minor on the issues of adoption. The order distributing the entire estate to said minor, which was entered pursuant to the special verdicts, was likewise reversed by this court on appeal (Estate of Baird, 193 Cal. 225, 223 P. 974); the court holding that by reason of the law of the case the evidence was insufficient to establish the claim of adoption and also that, independent of the rule of the law of the case, the evidence introduced was insufficient to sustain said claim. This court thereupon ordered and directed the trial court to set aside the special verdicts and again reversed the decree of distribution. The remittitur in pursuance of which said judgment was entered contained the following provision:

> "It is hereby ordered, adjudged, and decreed by the court that the decree of partial distribution of the superior court in and for the city and county of San Francisco in the above-entitled cause be, and the same is hereby, reversed, and the trial court is ordered and directed to set aside the special verdict and findings and to enter judgment for appellants denying the petition for partial distribution upon the ground that respondent is not the adopted son or heir of the deceased."

The judgment entered by the lower court, after quoting the remittitur, provided as follows:

> "It is therefore ordered, adjudged, and decreed that the hereinbefore mentioned special verdicts and findings be and the same are hereby vacated, annulled, and set aside, and the said petition for partial distribution of David Jennings Baird, a minor, is hereby denied."

After the going down of the remittitur to the lower court, two notices of intention to move for a new trial were filed on behalf of said minor, David Jennings Baird. Both motions were granted. Upon appeal to this court, the order granting the motions was reversed on April 23, 1926. Estate of Baird, 198 Cal. 490, 246 P. 324. On August 18, 1926, Veronica C. Baird and I. I. Brown, as executors of the estate of David J. Baird, deceased, filed their final account and petition for final distribution. The petition was set for hearing on August 30, 1926. On August 28, 1926, said minor, David Jennings Baird, filed a petition for distribution to him of the estate of said decedent. When the petition of the executors came on for hearing on August 30, the court, after hearing the account, continued the hearing on the executors' petition for distribution to September 20, 1926, and set the petition of said minor child for hearing on said date. Veronica C. Baird, decedent's mother, and Benjamin H. Baird and Thomas R. Baird, his brothers, all of whom are named as legatees and devisees in decedent's will, thereupon filed the petition for writ of prohibition now before us with the object of restraining further proceedings for the consideration of the petition of said minor child for distribution. The petition for distribution does not differ in material respects from the petition considered by this court on the four former appeals. In each the petitioner claims to be the legitimate son and heir of decedent by virtue of an adoption complying with the requirements of section 230 of the Civil Code.

Petitioners contend that under the judgment entered on April 22, 1924, in obedience to the mandate of this court (Estate of Baird, 193 Cal. 225, 223 P. 974), it was then and there finally adjudicated that said minor child was not the adopted son and heir of said deceased, and therefore can never succeed to any portion of the estate of said decedent. On the contrary, the child contends that said judgment was nothing more than a judgment of nonsuit, and, being a judgment of nonsuit only, he is not precluded from asserting his right to heirship in said estate in the present proceedings. It is quite true that a judgment of nonsuit does not bar a subsequent action upon the same cause, but a judgment upon a directed verdict is considered a judgment upon the merits and determines the issues. 9 Cal. Jur. 547, 15 Cal. Jur. 131, 24 Cal. Jur. 913; 2 Freeman on Judgments, 1590; Estate of Sharon, 179 Cal. 447, 177 P. 283; City and County of San Francisco v. Brown, 153 Cal. 644, 96 P. 281; Mohn v. Tingley, 191 Cal. 470, 217 P. 733. But we are not called upon to determine these questions, serious though they may be, for in our view of the matter under no hypothesis does the writ of prohibition lie.

[1, 2] Res judicata must be affirmatively relied upon and shown in evidence, and in some cases must be pleaded, but in no case is the plea in and of itself sufficient to oust the court of jurisdiction. In its strongest form it is nothing more than conclusive evidence upon all or some of the issues involved. When a former judgment is pleaded either in bar or as an estoppel on some issue, there immediately arise questions as to identity of the parties, the validity of the judgment as shown by the judgment roll, the legal effect to be given it, and perhaps many other questions. Such matters are for the determination of the trial court, and, whether correctly or incorrectly determined, it is nevertheless the exercise of jurisdiction over the subject-matter and the parties.

In Spitzer v. Superior Court, 74 Cal. App. 494, 498, 499, 241 P. 270, 271, this question was ably discussed, and the court there used the following language:

> "A former adjudication as a defense is generally regarded as an affirmative one, which must be presented, whether by pleading or evidence, by the one relying upon it (McLean v. Baldwin, 136 Cal. 565, 69 P. 259; Brown v. Campbell, 110 Cal. 644, 43 P. 12; Estate of McNeil, 155 Cal. 333, 100 P. 1086); and the benefit of a prior adjudication constituting a bar may be waived by failing to plead or pro-

sent it in the subsequent action (15 Cal. Jur., Judgments, § 233; Freeman on Judgments, § 808 [5th Ed.]). Where it appears, however, that there was no opportunity to plead a judgment urged as a bar, owing to the fact that it did not become final until after the entry of an interlocutory decree in a subsequent action, it may be presented before the entry of a final decree therein. Penfield v. Potts & Co., 126 F. 475, 61 C. C. A. 371; Bradley, etc., Co. v. Eagle Mfg. Co., 57 F. 980, 985, 6 C. C. A. 661; Freeman on Judgments, § 798 (5th Ed.). It is not a plea to the jursidiction; but where it is pleaded to the whole cause of action it is a plea in bar; or if to a particular fact or issue a plea in estoppel; but cannot be given the effect of depriving the court of jurisdiction. Fields v. Walker, 23 Ala. 155; Granger v. Superior Court, 159 Cal. 2, 112 P. 854. * * * The fact of a judgment urged as a bar, the identity of the parties, jurisdiction to render it, and the legal effect to be given it, are matters for determination in the first instance by the trial court, are questions on which the party against whom the judgment is urged has the right to be heard, and such determination, though erroneous, and hence not an act in the proper exercise of its jurisdiction, would nevertheless be an act in the exercise of its jurisdiction over the parties and the cause."

The case of Granger v. Superior Court, 159 Cal. 1, 5, 6, 112 P. 854, 856, cited in the above opinion, sustains the holding there made by use of the following language:

> "The opinion declared that Granger was entitled to be reimbursed for the amount of his purchase money and that an accounting should be had of the rents received during his possession. A cross-complaint was filed in that case by William G. Richards, as executor, and the case is still pending, no trial having been had since the reversal of the first judgment. It is obvious that the court still has jurisdiction of that case and that a writ of prohibition cannot be issued. It may be conceded that with respect to everything except the taking of a supplemental account and making of a decree requiring Granger to reconvey the property to the estate upon the payment of the money found due him upon the accounting, the whole controversy has been settled by the judgment in the action of Benallack v. Richards [154 Cal. 478, 98 P. 528]. But this does not affect the jurisdiction of the court to proceed in the action. That judgment can be pleaded as an adjudication of the matters determined by it, but it cannot be given the effect of depriving the court of jurisdiction."

There is in the case before us this further situation: The executors of said estate filed their petition for final distribution, which was regularly noticed for hearing on August 30, 1926. On the 28th day of August said minor filed, not only his petition for distribution, but asked the court to consider it as an opposition to the petition filed by the executors. Apparently this suggestion was acceded to by the court. Under this statement of facts the doctrine of res judicata might be a bar to the petition filed by said minor, and his opposition to the petition of the executors; it would therefore be a settlement of but one of the issues involved, and there would still be left the issue as to the parties to whom and the proportions in which the estate of said decedent should be inherited. But whether the claim of the doctrine of res judicata be pleaded as a complete bar or as conclusive evidence of one or more only of the material issues, the rule is the same. For a recent discussion of the doctrine, see Price v. Sixth District (Cal. Sup.) 258 P. 387.

It should also be noted that the minor claimant here asserts that, by reason of the fact that one Miles T. Baird, the brother of said decedent and one of the legatees under his will, did not appeal from the former decree of distribution made in said estate, said minor child succeeded to so much of said estate as would be inherited under said will by said Miles T. Baird. This observation is also made to apply to certain other persons claiming to be assignees of the interest of said Miles T. Baird in said estate under said will. This, of course, furnishes an added reason for a consideration by the trial court of the said former judgment before disposing of the petition for final distribution in said estate.

[3] It should also be noted that ordinarily the objection to the jurisdiction should be urged before the trial court and overruled before applying for prohibition. McAneny v. Superior Court, 150 Cal. 6, 87 P. 1020; Havenmeyer v. Superior Court, 84 Cal. 327, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; Shriver v. Superior Court, 48 Cal. App. 576, 192 P. 124; Drew v. Superior Court, 43 Cal. App. 651, 185 P. 680; 21 Cal. Jur. 627.

The petition is denied.

We concur: WASTE, C. J.; LANGDON, J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.

204 Cal. 384

FETTERLEY v. OSBORNE. (L. A. 9107.)

Supreme Court of California. June 19, 1928.

1. Insane persons ⚷97—Complaint alleging plaintiff, adjudged insane, was incarcerated by defendant after escaping from state hospital, failed to state case for damages for illegal restraint and unlawful expenditures by guardian.

Complaint for damages for illegal restraint and for unlawful expenditures on behalf of plaintiff by defendant, while acting as guardian of estate, alleging plaintiff had been adjudged insane, and subsequently adjudged sane and restored to rights, and that guardian unlawfully expended money for benefit of plaintiff, and alleging that guardian caused plaintiff to be incarcerated after plaintiff ran away from state hospital, failed to state cause of action.

2. Appeal and error ⚷917(2)—As against plaintiff's unsupported statement of late filing, demurrer is presumed to have been properly sustained.

As against unsupported statement by plaintiff that demurrer was filed too late, and judgment should have been rendered in favor of plaintiff on default, not sustained by anything in record, it will be presumed that court rightfully exercised jurisdiction in sustaining demurrer.

Department 2.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Oliver Fetterley against Thomas A. Osborne. From a judgment of dismissal, after an order sustaining a demurrer to the second amended complaint without leave to amend, in action for illegal restraint, plaintiff appeals. Affirmed.

Oliver Fetterly, in pro. per.

Irvin C. Taplin, of Los Angeles, for respondent.

TYLER, Justice pro tem. [1, 2] This is an appeal from a judgment dismissing the action after an order sustaining a demurrer to a second amended complaint without leave to amend. The plaintiff appears in propria persona, and he attempts to state a cause of action for damages for illegal restraint, and also to recover certain sums which he claims were unlawfully expended on his behalf by defendant, while acting as the guardian of his estate.

The complaint indicates that plaintiff had been adjudged insane by the superior court of the county of Los Angeles, and it recites that on December 19, 1923, he was adjudged sane and competent, and fully restored to all his rights as a competent person. It alleges the appointment, in May, 1922, of defendant as guardian of plaintiff's estate, and it charges the unlawful and useless expenditure by defendant, as such guardian, of certain sums for clothing and other expenses for the benefit of plaintiff. A further allegation recites that plaintiff ran away from the Southern California State Hospital, where he was incarcerated, and defendant caused him to be returned to that institution without sufficient reason. It is then charged that, by reason of the acts of defendant, plaintiff was wrongfully deprived of his liberty, friends, and social surroundings, and damages are alleged in the sum of $15,000.

It is here claimed that the court below erred in sustaining the demurrer to the complaint, as it was filed too late, and judgment should have been rendered in favor of plaintiff upon a default. There is nothing in the record before us that sustains appellant in this contention. As against his unsupported statement, it will be presumed that the court rightfully exercised its jurisdiction. That the complaint does not state a cause of action is plainly manifest.

Judgment affirmed.

We concur: RICHARDS, J.; SHENK, J.

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204 Cal. 386

FETTERLEY v. BROWN et al. (L. A. 9316.)

Supreme Court of California. June 19, 1928.

1. Malicious prosecution ⚷47—Complaint against defendants for conspiring to confine plaintiff in insane asylum, not alleging how or in what manner plaintiff was damaged, failed to state case for malicious prosecution.

Complaint alleging defendants conspired to imprison plaintiff in state hospital for insane without reasonable cause, that confinement of plaintiff was based on representation of defendant parole officer that plaintiff was insane, and that defendant physicians maliciously testified that plaintiff was insane, failing to allege how or in what manner plaintiff suffered damage by defendants' acts, failed to state cause of action for malicious prosecution.

2. Pleading ⚷189—Demurrer to complaint patently deficient on its face held properly sustained.

Where complaint was patently deficient on its face, judgment sustaining demurrer was proper, and should be affirmed.

Department 2.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Oliver Fetterley against Harry J. Brown and others for malicious prosecution. From a judgment of the superior court for defendants, plaintiff appeals. Affirmed.

Oliver Fetterley, in pro. per.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for respondents.

James S. Howie, Deputy Atty. Gen., for respondent Meyer.

Everett W. Mattoon and McIntyre Faries, both of Los Angeles, for respondents Brown, Johnson, and Steele.

Caroline R. Kellogg, of Los Angeles, for respondent Rosenoff.

TYLER, Justice pro tem. Appeal from a judgment, after the sustaining of demurrers to an amended complaint without leave to amend in an action for damages for malicious prosecution.

[1] The plaintiff appears in propria persona, and by his complaint he attempts to allege that all the defendants entered into a conspiracy to imprison him in a California state hospital for the insane; such conspiracy being without reasonable or probable cause. It appears therefrom that the arrest of the plaintiff and his subsequent confinement were based on the representations of defendant Brown, a deputy parole officer, which representations were to the effect that plaintiff was insane. Defendant Johnson is designated as a deputy sheriff, and the other defendants as physicians connected with the county hospital of Los Angeles and the California State Hospital for the Insane at Patton, Cal., all of whom, it is alleged, maliciously testified that plaintiff was insane, upon an official hearing had to determine the mental condition of plaintiff. The demurrers were rightfully sustained. Aside from other objectionable features, the complaint carries no averment showing how or in what manner plaintiff suffered damage by the alleged acts of the defendants.

[2] The complaint being patently deficient on its face, the judgment sustaining the demurrer was proper, and it should be and is hereby affirmed.

We concur: SHENK, J.; RICHARDS, J.

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204 Cal. 415

LAHTI v. McMENAMIN. (S. F. 12177.)

Supreme Court of California. June 25, 1928.

1. Automobiles 🔑153—Driving on wrong side of street is negligence.

Automobile driver on wrong side of street at time he struck pedestrian was negligent.

2. Appeal and error 🔑1066—Instruction as to pedestrian's failure to look was not prejudicial when failure to look at different place was alleged.

Where, in action for injuries, answer alleged contributory negligence in failing to look in westerly direction while south of center of street, instruction that plaintiff was not negligent because she failed to look in such direction after reaching the north half of the street did not prejudice the defense, whether correct or not.

3. Damages 🔑132(3)—$15,000 for fractured skull and permanent injury to mentality held not excessive.

Where person struck by automobile received fractured skull, was unconscious for 12 days, required trephining operation, and sustained permanent injury to her mentality, a verdict of $15,000, in addition to hospital and other expenses, was not excessive.

4. Damages 🔑185(2)—Evidence held to sustain finding of permanent injuries materially disqualifying plaintiff from performing former duties.

In action for injuries, evidence *held* to sustain finding that plaintiff sustained permanent injuries, which seriously and materially disqualified her from performing her former duties.

5. Damages 🔑216(1)—Instruction authorizing damages not exceeding those claimed and specifying amount was not error.

In action for injuries, instruction that jury, after considering all elements of damage, might resolve what sum would compensate plaintiff not exceeding the amount prayed for in the complaint, to wit, $16,312.10, was not erroneous; it being for defendant to request instruction that amount named did not necessarily furnish any criterion for amount of verdict, if desired.

6. Appeal and error 🔑1050(1)—Judgment will not be reversed on ground that proper evidence that defendant had been drinking improperly influenced jury.

In action for injuries in automobile collision, it not being claimed that evidence that witnesses detected intoxicating liquor on defendant's breath was immaterial, judgment would not be reversed on ground that jury was improperly influenced thereby.

7. Appeal and error 🔑1050(1)—Judgment will not be reversed when verdict is not excessive on ground that jury were improperly influenced by evidence of insurance.

Where verdict for injuries in automobile collision was not excessive, and evidence that representatives of insurance company visited scene of accident was not claimed to have been erroneously admitted, judgment would not be reversed on ground that jury may have been improperly influenced by fact that defendant carried insurance.

Department 1.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Mary Lahti against William McMenamin for damages for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Kelby & Lawson, Samuel M. Garroway, and L. J. Styskal, all of Los Angeles, and Leon French, of San Francisco, for appellant.

Charles O. Bruce, Elliott Johnson, and Ford, Johnson & Bourquin, all of San Francisco, and F. V. Cornish and Cornish & Cornish, all of Berkeley, for respondent.

CURTIS, J. [1] Plaintiff, while crossing East Twelfth street near its intersection with Twenty-Second avenue, in the city of Oakland, was struck by an automobile driven by the defendant. As a result of the collision, she received bodily injuries, and thereafter instituted this action to recover damages for the injuries so sustained. The defendant, as a defense to plaintiff's action, set up contributory negligence on plaintiff's part as the proximate cause of her said injuries, and alleged that "while plaintiff was at all times south of the center line of East Twelfth street, plaintiff carelessly, recklessly, and without regard to her own safety and protection, was facing and looking in a northeasterly direction, and as a result thereof, plaintiff walked into, and was struck by, the rear end of defendant's machine." The plaintiff claimed, and so testified, that at the time of the collision she was north of the center line of said street, and that defendant was traveling on the wrong side of said street, and while so traveling on the wrong side of said street struck and injured her. The evidence was conflicting as to whether the accident actually happened to the north or the south of the center line of said street. The case was tried before a jury, and its verdict was in favor of plaintiff. Therefore the jury impliedly, at least, found that the collision occurred on the north side of the street. It is admitted that defendant approached the point where the collision occurred from a westerly direction. In view of the finding of the jury just referred to, and this admission, it is apparent that defendant was traveling from a westerly direction on the wrong side of the street at the time his machine collided with plaintiff. Under these facts there can be no question as to defendant's negligence.

[2] The court, at the request of the plaintiff, gave the following instruction:

> "If you find from the evidence in this case that the plaintiff, when struck by defendant's automobile, had reached a point in her attempt to cross east Twelfth street on the northerly half thereof and at a point where vehicles operating in accordance with the provisions of the Motor Vehicle Act [St. 1927, p. 517] would be reasonably expected to proceed from an easterly direction, then I instruct you that you cannot find the plaintiff guilty of contributory negligence because she, at that point, failed to look in a westerly direction, or failed to anticipate the unlawful use of the streets by any other person."

Defendant contends that in so instructing the jury the court committed error, in that it took away from the consideration of the jury the question as to whether plaintiff was guilty of contributory negligence as alleged in defendant's answer. We do not think this contention of defendant can be sustained. As will be noted from the excerpt of defendant's answer above quoted, defendant's only plea of contributory negligence went to plaintiff's failure to look to her left, or in a westerly direction, being the direction from which automobiles or other vehicles might lawfully approach her as she crossed the south half of said street. The instruction complained of made no reference to plaintiff's failure to look in a westerly direction while crossing that portion of said street south of the center line thereof, but referred exclusively to her failure to look westerly for approaching vehicles after she had passed the center line of said street and while she was crossing the north half of said street. Had the jury believed that she was south of the center line of said street at the time she was struck by defendant's machine, there is nothing in the foregoing instruction which would have prevented them, or which would in any way have influenced them, from considering defendant's claim that her failure to look westerly as she crossed this portion of the street was the proximate cause of her injury. Whether the instruction contained a correct statement of the law applicable to plaintiff's actions after she crossed the center line of said street need not here be decided, and we expressly refrain from passing upon this question, but, even if erroneous, it did not prejudice defendant's defense of contributory negligence pleaded in his answer.

It is next contended by defendant that the damages were excessive. The verdict of the jury was for $16,312.10, being the entire amount prayed for. It was stipulated that the expenses incurred by plaintiff for services of physician and for hospital and other expenses of a like character were the sum of $1,312.10. This would leave $15,000 for general damages.

"The amount of damages in such cases is committed first to the sound discretion of the jury and next to the discretion of the judge of the trial court, who, in ruling upon the motion for new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just. Upon appeal, the decision of the trial court and jury on the subject cannot be set aside unless the verdict is 'so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury.'" Hale v. San Bernardino, etc., Co., 156 Cal. 713, 715, 106 P. 83, 84.

[3, 4] After reviewing the evidence in this case, we are satisfied that the verdict in plaintiff's favor is not "so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury." The plaintiff, by rea-

son of the collision, received a fractured skull. For two days thereafter it was doubtful whether she would survive her injuries. For twelve days she was unconscious, and thereafter she gradually regained consciousness. The fracture was what is known as a depressed fracture, and necessitated the use of a trephining operation. She remained in the hospital a number of weeks, but at the time of leaving had not regained her normal mentality. She resumed her former employment, but her employer testified that she had not the memory she had before the accident, and that she forgot directions, and a good deal of her work had to be done over again. The plaintiff attended night school some six months after recovering from her injuries, and the teacher at the school testified that plaintiff did not make any progress, and that she could not retain anything or follow the simplest directions. Defendant contends that this evidence did not prove that plaintiff had sustained any permanent injury, for the reason that it all went to the condition of plaintiff immediately after the receipt of her injuries or within six months thereafter, and was not sufficient to prove her condition at the time of the trial of said action, some eighteen months thereafter. In addition to this evidence, there was the testimony of an intimate friend of plaintiff that the latter was at the house of said friend for over three months after the accident, and that during that time plaintiff was partly out of her mind, and that, while she had improved, she was not normal even at the time of the trial. We think this evidence sufficient to support the conclusion at which the jury evidently arrived, that plaintiff had, as a result of the accident, sustained permanent injuries which seriously and materially disqualified her from performing the duties which she was able to perform prior to the time she met with said accident.

[5] Defendant suggests a number of circumstances happening during the trial which, he contends, had the effect of improperly influencing the jury to render the verdict in the amount specified, and which he claims was excessive. The first of these was an instruction of the court to the effect that the jury might, after considering all the elements contributing to plaintiff's damage, "resolve what sum will fairly compensate her for the injury and loss, if any, sustained by her; *not exceeding, however, the amount prayed for in the complaint, to wit, $16,312.10.*" That portion of the instruction italicized is the portion to which defendant particularly objects. An instruction of this character is usually given in negligence cases, and it is difficult to understand how a jury in such class of cases can be properly instructed by the court without employing language similar to that used by the court in the instruction complained of. There could be no error, therefore, in so instructing the jury. If the defendant desired the jury further instructed to the effect that the amount named therein did not necessarily furnish any criterion for the amount of their verdict, it was his duty to ask for such qualifying instruction, and, not having done so, he cannot be heard to complain that it was not given. Treadwell v. Nickel, 194 Cal. 243, 263, 228 P. 25. While it was held that the giving of such an instruction is error in Alabama & V. Ry. Co. v. Dennis, 128 Miss. 298, 91 So. 4, the weight of authority is to the contrary. Van Meter v. Gurney, 240 Ill. App. 165; Stahl v. St. Louis-San Francisco Ry. Co. (Mo. Sup.) 287 S. W. 628; Ches. & Ohio Ry. Co. v. Carnahan, 241 U. S. 241, 36 S. Ct. 594, 60 L. Ed. 979; Norfolk & Western Ry. Co. v. Earnest, 229 U. S. 114, 33 S. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172. We cannot say what influence the giving of this instruction had upon the minds of the jury, but, so long as the instruction was one which the court might properly give to the jury, the giving thereof could not legally prejudice any of the rights of the defendant.

[6] Another circumstance occurring during the trial which the defendant claims influenced the jury in rendering a verdict which was excessive was the asking by plaintiff's counsel of a number of the witnesses whether they detected intoxicating liquor on defendant's breath at the time of the accident. These witnesses all answer this question in the affirmative. Defendant makes no claim that this evidence was not material to the issues involved herein. His only contention is that the jury was improperly influenced by testimony which was entirely proper. We feel that but little weight can be given to this argument.

[7] The further circumstance which defendant contends improperly influenced the jury in rendering a verdict deemed by him as excessive is that the evidence shows that two representatives of an insurance company visited the scene of the accident with one of defendant's witnesses a few days following the accident. Here again defendant makes no claim that this evidence was erroneously admitted, but relies upon what he contends is a well-established fact, that juries are often influenced in the size of their verdict in negligence cases where they are advised that the defendant has insurance to protect him against any verdict that may be rendered against him. We are not disposed to dispute defendant's contention that juries are on occasions so influenced, and the rules of evidence are so framed to exclude any direct evidence of such matters. But, when the fact that defendant carries insurance is properly brought to the knowledge of the jury, either by the evidence on the part of the defendant, or indirectly in connection with proof of some

material fact in the case, we know of no rule of law that empowers any court to set aside the jury's verdict upon the assumption that such evidence might have influenced the jury in rendering a verdict which was excessive in amount. If the verdict of the jury is excessive, then it should be set aside by the court, no matter what may have prompted the jury in the rendition thereof. On the other hand, if the verdict is not excessive, as we have held to be the case in this action, then it should be sustained, notwithstanding the fact that there is evidence in the record which might have tended to influence the jury in allowing excessive damages. The fact that the verdict is not excessive is conclusive proof that the jury were not improperly influenced by such evidence. We find no valid reason for disturbing the judgment herein, and for that reason it is affirmed.

We concur: PRESTON, J.; SEAWELL, J.

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204 Cal. 399

In re McCRAY'S ESTATE.

McCRAY et al. v. CITIZENS' TRUST & SAVINGS BANK OF LOS ANGELES.

(La. 9570.)

Supreme Court of California. June 25, 1928.

1. Wills 🔑439—Court must interpret will and carry out testatrix's intention, where not contrary to law.

It is duty of the court to interpret the provisions of a will and to carry out the intention of the testatrix, if that intention can be ascertained, provided no law is violated in so doing.

2. Trusts 🔑25(1)—Wills 🔑671—Technical language is unnecessary to creation of trust either by deed or will.

No technical language or set form of words is necessary to the creation of a trust either by deed or will.

3. Trusts 🔑25(1)—Words "upon trust" or "trustee" are not indispensable to create trust otherwise sufficiently evident (Civ. Code, § 2221).

The words "upon trust" or "trustee" are not indispensable to the creation of a trust, if the intent to create a trust is otherwise sufficiently evident; it being sufficient, if subject-matter thereof, purpose, and persons beneficially interested are indicated with reasonable certainty, under Civ. Code, § 2221.

4. Trusts 🔑160(2)—Failure to expressly appoint trustee held not fatal to creation by testatrix of trust in real property (Civ. Code, §§ 852, 857, subd. 3).

Testatrix's creation of trust in real property by will *held* not to fail in accomplishment because of omission to expressly appoint a trustee, under Civ. Code, § 857, subd. 3, will being writing complying with § 852, since a trust will not be allowed to fail for want of trustee, even though none be named.

5. Trusts 🔑156—Executor is proper trustee to hold property during existence of trust, where no trustee is named in will.

When by terms of will a trust is imposed on property to pay over income to designated beneficiaries, and no trustee is named in will, executor is proper trustee to hold property during existence of trust.

6. Trusts 🔑156—If executor is not expressly appointed trustee, court may determine from whole will whether he is to so act.

If executor is not expressly appointed trustee, where by terms of will a trust is imposed on property to pay over the income therefrom to designated beneficiaries, the court may determine from the whole will whether or not executor is to act as trustee.

7. Trusts 🔑156—Bank named as executor in will not naming trustee of testamentary trust held properly appointed trustee (Civ. Code, § 2289; Code Civ. Proc. § 1702).

Under will by which testatrix created trust without naming trustee in real property for her sons, bank named in will as executor *held* properly appointed trustee, under Civ. Code, § 2289, and Code Civ. Proc. § 1702.

8. Wills 🔑672(1)—That there was no direct devise of estate to trustee held not to affect validity of testamentary trust, where estate would vest by implication from nature of duties.

That there was in will no direct devise of an estate to trustee *held* not to affect validity of trust created by testatrix in real property, since where, from nature of the duties to be performed, the taking of such estate is necessary, an estate in the trustee will vest by implication.

9. Perpetuities 🔑4(3)—Beneficiaries becoming vested with title to testatrix's realty, subject only to trust estate for 10 years provided in will, rule against perpetuities did not apply.

Under will whereby testatrix created trust for 10 years through an unnamed trustee who was to have possession and control of her realty with no power of disposition, but with duty of collecting and dividing income thereof equally among her three sons and only heirs during that period, beneficiaries became vested with title to testatrix's real property on her death, subject only to trust estate for 10 years provided for in will, and hence there was no estate remaining to which the rule against perpetuities, and Civ. Code, §§ 715, 716, could apply.

10. Perpetuities 🔑4(3)—Vested interests do not violate rule against perpetuities.

Vested interests are never obnoxious to rule against perpetuities.

In Bank.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

In the matter of the estate of Ella McCray, deceased. From part of a decree of the superior court directing distribution and appointing the Citizens' Trust & Savings Bank of Los Angeles a trustee, Harold A. McCray and others appeal. Reversed in part, with instructions; otherwise affirmed.

Superseding opinion of District Court of Appeal, 260 P. 940.

T. Frank Courtney and D. Webster Egan, both of Los Angeles, for appellants.

Henry Merton and Walter K. Tuller, both of Los Angeles, Pillsbury, Madison & Sutro and Brobeck, Phleger & Harrison, all of San Francisco, for respondent.

O'Melveny, Millikin & Tuller, of Los Angeles, amici curiæ.

WASTE, C. J. Ella McCray died on February 19, 1925, leaving an estate consisting of both real and personal property. A holographic will, executed by her and bearing date August 20, 1924, was admitted to probate upon the petition of the respondent Citizens' Trust & Savings Bank, named therein as executor. By her will she bequeathed to her three sons and only heirs certain personal property, but did not devise to them, or otherwise attempt to dispose of, the fee in her real estate, except that in the body of her will there appears the following provision:

> "The real estate held in trust for 10 years at least and income equally divided among the sons."

On the reverse side of the paper upon which the will is penned this language is used:

> "I want this real estate fixed so that the McCray estate will be held in trust for a time so that it cannot be squandered and wasted."

The will contained no express appointment of a trustee. The "sons" referred to in the provision first above quoted were the then three living adult sons of the testatrix. One of them having passed away, his interest is represented in this proceeding by the administratrix of his estate. In due course, the probate court entered its decree of partial distribution, wherein appeared the following provision:

> "(5) To Citizens' Trust & Savings Bank, a corporation, of Los Angeles, Cal., as trustee, all the real property belonging to said estate, herein described, to be held in trust for 10 years from August 20, 1924, and the income therefrom to be equally divided annually hereafter share and share alike, one-third to Harold A. McCray, his heirs and assigns, one-third to Wilbur D. McCray, his heirs and assigns, and one-third between the heirs of Richard H. McCray, now deceased, their heirs and assigns until August 19, 1934, on which last date this trust shall terminate, and the title in fee of all said real property shall thereupon vest: An undivided one-third in Harold A. McCray, his heirs and assigns forever, an undivided one-third in Wilbur D. McCray, his heirs and assigns forever, and an undivided one-third in the heirs of Richard H. McCray, now deceased, their heirs and assigns forever, free from the control of said trustee, or its successors."

The surviving sons and the personal representative of the deceased son prosecute this appeal from the foregoing provision in the decree of distribution.

[1-3] The decedent's attempted creation of a trust in her real property is first assailed by the appellants upon the ground that the will should have expressly provided for the appointment of a trustee, the vesting of an estate in such trustee, and the designation of a purpose for which a trust may legally be created. Failing to do so, the effect, they contend, is to render abortive the decedent's effort, resulting in the devolution of such property as in the case of intestacy. We are unable to agree with this contention. It is the duty of the court to interpret the provisions of a will and to carry out the intention of the testatrix, if that intention can be ascertained, provided no law is violated in so doing. Estate of Reith, 144 Cal. 314, 316, 77 P. 942; Estate of Marti, 132 Cal. 666, 668, 61 P. 964, 64 P. 1071. No technical language or set form of words is necessary to the creation of a trust, either by deed or will. The words "upon trust" or "trustee" are not indispensable if the intent to create a trust is otherwise sufficiently evident. Estate of Tessier, 2 Coff. Prob. Dec. 362, 367; Taber v. Bailey, 22 Cal. App. 617, 620, 135 P. 975; Estate of Doane, 190 Cal. 412, 415, 213 P. 53. It is sufficient if the subject-matter of the trust, the purpose thereof, and the persons beneficially interested are indicated with reasonable certainty. Section 2221, Civ. Code. In the instant case, the testatrix, by the employment of explicit language, clearly evidenced an intention to impose a trust for a designated period upon her real property, during which period any income therefrom was to be paid over to her sons. That a trust may validly and legally be created for the purpose designated by her is recognized in subdivision 3 of section 857 of the Civil Code, and the will being in writing complies with the provisions of section 852 of the same Code in that respect.

[4-8] The testatrix did not fail in the accomplishment of her purpose because of the omission to expressly appoint a trustee. A trust will not be allowed to fail for want of a trustee, even though none be named. Hill v. Den, 54 Cal. 6, 20; Cauhape v. Barnes, 135 Cal. 107, 110, 67 P. 55. When, by the terms of a will, a trust is imposed upon property for the purpose of paying over the income therefrom to designated beneficiaries, and no trustee is named in the will, the executor is the proper trustee to hold the property during the existence of the trust. Estate of Tessier, supra, p. 367; 1 Perry on Trusts (6th Ed.) § 262. If the executor is not expressly appointed trustee, the court may determine from the whole will whether or not

he is to act as trustee. Section 2289 of the Civil Code, following the rule in equity, provides that:

> "When a trust exists without any appointed trustee * * * the superior court of the county where the trust property, or some portion thereof, is situated, must appoint another trustee, and direct the execution of the trust."

Section 1702 of the Code of Civil Procedure is broad enough in its terms to confer that power upon the superior court sitting in probate, and in which the administration of an estate is pending. The respondent bank, named in the will as executor, was therefore properly appointed trustee by the court below. We find no merit in appellants' contention to the effect that there is in the will no direct devise of an estate to a trustee. In response to a similar contention, advanced in the Estate of Reith, supra, at page 320 (77 P. 944), this court held that:

> "It is sufficient to say that when from the nature of the duties to be performed the taking of such estate is necessary, 'an estate in the trustees will vest by implication.'"

See, also, Estate of Tessier, supra, p. 368. Neither is there any merit in the further contention of the appellants that the decree appealed from declares a trust other than and different from that attempted to be set up by the testatrix in her will.

[9, 10] Finally, the appellants contend that the trust decreed by the probate court to have been created by the testatrix is void, in that it suspends the absolute power of alienation for a fixed period of years, contrary to the limitations prescribed by the sections of the Civil Code relating to restraints upon alienations, when those sections are read in the light of section 9 of article 20 of the state Constitution. That section, taken verbatim from the Constitution of 1849, art. 11, § 16, declares that "no perpetuities shall be allowed except for eleemosynary purposes."

Section 715 of the Civil Code, as originally enacted in 1872, provides that the absolute power of alienation "cannot be suspended, by any limitation or condition whatever, for a longer period than * * * during the continuance of the lives of persons in being at the creation of the limitation or condition," except in the single case of contingent remainders in fee mentioned in section 772 of the same Code—an exception which has no bearing on the instant case. It remained unchanged until 1917 when it was recast and a new subdivision added. Stats. 1917, p. 699. As so amended, the section now reads:

> "715. Except in the single case mentioned in section seven hundred seventy-two, the absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than as follows:
>
> "1. During the continuance of the lives of persons in being at the creation of the limitation or condition; or
>
> "2. For a period not to exceed twenty-five years from the time of the creation of the suspension."

By section 716 (enacted in 1872) every future interest is void in its creation "which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed" in the chapter of the Code. It would seem that, by the subsequent addition of subdivision 2 to section 715 the Legislature had made provision for the creation of such trusts as the one here attacked; but it is the contention of the appellants that this amendment, which permits of a flat period of 25 years, independent of lives in being, within which the absolute power of alienation may be suspended, is unconstitutional and void as being in violation of the provisions of the Constitution, supra. We deem it unnecessary to decide the question presented by this contention, for we do not find any room in this case for the application either of the constitutional inhibition against perpetuities, supra, or the statutory provisions against restraints on alienation. The testatrix did not attempt to dispose of the fee in her real estate. The utmost which she did was to attempt to create a trust for the period of 10 years through an unnamed trustee who was to have possession and control of her real estate, with no power of disposition, but with the duty of collecting and dividing the income thereof equally among her three sons and only heirs during that period. By so doing, she carved out of the fee to her real estate nothing more than an estate for years; that being all that was necessary for the purpose and full execution of the trust. Title Insurance & Trust Co. v. Duffill, 191 Cal. 629, 648, 218 P. 14. She therefore failed to dispose of other than this limited interest in her real property, and the fee therein became vested immediately upon her death in her three sons as her only heirs at law; in other words, they became vested with the title to the decedent's real property, subject only to the trust estate for 10 years provided for in her will. This being so, and the entire real estate, including the trust estate for years created by her will, being thus vested immediately upon her decease, there was no estate remaining to which the rule against perpetuities could apply, for vested interests are never obnoxious to the rule. Gray, The Rule against Perpetuities (3d Ed.) § 99. See, also, Blakeman v. Miller, 136 Cal. 138, 68 P. 587, 89 Am. St. Rep. 120.

Assuming that the provision of the Constitution which forbids, but does not define, perpetuities, has reference to the rule which had become crystallized under the English common law, that rule merely provides that "all future estates" which may "arise by way of executory devise, conditional limitation, or shifting and springing uses, must vest within a life or lives in being at the death of the testator and twenty-one years; and in case the person in whom the estate or interest should then vest is en ventre sa mere, nine months more will be allowed; and all estates created as aforesaid, and so limited that they may not vest within that time, are void." 1 Perry on Trusts, §§ 379, 380; Goldtree v. Thompson, 79 Cal. 613, 620, 22 P. 50. The rule, "as applied to interests in land, may be stated as follows: Any limitation or provision, the purpose or possible effect of which is to cause an estate to commence in the future, is invalid if, as a result thereof, an estate may commence more than twenty-one years after a life or lives in being." Tiffany on Real Property (2d Ed.) § 179. See, also, Estate of Hinckley, 58 Cal. 457. Decisions from other jurisdictions where a like rule obtains, in causes similar to that before us, illustrate the nonapplicability of the rule against perpetuities to the situation presented in the instant case. Armstrong v. Barber, 239 Ill. 389, 88 N. E. 246; Mettler v. Warner, 243 Ill. 600, 90 N. E. 1099, 134 Am. St. Rep. 388; Belfield v. Booth, 63 Conn. 299, 27 A. 585; Cowherd v. Fleming, 84 W. Va. 227, 100 S. E. 84; In re Rhodes' Estate, 147 Pa. 227, 23 A. 553. The substance of these cases is set forth in the statement of the principle in Gray's Rule against Perpetuities, supra, § 186 et seq.

The appellants, however, contend that the statutory rules against restraints on alienation, supra, have application to the instant case for the reasons set forth in Estate of Walkerly, 108 Cal. 627, 41 P. 772, 49 Am. St. Rep. 97, upon which they strongly rely. The rule against restraints on alienation has been, in some cases, confused with the rule against perpetuities; but the two rules, while having the same end in view, viz. that of preventing undue interference with the freedom of transfer of property, are of entirely different origin and application. The rule against perpetuities, ingrafted upon our system by the Constitution, relates only to future interests in property, the vesting of which is to be postponed beyond the allotted time. The rule relating to restraints on alienation, on the other hand, is statutory in origin, and has reference to an undue prevention of the transfer of estates already vested. This distinction was clearly pointed out in Strong v. Shatto, 45 Cal. App. 29, 187 P. 159, and in Estate of Cavarly, 119 Cal. 406, 51 P. 629. In the latter case this court said (page 409 [51 P. 630]):

> "Our statute is not, properly speaking, against perpetuities. It simply prohibits restraints upon alienation."

The Estate of Walkerly, supra, was a case arising under the provisions of section 715 of the Civil Code, supra, as it read prior to its amendment in 1917, and which, at the time the facts in the case arose, forbade restraints on alienation beyond a life or lives in being. It is clear that the amendment to the section (paragraph 2, supra), which permits of alienation "for a period not exceeding twenty-five years from the time of the creation of the suspension," if valid, takes this case entirely out of the operation of the section, since, even if it should be assumed that there is any suspension of alienation in the instant case, it could at most be only for the period of 10 years.

The appellants undertake to argue that the amendment to the section is unconstitutional as in violation of the constitutional rule against perpetuities, but in so doing they fall into the confusion of terms to which we have referred, and we find no merit in their contention. The Estate of Walkerly, supra, while doubtless sound law as applicable to the facts of that case and to the state of the law as it then existed, has no application to either the facts in the present case or the law as it now exists.

For the foregoing reasons, the probate court was correct in recognizing and upholding the trust created by the will of the testatrix and, in the exercise of its power, in the appointment of a trustee in order to carry into effect the terms of the trust; but it was in error in providing in its decree that title in fee to the real property should not vest in those entitled thereto, their heirs and assigns, until August 19, 1934, on which last-named date, the decree further provided, the trust should terminate and the title in fee of all of the real property should thereupon vest. It should have distributed the real property of the testatrix to her heirs at law, or their heirs or assigns, subject to the term of the trust estate.

In so far as the court was in error in respect to the above-noted portions of its decree, the judgment is reversed, with instructions to the court below to make and enter its decree of distribution of the fee of the real estate to the heirs at law of the testatrix, their heirs or assigns, in accordance with the laws of succession, and subject to the terms of the aforesaid trust estate. In all other respects the judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.; TYLER, Justice pro tem.

92 Cal. App. 550

PEOPLE v. LE BARON. (Cr. 1018.)★

District Court of Appeal, Third District, California. June 15, 1928.

Rehearing Denied July 14, 1928. Hearing Denied by Supreme Court Aug. 13, 1928.

1. Criminal law 🔑511(2)—Slight evidence corroborating accomplice's testimony meets statutory requirement if it tends to connect defendant with commission of offense (Pen. Code, § 1111).

Even though it be slight and when standing alone entitled to but little consideration, evidence corroborating testimony of an accomplice sufficiently measures up to the requirements of Pen. Code, § 1111, if it tends to connect the defendant with the commission of the offense.

2. Criminal law 🔑511(1)—Evidence sufficient to justify conviction held sufficient corroboration of accomplice's testimony (Pen. Code, § 1111).

Evidence which, standing alone, would have been sufficient to justify conviction *held* sufficient as evidence corroborating the testimony of an accomplice and tending to connect defendant with commission of an offense within Pen. Code, § 1111.

3. Criminal law 🔑743—Jury are sole judges of credibility of accused's testimony.

The jury are exclusive judges of the credibility of the testimony of the accused.

4. Criminal law 🔑304(3)—Courts and juries may take notice of opiate user's need of keeping nerves stimulated.

Courts and juries may take notice of and apply the common knowledge that a confirmed user of opium, morphine, cocaine, and other like opiates must at all times keep his nerves stimulated, and when the effects of the poison are disappearing will develop a state of desperation unless the drug is immediately accessible to him.

5. Poisons 🔑4—Possession of drugs for others or for joint use with them is not defense to charge of violation of statute (State Poisons Act as amended by St. 1925, p. 137).

The fact that one's possession of drugs is for the use of certain other persons or for the use of himself and others rather than for himself alone is not a defense to charge of violation of State Poisons Act (St. 1907, p. 124), as amended by St. 1925, p. 137.

6. Criminal law 🔑1170½(5)—District attorney's improper cross-examination to show defendant prostitute held not ground for reversal of conviction for violating State Poisons Act (St. 1907, p. 124, as amended by St. 1925, p. 137).

Conviction of violation of State Poisons Act (St. 1907, p. 124), as amended by St. 1925, p. 137, would not be reversed because of district attorney's improper cross-examination looking to proof that accused was prostitute, where throughout the trial defendant's counsel appeared to regard the business and character of defendant as proper subject of inquiry, and verdict was more than satisfactorily supported by competent evidence.

7. Witnesses 🔑277(2)—Cross-examination to show defendant, charged with violating State Poisons Act, was prostitute, was improper as tending to prejudice jury (St. 1907, p. 124, as amended by St. 1925, p. 137).

Cross-examination of defendant charged with violation of State Poisons Act (St. 1907, p. 124), as amended by St. 1925, p. 137, looking to development before jury of fact that accused was prostitute, was manifestly erroneous as tending to prejudice the jury.

8. Criminal law 🔑1169(10)—Error in admitting letter was not reversible, where substance had been testified to without objection.

Case would not be remanded because of erroneous admission in evidence over defendant's objection of letter tending to show the motive which prompted witness to cause defendant's arrest, where all that could be gathered from the letter by construction or implication had been testified to by witness or defendant without objection.

9. Poisons 🔑9—Information for violation of state act need not allege intent (State Poisons Act, as amended by St. 1925, p. 137).

Intent is not declared to be an ingredient of the offense of possession of poisonous drugs by the State Poisons Act (St. 1907, p. 124), as amended by St. 1925, p. 137, and hence criminal intent need not be alleged in the information.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Isabel Le Baron was convicted of a violation of the State Poisons Act, and she appeals. Affirmed.

Edward Bickmore, of Merced, and Edwin V. McKenzie and J. H. Sapiro, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, Acting P. J. By an information filed in the superior court of Merced county by the district attorney thereof the defendant was charged with violating the provisions of the "State Poisons Act," so called. Stats. 1907, p. 124, as amended by the Legislature of 1925; Stats. 1925, p. 137.

The information, in two separate counts, accuses the defendant of the commission of two different offenses under said act, to wit: (1) Having in her possession cocaine, a poisonous drug; (2) having in her possession morphine, also a poisonous drug.

The trial of the defendant upon said charges resulted in her conviction by the jury of each of said offenses. She made and urged a motion for a new trial, which was denied. This appeal is prosecuted by her from the judgment of conviction and the order denying her motion for a new trial.

The points presented and vigorously pressed for a reversal are: (1) That the testimony relied upon by the people for a conviction—in fact, the only testimony, as it is the

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★Rehearing denied. Hearing denied by Supreme Court.

claim, tending to support the allegations of the information—was that of an accomplice of the accused in the alleged commission of the crimes charged, and that such accomplice's testimony was not corroborated by testimony independent of that of such accomplice in the manner prescribed by section 1111 of the Penal Code; (2) erroneous rulings on the admission of certain testimony; (3) that neither count of the information states a public offense.

It appears that in the city of Merced there was a house known as the "Palace Rooming House" or "Palace Rooms." At this house, at the times connected with the present inquiry, transients could secure lodgings and, if desired, according to the testimony of the alleged accomplice, and which testimony is strongly corroborated by circumstances, a customer or lodger could secure the unsavory companionship for the night or even for a less permanent duration of time of a female abandoned to the lowest vices to which a human of that sex can descend. In other words, speaking plainly, and in perfect accord with the facts and circumstances developed through the evidence, while it is true that a person could secure a room at said house to be used solely for the purpose of rest, it is also true that the place was conducted as a house of assignation or prostitution. It further appears that in the months of May, June, and July, 1927, a woman known as May Howard, also known as "May Wilson," had said house under lease and owned the furniture that it then contained; that, during that time and down to July 14, 1927, said May Wilson, by which name we will hereinafter refer to that party, did not herself, or personally, manage or conduct said house, nor was she then about the premises very often, but that she employed a young woman, of the age of 22 years, and who was known as Dewie Dale, to manage the establishment for her (Wilson); that Miss Dale did manage the place during the months mentioned. The evidence also discloses that, on the 14th day of July, 1927, the defendant purchased the leasehold interest of May Wilson in the premises and also all the furniture and household equipments it then contained. The defendant, it may here be stated, was the wife of a man by the name of McCracken, but who for some time and at all the times referred to herein passed under the pseudonym of "Paul Le Baron." After and from the time the defendant took possession of the premises, Dewie Dale (now quoting from the statement of the facts as it is presented in the defendant's brief) "continued as an inmate of the house up to the time of the arrest of the defendant on July 30th, 1927; that the defendant and her husband, Paul Le Baron, had stopped at this house at divers times prior to the taking over of the lease by the defendant on July 14th, and were there twice for a day or two at a time after the last-mentioned date (Dewie Dale still being in charge for defendant), coming to Merced and stopping at said lodging house on the evening prior to the arrest of the defendant; that at the times the defendant and her husband were present in Merced after said July 14th, and particularly on the evening and night preceding the arrest of the defendant, said Dewie Dale, the defendant, and her husband occupied several of the front rooms of said lodging house and particularly jointly used a front corner room of the same." On the morning of the 30th of July, 1927, a controversy of an acrimonious nature arose at the "rooming house" between Dewie Dale, on the one side, and the defendant and her husband on the other, the origin thereof being differently explained by Dewie and the defendant. The quarrel having ended, Dewie Dale by telephone called the chief of police and informed the party answering the call that the defendant had concealed in the house a quantity of narcotics. Two police officers shortly thereafter appeared at the house, and within a few minutes subsequently and while the Dale woman was telling said officers of the alleged fact of the possession of the narcotics by the defendant, the chief of police, Wayne Westfall, also appeared at the house. Miss Dale repeated to the chief the charge against the defendant, and at the same time led that officer into the lavatory or "toilet," as she expressed it, and, reaching through an aperture in the ceiling, brought out and delivered to the chief two cans containing morphine and a package containing cocaine. When the chief of police entered the rooming house the defendant was present. She heard the charge laid against her before the chief by Dewie Dale, but she denied having possession of the drugs and declared that she did not know until then that there were any such articles in the house, and had no knowledge of how or by whom the narcotics were placed above the ceiling of the toilet. The two women were placed under arrest by the chief and taken to jail, where they were incarcerated. Charges of unlawful possession of poisonous drugs were filed before a magistrate against both women, and, upon a preliminary examination of the charges, both were held for trial in the superior court for said offenses, and there a separate information, based upon the magistrate's commitment, was filed against each. At the time of the trial of the defendant, Dewie Dale had not been brought to trial. Paul Le Baron was at the rooming house at the time the Dale woman telephoned for the officers, but he left the premises either before or immediately upon the arrival of the officer (the record is not clear as to this), and, so far as the present record discloses, has not been seen or heard of since the date of the arrest of the two women.

At the trial of the defendant the chief of police testified to the facts embraced within the above general statement, in so far as was concerned his connection with the occurrences at the rooming house after he appeared there. The chief further testified that, in addition to the narcotics, the Dale woman also took from the ceiling of the toilet and delivered to him a package containing "little rubber tubes," "some little glass vials," a catheter, etc.; that, about an hour after the women were confined in jail, he, with Dewie Dale, returned to the rooming house, the latter having told him at the jail that there were some other articles at the house belonging to the narcotic equipment. Dale, on that occasion, after looking about the house for a time, found in the drawer of the phonograph stand a box containing "hypodermic needles," and passed the box and its contents over to the chief. The latter further testified that Dale delivered to him as a part of the "drug outfit" a small syringe. The witness was not certain whether that instrument was taken by the Dale woman from the place over the ceiling from which she obtained the cases of morphine and the cocaine package and at that time delivered to him, or was found and delivered to him by her on their return to the house after she had been taken to jail. He was positive, though, that the syringe was found and delivered to him by Dewie on the one or other of those occasions. The chief testified that the phonograph stand referred to was in the room which defendant stated to him that she and her husband occupied. He further testified that at the time of the arrest, and while he was still at the rooming house, the Dale woman stated to him that, while she had on two or three occasions used cocaine, she was not a "drug addict."

Dewie Dale, testifying for the people, stated:

That on the 30th of July, 1927, she was engaged in the business of prostitution at the "Palace Hotel" in Merced, and that the defendant at the same time and place was engaged in the same business. (This testimony was received without objection, and no motion to strike it from the record was made by defendant's counsel or by defendant herself.) Continuing, the witness said: That she placed the cases and the package of cocaine "in the attic" (as she termed it) of the toilet, "punching a hole through the ceiling for that purpose, by the direction of Paul Le Baron, given in the presence of the defendant. That one of the cans was so concealed within the last two weeks of June, 1927, and the second can, by his direction, placed in the same place about two or three weeks after putting the first can there. That the "little rubbers" and glass vials were, by direction of Le Baron, by her put in the same place, wrapped in a separate package, as was also the cocaine. The can of morphine last placed in the ceiling of the toilet, she said, was given to her by Paul Le Baron about half an hour after he and defendant arrived at the house from San Francisco. That Le Baron "took it from his bag"; that "he (Le Baron) said: 'Dewie, take this can and put it in the plant with the other.'" That, as Dewie took the can, Le Baron said to her: "Just wait a minute; I have something else." "So," continued Dewie, "he went through his bag and started to look for the cocaine, and he could not find it, and so Isabel says: 'Just a minute; I will get it for you.' And she (defendant) went to his bag and got his bathrobe and went in the pocket and took out the blue package of cocaine, and she handed it to me, and when she handed me that morphine, I put it in the plant, in the hiding place."

"Q. (By District Attorney): Is Paul Le Baron an addict? A. He is.

"Q. Is Isabel an addict? A. She is.

"Q. Do you know approximately the amount used by either of them, the amount of morphine? A. Well; I don't know to the grain, but I know just about how much of a cube they use. * * * Well; Isabel uses, I think, a little less than Paul, but not very much less—I would say a quarter of a tube less.

"Q. How does she (defendant) use it? A. With a hypodermic."

Witness explained how the syringe found in the room of defendant and the hypodermic needles were used by a narcotic addict for the purpose of self-injection of the narcotics, and stated that she had seen the defendant use those articles when injecting morphine or cocaine into her body. The witness testified that Le Baron stated to her, in the presence of the defendant, that he had acquired the leasehold interest of May Wilson in the premises and also had purchased from the same party the furniture and household equipment in the house, and that the house was to be under the charge and management of the defendant; that she (Dewie Dale) could remain at the house and conduct the same until the defendant (his wife) had so far recovered her health as to enable her to take personal charge and management thereof; that she (witness) did remain at the house and in control and paid to the defendant any moneys she received for the renting of rooms. At the time of the arrest (the witness stated) the defendant was in active charge of the house. Dewie Dale, on cross-examination, stated that the narcotics referred to herein were placed in the "hiding place" in the house by her while May Wilson was owner of the "Palace Rooms" or "Palace Hotel," as sometimes the premises in question were called by the witnesses. May Wilson herself was not at the house at any time while she owned it, but Dewie, as explained above, was managing the place for Wilson. In this connection it is proper to state that the defendant testified that both she and her husband stopped at the rooming house several times in the month of June, 1927. The Dale woman testified that on two of such visits she "planted," or concealed in the house, at the request of Paul Le Baron, the narcotics which she delivered to the chief of police on the 30th of July.

The defendant testified that she had known Paul McCracken, or Le Baron, for about six years prior to the time of the trial of this case, and that, about a year prior to the trial, she and Paul intermarried in Jackson county, Or. She testified that she and her husband had been occasional visitors to the Palace Rooming House and visited the house in the month of June, 1927; she admitted that she acquired from May Wilson the latter's leasehold in the premises and also purchased the furniture in the house and took possession thereof on the 14th of July, 1927, but that a written transfer was not executed until the 27th day of July of that year; that she was not in good health at the times referred to and for that reason she employed Dewie Dale, who had been conducting the place for May Wilson, to take charge of the place and manage it until she (defendant) was herself able to do so. She stated that she first met Dewie Dale at a roadhouse near Sacramento City on September 17, 1926, at which roadhouse Dewie was employed, and that she again met her in January, 1927, at her (defendant's) house in Los Angeles; that she became interested in the proposition of taking over the Merced rooming house through the suggestion of Dewie Dale. Defendant, in reply to questions by her own attorney, stated that her husband (Paul Le Baron) was "what is known as a drug addict," and that she herself was in the habit of taking morphine once a week. In assumed mitigation of this habit of herself and husband, she explained that both took the narcotics because of "ill health"; that, as to herself, she used the morphine by the advice of her physician for the purpose of relieving herself from the bodily pains incident to her ill health or the disease, whatever its specific nature was, from which she was and had for a year been a sufferer. She in effect admitted that she was a prostitute, a proposition as to which further consideration will be required when we take up for determination the point involving an attack on certain rulings as to the admissibility of certain testimony and upon which a demand for reversal is predicated.

The foregoing synoptical statement of the testimony is sufficient for the purpose of considering the point first made by the defendant for a reversal, to wit: That the testimony of Dewie Dale, who, it is claimed, was an accomplice of the defendant in the commission of the offenses charged in the information, was not corroborated as the law declares is indispensable to the support of a conviction, where such accomplice's testimony is the only testimony directly connecting the accused with the commission of the offense charged. In considering this question, we are not to be understood as deciding that Dewie Dale, under the evidence presented by the record before us and under the statute upon which the information herein is founded, is an accomplice. Nor is it to be understood that we here intend to hold that she was not such accomplice. See latter clause of section 1111, Pen. Code. We may and will assume, however, for the purposes of the decision herein, that she was an accomplice of the accused in the commission of the offenses of which the latter was convicted.

[1] As to the quantum and the quality of proof essential to the corroboration of the testimony of an accomplice to justify, legally, a conviction of the accused upon such testimony, section 1111 of the Penal Code provides:

> "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

It will be noticed that the language of the foregoing section is, in substance, that the corroborating testimony is sufficient if it *tends* to connect the defendant with the commission of the offense, and the courts of this and of many, if not all, of the other state jurisdictions, in construing that language have uniformly held that if the corroborating evidence of itself *tends* so to connect the defendant, it sufficiently measures up to the requirements of the section, even though it be slight, "and entitled, when standing by itself, to but little consideration." People v. McLean, 84 Cal. 480, 482, 24 P. 32. See, also, People v. Melvane, 39 Cal. 616. "If," says the court, in People v. Blunkall, 31 Cal. App. 778, 783, 161 P. 997, 999, "there be some independent evidence fairly *tending* to connect the defendant with the commission of the crime, then the testimony of the accomplice is corroborated within the intent of the above section. People v. Garnett, 29 Cal. 622; People v. Clough, 73 Cal. 348, 15 P. 5; People v. Miller, 65 Iowa, 60, 21 N. W. 181; People v. Mayhew, 150 N. Y. 346, 44 N. E. 971."

[2] It seems to us very clear that the reading of the evidence, as in conspectus form it has hereinabove been reproduced, cannot leave in the mind of one free from a partisan interest in the case any doubt that there are facts and circumstances brought out by evidence independent of the testimony of Dewie Dale which in probative effect extends beyond that quantum of proof, which merely tends to connect the accused with the commission of the offenses with which the information charges her. Indeed, the facts and circumstances referred to were in part brought into the record by the defendant's own admissions and are these: (1) That the defendant and her husband visited and temporarily stopped at the rooming house on several different occasions in the middle part of the month of June, 1927, and also several different times in the month of July, prior to the 14th day of that month, on which date the defendant took possession of the premises under the lease transferred to her by May Wilson. (2) That, from and including the last named date she held possession of the house and through Dewie Dale, her agent, managed the business conducted thereat, until a few

days prior to the 30th of July, when, as she admitted to the chief of police, she was herself in personal charge of the place. (3) That her husband was a drug addict, or, as that phrase really means, an habitual or confirmed user of narcotics, and that she herself, though denying that she was a "drug addict," used morphine once a week. (4) That (the chief of police testified) when Dewie Dale returned to the house with that officer, after her arrest, to look for and deliver to him, if she found them, certain articles which are necessary to be used where opiates are hypodermically administered, she searched several different rooms in the house and several different places in the rooms before she was able to locate any such articles, and finally found a number of "hypodermic needles" in the drawer of the phonograph stand, which was then in the room occupied by the defendant and her husband, a circumstance reasonably affording the inference that the needles were placed where found by some one other than the witness, otherwise the latter would have known their precise location and not have been required to search the several rooms in the house to locate them. (5) The undisputed fact that the narcotics were secreted in the toilet in the bathroom which was directly connected with the room occupied by the defendant and her husband on every occasion that they visited and stopped at the house.

[3, 4] These circumstances were more than sufficient to meet the requirement of section 1111 of the Penal Code as to the corroboration of the testimony of an accomplice. Indeed, we feel no reluctance in saying that upon those circumstances alone, or without regard to the testimony of Dewie Dale, the jury could, as they did, predicate an impregnable verdict of guilty. Of course, the jury were not bound by the testimony of the defendant denying knowledge of the fact that the narcotics were concealed in her house until the time of the arrest of herself and Dewie Dale. They were the exclusive judges of the question of the credibility of her testimony. It can readily be perceived how the jury could have concluded from all the circumstances of the case that the narcotics were secreted and kept in the house for her own as well as for the convenient use of her husband, admittedly a slave to the drug habit. It is known as a matter of common knowledge that a confirmed user of opium, morphine, cocaine, and other like opiates must at all times keep his system of nerve fibers maintained to a certain condition of stimulation, and that when the effects of the poison are disappearing, will develop a state of desperation unless the poisonous drug is immediately accessible to him. This proposition is, indeed, so generally known and understood that it would be absurd to say that the courts and juries may not take notice thereof and apply it where necessary in the determination of an issue such as is presented here. But this discussion need not further be pursued. As before stated, it is perfectly clear, as it has been our sole purpose to point out in the foregoing consideration of the evidence, that in any event there is sufficient evidence, apart from or independent of the testimony of Dewie Dale, to support the verdict, and that therefore, if Dewie Dale was an accomplice of the accused, such independent evidence more than measures up to the requirement of the law as to the quantum of corroborating evidence necessary in such instances.

[5] It may well here be suggested, in order to meet any argument which might be offered upon the proposition, that even if the defendant herself was not a drug addict (a matter for the jury to determine, notwithstanding her positive denial that she was), but held possession of the drugs for use by her husband or by Dewie Dale or for both, that fact would not constitute a legal defense to the charges alleged against her. Nor would it be a defense to said charges if it appeared that the possession was joint—that is, if the drugs were kept in the house to be used by herself, her husband, and Dewie Dale. In that case each would equally be subject to punishment for such unlawful possession. This proposition, though, is so clearly a commonplace that the citation of cases to support it is entirely unnecessary, yet, it may not be wholly amiss to state that precisely the same proposition is suggested in the case of the People v. Hay, 74 Cal. App. 464, 472, 241 P. 275.

[6, 7] The second point, as above declared, is founded on rulings admitting certain testimony which, it is claimed, resulted in seriously prejudicing the accused in the minds of the jury. On cross-examination, the district attorney examined the defendant as follows:

"Q. What is your occupation? A. I have none.

"Q. Haven't you been practicing prostitution? A. No, sir, not for one year; my health would not permit it.

"Q. You have not practiced prostitution nor been in a house of prostitution for one year? A. I have been in a house of prostitution, but I have not practiced it.

"Q. You were not working? A. I was not working; no, sir.

"Q. Weren't you working here for May Wilson? A. No, sir.

"Q. Never? A. No, sir."

There were no objections interposed by the defendant's counsel to those questions.

The district attorney, assuming (upon what theory or for what purpose we have been unable to discern) that it was not only legally proper but important to show, if he could, that the defendant had practiced prostitution within the year during which she stated that her health was such as to prevent her from actually engaging in that business, asked her on cross-examination if she had not "worked" during said period of time in several different houses of ill fame in the city of

Los Angeles. There were no objections made by the defendant's counsel to those questions. The prosecutor then asked the defendant whether, on the night of the 9th of August, 1927, she was "entertaining" a "man" in her apartment at 355 Fulton street, San Francisco, when a detective entered the apartment looking for Paul Le Baron, and that the "man" then said to the detective, in the presence of the defendant, that "he had picked you (defendant) up on the street and paid you (defendant) $14, or some such sum." Counsel for the accused did object to that question and assigned the asking of the question as misconduct on the part of the prosecutor. The defendant admitted that within the year preceding the time of the trial of this case she was in several houses of prostitution in the city of Los Angeles referred to by the prosecutor but denied that during that time, or while in said houses, she actually practiced prostitution. As to the San Francisco episode, she positively denied that any such transaction occurred.

In rebuttal, the prosecutor introduced as a witness one A. J. Kane, the head of a San Francisco detective agency, who testified, in response to questions by the district attorney, that on the night of the 9th of August, 1927, he went to the apartment of the defendant at 355 Fulton street, in San Francisco, to look for and arrest Paul Le Baron; that upon entering the apartment, he saw a man in a room therein partly undressed and engaged in putting his clothes on; that he asked the man if he was McCracken (or Le Baron), and defendant interposed, saying, "He (the 'man') is my uncle." To which the "man" replied: "Uncle, hell! I am not; I paid her $14 to stay here all night." To that testimony the defendant made no objection. It should be explained, however, that after the detective had stated his purpose in visiting the defendant's apartment, to wit: to arrest Le Baron "for Merced county," counsel for the defendant objected to the testimony as "irrelevant, immaterial, and incompetent"; but, upon the statement by the court that, while the defendant could not be impeached by testimony of particular acts, the testimony proposed, as explained by the prosecutor, was nevertheless admissible for the purpose of contradicting defendant's testimony that she was not then practicing prostitution or engaged in that business, as affecting the credibility of her testimony, counsel for the defendant acquiesced in that view of the law and made no further objections to the detective's testimony. The result was that the latter's testimony about seeing a man, not fully attired, in defendant's room, and of what the man stated was the occasion or reason for his presence there, went before the jury without objection. And so throughout the trial, as the record discloses, counsel for the defendant, from the nature of his objections, appears to have assumed that it was legally proper for the people to bring before the jury in a competent way any fact or circumstance which would tend to show that his client was not only a prostitute but that she had practiced prostitution continuously down to the date of her arrest for the offenses with which the information charges her, upon the theory that such testimony went to the impeachment of her testimony that she had not actually followed her sordid vocation during the course of the year immediately preceding the date of trial.

The cross-examination of the defendant by the district attorney looking to the development of the fact before the jury that the accused was a prostitute was manifestly erroneous and should not have been permitted. People v. Un Dong, 106 Cal. 83, 87, 88, 39 P. 12; People v. Crandall, 125 Cal. 129, 134, et seq., 57 P. 785; People v. Vatek, 71 Cal. App. 453, 468, 236 P. 163. In People v. Un Dong, supra, the defendant (on trial for the crime of assault with a deadly weapon alleged to have been committed on a public street in the Chinese quarters of San Jose) and an associate, one Ah Wei, lay in wait in the night time for the prosecuting witness, one Ah Bong, to appear upon the street from a restaurant where he was known by defendant to be at the time, and when, finally, Ah Bong made his appearance upon the street the defendant told Ah Wei to shoot; that the latter thereupon fired two shots at Ah Bong, one of which hit him in the back. In cross-examining the defendant, the district attorney asked him, among other questions, if it was not true that the house he resided in was a house of prostitution. Objection by the defense to that question was overruled, and the defendant answered in the negative. Other like questions were asked, objected to, the objection overruled and the defendant answered in the negative. In reply to the argument of the attorney-general that the negative answers of the defendant to the questions allowed had the effect of curing the error, or any prejudice to the rights of the defendant which affirmative answers might have produced, the court, after characterizing the cross-examination as "improper in the highest degree," said: "The error in such case lies in permitting an examination of that character," citing People v. Wells, 100 Cal. 459, 34 P. 1078. The rule as thus laid down is proper to invoke in all cases in which the testimony sought to be elicited by the indicated cross-examination has no possible connection with the issue under trial. Indeed, such a cross-examination in any case, unless it is one in which the accused is charged with some sex offense to which such an inquiry would or might be directly pertinent, is improper, so much so that the mere asking of questions along those lines, even if answers thereto were disallowed, would itself be highly prejudicial to the accused, because of the insinuation with which necessarily they are pregnant that the defendant is or has been guilty of living a life characterized by the worst kind of moral depravity, an insinuation which would be likely to find lodgment in the minds of the jury so that they, maybe unconsciously, would or might be more or less influenced against the accused, even in cases where, as the court stated was true in the case of Un Dong, supra, there was unsatisfactory competent proof of the defendant's guilt. In the present case, however, while we do not approve of the cross-examination of the defendant by the district attorney along the lines indicated, the situation with respect to such cross-examination is peculiar and entirely different from that found in any of the cases where a like cross-examination was prosecuted under the approval of the trial court and of which the cases above cited are exemplars. The fact that the place where the narcotics were kept and found was a house of prostitution was first brought out in the direct examination of Dewie Dale by the district attorney, and the further fact that both the Dale woman and the defendant were prostitutes was likewise shown. Naturally, the defendant's counsel did not object to Dewie Dale's testimony admitting that she was and had been engaged in the house where the narcotics were secreted and found in the business of prostitution, but counsel did not, as he should have done, object to that witness' testimony that the defendant was a prostitute. The only objection made by counsel in connection with the part of Dewie Dale's testimony describing the character of the house and stating that both she and the defendant were prostitutes was to the following question to that witness by the prosecutor: "What connection did Paul Le Baron have with that place?" referring to the Palace rooming house. The objection to that question by counsel for the accused was that it called "for a conclusion of the witness." Later on in the direct examination of Dewie Dale, the district attorney brought from the witness the statement that both she and the defendant were "girls" of Paul Le Baron—that is, that he practically lived with both of the women. Then the prosecutor asked: "You were both his girls, and you were working under him?" Objection here was made by counsel for the defendant upon the ground that the relationship of the women to Le Baron was foreign to the issues and assigned the asking of the question as misconduct. The district attorney stated, in an attempt to support the competency of the question, that its purpose was to bring out ultimately the fact that the defendant was in personal charge of the house when the narcotics were delivered to the chief of police. A colloquy followed between court and counsel, and finally the attorney for the defendant stated that the latter had admitted that she was in charge of the house at the time mentioned, and "that ought to be sufficient." Thus that particular matter ended.

It will thus be seen that, as above stated, counsel for the defendant, in the trial of the case, from its beginning to its conclusion, appears to have been of the opinion that the malodorous character of the business maintained in the "rooming" house as well as the bad personal character of the defendant was a legitimate subject of inquiry in the case. Allowing all that testimony to go before jury without objection clearly supports that conclusion, and as clearly does it place the defendant before this court in a position in which consistently or logically or legally she cannot ask for a reversal of the case because the testimony referred to thus became a part of the record upon which the jury were to decide the question of her guilt or innocence. It may here well be repeated that the verdict is more than satisfactorily supported by competent evidence, otherwise a different situation—such as the court said appeared in the case of People v. Un Dong, supra—might be presented here.

[8] Defendant emphasizes the proposition that timely objection was made in her behalf against a certain letter introduced in evidence by the district attorney by way of rebuttal. The record shows that Dewie Dale stated in her direct examination that she was in love with Paul Le Baron, and that she had frequently had sexual relations with him, not only with the knowledge but with the express approval of the defendant. On cross-examination, and upon the theory that it affected the credibility of her testimony, the defendant's counsel asked Miss Dale if the motive prompting her to cause the arrest of the defendant was jealousy of the latter's relations with Paul Le Baron. The witness replied in the negative, but declared that she caused the arrest of defendant because Le Baron had the day previously severely beaten her about the face and body,, had threatened to kill her, and that defendant had encouraged Paul to beat her and also stated that he (Paul) ought to "bump her off," meaning that he ought to kill her. Under the guise of rebuttal and upon the assumption that he had a right to show that jealousy was not the reason Miss Dale caused defendant to be arrested, the district attorney offered in evidence a letter (referred to above) written by the defendant at Los Angeles under date of May 23, 1927, and addressed to Dewie Dale, at Merced, in which defendant, addressing Dewie in endearing terms, gave a graphic account of the trip of herself and Paul Le Baron in an automobile to Los Angeles, gave a somewhat vivid description of the harrowing details of a physical combat which Paul had had with an unnamed drunken Mexican,

who, it seems, had been traveling with them, told of the narrow escape of Paul from death at the hands of the Mexican, of how valiantly Paul fought the "crazy Mexican" and the skill with which he successfully defended both himself and defendant against injury and concluded by saying that if Dewie had only been present and had witnessed the fight she would now not only love and respect Paul, as she always had, but that she would "worship him." This is the substance of the contents of the letter. There was no necessity for introducing the letter in evidence, even if it were to be conceded that it was competent evidence for the purpose for which it was offered. Miss Dale, while denying that jealousy was her motive in causing the arrest of the defendant, admitted that she had a personal motive in exposing to the officers defendant's possession of the narcotics. All that the defendant needed or cared to show was that Miss Dale was interested in the success of the people's case for personal reasons. This shown, it could make no difference what the specific motive was, for, whatever it might have been, there was thus created an opening for the argument by defendant that she might, in her zeal for revenge against the latter, stray from the path of truth when giving her testimony to the jury. But, admitting that it was error to allow the letter to be received in evidence, there are substantial reasons arising from the record itself for holding that the case should not be remanded for such error, and they are these: (1) All that can be gathered from the letter (and this by construction or implication) is what Dewie Dale testified to without objection on her direct examination, viz., that she loved Le Baron and that she sustained immoral relations with him with the approval or acquiescence of the defendant. (2) That (also by construction or implication) the defendant, as without objection she testified, was a "professional" prostitute. It is perfectly clear that any testimony that she was engaged in that unholy business, received after she herself admitted on the witness stand and, after Dewie Dale, without objection, testified that her business was that of a prostitute, could not have intensified the harm, if any, which had already been done in that respect under the circumstances as fully explained above.

[9] The last point (and in regular order it should have been the first to be considered) to which attention is invited is that the information fails to state the offenses therein sought to be charged because the defendant is not thereby charged with "willfully, unlawfully and feloniously having narcotics in her possession." This contention means that, to state the crime set forth in the information, it is necessary to allege that the accused committed the acts constituting said crimes with the *intent* to do so. The contention is devoid of merit. The statute defining the offenses charged against the defendant does not declare that either intent or scienter is an ingredient thereof. It provides that the mere possession of the narcotics named in the information shall subject the possessor to the penalties prescribed therein. The rule of criminal pleading applying to cases of the character of the one here is exhaustively considered in the case of People v. O'Brien, 96 Cal. 171, 176, et seq., 31 P. 45, 47, and many authorities are cited, agreeing that:

> "When an act, in general terms, is made indictable, a criminal intent need not be shown, unless from the language or effects of the law a purpose to require the existence of such intent can be discovered"—citing Halsted v. State, 41 N. J. Law, 552, 32 Am. Rep. 247.

It is further declared in the O'Brien Case:

> "The same principle is applied to many cases, such as selling intoxicating liquors to minors, abducting girls under a certain age, usurping an office under the belief that the usurper was truly elected, illegal voting under the belief that the voter is a qualified elector, publishing a libel in ignorance of its contents, storing gunpowder, and the like. 1 Wharton's Crim. Law, § 88; 2 Wharton's Crim. Law, § 1584; Hill v. State, 62 Ala. 170."

To the same effect are the cases of People v. Hartman, 130 Cal. 487, 62 P. 823; People v. Pera, 36 Cal. App. 292, 304, 171 P. 1091; Commonwealth v. Weiss, 139 Pa. 251, 21 A. 10, 11 L. R. A. 530, 23 Am. St. Rep. 182; State v. Gould, 40 Iowa, 374; Commonwealth v. Holstein, 132 Pa. St. 357, 19 A. 273; Rex v. Ogden, 6 Car. & P. 611. See, also, Pen. Code. § 7.

We may add that if the defendant in a case, like the one here, is prosecuted under the State Poison Act, and his possession of any of the narcotics falling under the condemnation of the statute is upon the prescription of a physician given in good faith or for purely medicinal purposes, he may shield himself against punishment by exhibiting the prescription and so proving the fact that such possession was lawful. People v. O'Brien, supra. No such proof was offered in the present case.

The judgment and the order are affirmed.

We concur: PLUMMER, J.; BARTLETT, Justice pro tem.

92 Cal. App. 598

NYE & NISSON v. WEED LUMBER CO.
(Civ. 6081.)

District Court of Appeal, First District, Division 2, California. June 19, 1928.

1. Sales 🔑384(7)—Seller may, on buyer's breach, recover excess of contract price over net proceeds obtained from resale (Civ. Code, § 3311).

Under Civ. Code, § 3311, the measure of damages for breach of contract to purchase personal property, when title is not vested in buyer, may properly be the excess of the contract price over the net proceeds obtained from a resale of the property.

2. Sales 🔑340—Seller, on buyer's refusal to accept goods, may sue for purchase price, treat property as his own, and sue for difference between market price and market value, or sell property as buyer's agent and sue for difference between contract price and proceeds (Civ. Code, § 3049).

On buyer's breach of contract to buy personal property, seller may stand on contract, retain property for benefit of buyer and sue for purchase price, or may retain and treat property as his own and sue for the difference between the contract price and the market value of the property at time and place of agreed delivery, or may, under Civ. Code, § 3049, sell the property as buyer's agent and sue for the difference between the price and the net proceeds of resale.

3. Sales 🔑208—Title to eggs, to be procured by seller after contract was entered into, did not pass at time contract was made (Civ. Code, § 1140).

Where seller of processed eggs did not have possession of the eggs at time of contract, but subsequently received, candled, and packed the eggs for the buyer, and the contract did not specifically nor impliedly provide for immediate transfer of title, the title did not pass at the time the contract was entered into, under Civ. Code, § 1140.

4. Sales 🔑199—Time of transfer of title depends on intent ascertained from contract.

The question of the immediate transfer of title to personal property depends on the intent of the parties, which is to be ascertained from the contract.

5. Sales 🔑333—Notice to buyer of time and place of resale by seller as buyer's agent held unnecessary.

Seller, reselling eggs as buyer's agent on buyer's refusal to accept eggs, to recover difference between contract price and net proceeds of resale, was not required to give buyer notice of specific time and place of sale.

6. Sales 🔑68—"Processed eggs" within contract for sale thereof meant dipping the egg or glazing the shell with solution to prevent fermentation or deterioration.

The term "processed eggs" in a contract for sale thereof meant that the egg was to be dipped or the shell glazed with a solution intended to fill the pores of the shell to prevent penetration of air or bacteria, and to thereby deter fermentation or deterioration, in view of the meaning of the term "in poultry industry."

7. Sales 🔑168(3)—Candling held adequate method of determining soundness of eggs.

Candling eggs *held* adequate method of determining their soundness in action for buyer's refusal to accept processed eggs.

8. Sales 🔑266, 272—Implied warranty that eggs were sound and merchantable became part of contract of sale (Civ. Code, §§ 1771, 1775).

Under Civ. Code, §§ 1771, 1775, implied warranty that processed eggs were sound and merchantable become part of the contract for sale thereof.

9. Trial 🔑404(1)—Findings will be liberally construed to uphold judgment.

Every presumption of law favors a liberal construction of the findings so as to uphold the judgment rather than defeat it.

10. Sales 🔑279—Warranty as to recognized grade of commodity must be accepted in light of meaning known to trade.

When a warranty is made as to a recognized grade of a commodity, it must be accepted in the light of the meaning of that term as it is known to the trade.

11. Sales 🔑284(1, 2)—One or two defective eggs in case of processed eggs is not breach of implied warranty.

A defective egg or two in a case of processed eggs does not constitute breach of implied warranty that eggs are sound and merchantable.

12. Sales 🔑177—Buyer's refusal to accept 750 cases of processed eggs was not warranted by a small number of defective eggs.

A small number of defective eggs did not warrant buyer of 750 cases of processed eggs to refuse to accept eggs.

13. Appeal and error 🔑1170(10)—Defective findings held not ground for reversal (Const. art. 6, § 4½).

Under Const. art. 6, § 4½, the mere fact that findings contained negative pregnants *held* not ground for reversal, where the judgment was sustained by the evidence.

14. Sales 🔑180(4)—Buyer, after acceptance of substantial portion, could not cancel contract as to undelivered portion, in absence of evidence that undelivered part was defective.

Buyer having accepted and paid for 128 cases of processed eggs under an entire contract for 750 cases *held* not warranted in canceling contract as to undelivered cases, in the absence of evidence that eggs to be delivered would be defective.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Nye & Nisson against the Weed Lumber Company, also doing business under the firm name of Weed Mercantile Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Taylor & Tebbe, of Yreka, and Frank Thunen, of San Francisco, for appellant.

Smith & Jacobson, of San Francisco, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment for damages secured pursuant to section 3311, Civil Code, for breach of a contract to purchase processed eggs.

Respondent is engaged in the commission poultry and eggs business at San Francisco, Cal. The appellant is a holding corporation for the Weed Mercantile Company, and operates a store at Weed, Cal., in connection with its lumber industry. In April, 1923, appellant contracted with respondent for the purchase of 750 cases of special processed eggs at 34 cents per dozen, to be delivered upon request, f. o. b. at San Francisco. The contract for these eggs was entered into through correspondence between the parties. April 5, 1923, appellant sent the following telegram to the respondent:

> "Would like to contract for 1000 cases of processed specials for fall delivery. Advise immediately terms of contract for this season."

To which message respondent replied:

> "Answering—terms same as last year; price 34¢."

These messages were followed April 10th by this letter from appellant:

> "Gentlemen, you might write us confirming sale to the Weed Mercantile Company of 750 cases processed eggs to be delivered as needed between the dates of October 1st, and February 1st, at a price of 34¢ per dozen, f. o. b. San Francisco."

To which letter the respondent replied April 12th:

> "This is to acknowledge the receipt of your letter of the 10th inst., and confirm sale to the Weed Mercantile Company of 750 cases processed eggs, specials, to be delivered as needed between the dates of October 1st, 1923, and February 1st, 1924, at a price of 34¢ per dozen, f. o. b. San Francisco, Cal."

Pursuant to this contract 128 cases of processed eggs were shipped, accepted, and paid for by appellant, leaving undelivered 622 cases, containing 18,660 dozens of eggs, which appellant refused to accept and attempted to cancel the contract upon the ground that the eggs which had been received were unfit for use.

Several shipments of eggs were made to appellant prior to October 1st, which it insisted should not be charged against the contract for 750 cases above mentioned. The inference is that these eggs were entirely satisfactory and that the appellant was anxious to preserve the full benefit of its contract for 750 cases to be supplied at 34 cents per dozen between October 1st and the following February. By the middle of November the price of eggs had slumped. William Russell, a dairy produce broker, testified:

> "* * * The decline (in the price of eggs) started about the middle of October, but in * * * November and December it commenced to show itself strongly. In January it became very strong. Up to and including February 1, 1924, the market on processed pullet (eggs) went as low as 16 cents. I would consider a price of 20 cents * * * between January 23, and January 31, 1924, to be a fair market value of the eggs."

The 622 cases of rejected eggs were in fact sold on the open market the latter part of January for 20 cents to 22 cents per dozen.

By December 5th, 128 cases of eggs had been shipped, accepted, and paid for by appellant. November 2d it began to complain of the quality of eggs received, saying in a letter of that date:

> "We have had several complaints from our steward that the eggs we were getting from you were not satisfactory. * * * In several cases we find we have lost quite a few eggs from each case. * * * Advise us if you will be in a position to fill contract for storage eggs stored in months of May and June? * * *"

On December 14th appellant wrote respondent again, as follows:

> "* * * It is with regret that we will be compelled to request that you cancel our contract for processed eggs, as our steward has positively refused to use further shipments of storage eggs from you. * * * We will not be in a position to favor you with further orders this year on storage eggs."

On December 18th respondent wrote appellant declining to cancel the contract for eggs which were undelivered, saying that the price of eggs had dropped materially since the execution of the contract, and that in the absence of instructions to the contrary respondent would sell the 622 cases of undelivered eggs on the market for the benefit of appellant and credit its account with the proceeds of sale. December 31st appellant replied, saying:

> "* * * We cannot use those eggs and will be compelled to insist that you cancel the contract as requested."

Following this notice of intention to sell the eggs, the respondent did in fact sell the remaining 622 cases of eggs for the highest market price, receiving $3,906.60 therefor. The contract price of the undelivered eggs amounted to the sum of $6,344.40. The excess of the contract price, over the proceeds of resale therefore, was the sum of $2,437.80. Respondent thereupon brought suit for damages for this sum, for breach of contract.

Judgment and findings were entered accordingly.

Appellant contends that: (1) The evidence does not support the findings; that (2) the findings do not support the judgment; and that (3) there was a breach of warranty, as to the soundness of the eggs, required by section 1768 of the Civil Code.

[1, 2] The measure of damages for the breach of a contract to purchase personal property, when the title is not vested in the buyer, may properly be the excess of the contract price over the net proceeds obtained from a resale of the property. Secton 3311, Civ. Code; Burner v. American Bar Q. Min. Co., 76 Cal. App. 767, 246 P. 74; Garcia & Maggini v. Washington Dehydrated Food Co. (C. C. A.) 294 F. 765. However, in the event of a breach of contract to purchase personal property, the seller may have an option to stand upon the terms of his contract, retain the property for the benefit of the buyer and sue for the purchase price, or the seller may retain and treat the property as his own, suing for the difference between the contract price and the market value of the property at the time and place of the agreed delivery thereof, or, as was done in the present case, the seller, acting as an agent for the buyer, may sell the property pursuant to section 3049, Civil Code, and sue for the difference between the contract price and the net proceeds of the resale. Burner v. American Bar Q. Min. Co., supra. Section 3311, Civil Code, provides:

> "The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be: (1) If the property has been resold, * * * the excess, if any, of the amount due from the buyer, under the contract, over the net proceeds of the resale. * * *"

[3-5] In the present case the title to the undelivered eggs had not passed to the buyer for the reason that they were not in the possession of the seller at the time of the execution of the contract, but were received, candled and packed for the appellant subsequent to that time. The terms of the contract do not specify nor imply that the parties intended an immediate transfer of title, which, indeed, under the circumstances was impossible because the produce involved in the contract was then neither ascertained, selected, accepted, nor stored with the seller. Title therefore did not then pass. Sections 1140, 1141, Civ. Code; 1 Williston on Sales, (2d Ed.) 520, § 258. The question of the immediate transfer of title to personal property depends upon the intent of the parties, which is to be ascertained from the contract. 1 Williston on Sales, supra, 525, § 261; Turner, Kuhn & Fraser, Inc., v. Jones, 61 Cal. App. 732, 735, 215 P. 1033. Nor was it necessary that the seller should first give the buyer notice of the specific time and place of sale of the property. Garcia & Maggini v. Washington Dehydrated Food Co., supra. The method of measuring damages in the present case was therefore proper.

[6, 7] We are of the opinion that the evidence is ample to support the findings and the judgment. It appears from the record that a sufficient number of eggs of the quality and character specified to fulfill the contract were always on hand in the possession of the respondent, stored and subject to the appellant's order when desired. They were what were termed "special processed eggs," all of which were candled before they were packed and shipped to the purchaser. The term "special" was understood by the parties to refer to a selected grade of pullet's eggs. They were not purchased as fresh eggs, but the contract called only for "processed eggs." There is no controversy as to whether they were properly processed. This term, as it is used in the poultry industry, merely means that the egg is dipped, or the shell glazed with a solution which is intended to fill the pores of the shell to prevent the penetration of air or bacteria and to thereby deter fermentation or deterioration. 9 American Ency. 727. Manifestly, the effect of processing eggs will not indefinitely preserve their wholesomeness. It is argued by appellant that the system of candling eggs is inadequate to determine their soundness. But the system of candling eggs is the universal modern method employed by poultrymen to ascertain the quality and condition of eggs. We are referred to no other or better means of determining the age or condition of an egg. Webster's New International Dictionary, at page 319, defines the term "candling" as follows:

> "To test or examine by holding (the egg) between the eye and a candle, or other light. Eggs of unknown age are so tested, those unclouded and almost translucent being classed as candled eggs, and next in grade to fresh-laid eggs." King v. C. C. Bendell Commission Co., 7 Colo. App. 507, 44 P. 377.

Appellant contends that findings numbered 7, 8, 11, 12, 13, and 14 are unsupported by the evidence. The first three of these findings are general, specifying the terms of the contract entered into between the parties, the readiness and ability of the respondent to fulfill the agreement on its part, and the refusal to comply therewith on the part of appellant; the decrease of the market value of eggs subsequent to the execution of the contract; respondent's sale of the 622 cases of eggs which appellant refused to accept, and the amount of damages sustained by the breach of the contract. There is substantial evidence to support each of these findings. The contract appears in the correspondence heretofore quoted, and the terms are practically undisputed. From a fair reading of the record, it appears that respondent always held in store in its warehouse sufficient "special processed eggs," candled, sound, and merchantable, which it was able and willing to ship to appellant upon request In behalf of respondent, Mr. Whitmore testified:

> "We had 750 cases contracted for by the Weed Lumber Company. The orders we got were set aside against the Weed Lumber Company, not as our open stock."

Mr. Moncharsh testified:

> "We set away every case of eggs that we have sold on this contract.
>
> "Q. At the time that this contract was repudiated in December, 1923, was the balance of the eggs then due on the contract set aside for the Weed Lumber Company? A. They were still in the warehouse waiting to be withdrawn on order."

Respecting the soundness and quality of the eggs, this last-mentioned witness further testified:

> "When we received an order from Weed Lumber Company, we candled every egg to see whether there were any bad ones.
>
> "Q. And suppose you did find half a dozen cases of bad ones; what would you do with them? A. Throw them away; that would be the loss of Nye & Nisson."

Mr. Roberts testified:

> "* * * Every egg must be candled before it goes out to the customer, so it will be good. We know that it is good if it is candled. * * * I filled orders for Weed Mercantile Company for processed eggs. I candled practically all of them. The condition of the eggs at the time they were shipped under this contract, * * * I would consider very fancy. That is, what we call a fancy egg, is an egg that will keep up anywhere. * * * I never mixed the eggs up. As far as I know there was nothing shipped to Weed Mercantile Company that did not conform to the word 'processed specials.'
>
> "Q. You say you candled all these eggs? A. The only one that ever helped me was Mr. Whitmore. At times he would candle four or five cases."

Respecting the quality of the rejected eggs, which were sold on the open market, Mr. Smith, who purchased 250 cases of these eggs for Fred L. Hilmer Company, testified:

> "They were processed storage eggs fit for human consumption. There are always a few cracked or bloody eggs that are unfit. * * * These eggs were sample average."

There is some controversy over the question as to whether appellant received "special processed eggs," as the contract required, or another grade of eggs termed "processed pullet eggs." Mr. Moncharsh, however, testified that both of these terms referred to precisely the same grade of eggs. He said:

> "We use the word 'special,' 'processed special,' in a wholesale way to a jobber; we use the word 'processed pullets' which were the same egg—simply changed to 'specials' in a retail way. * * * We put up eggs other than pullets last year, and called them extras."

It is true, as contended by the appellant, that findings Nos. 13 and 14 contain negative pregnant statements, which in form are defective, and leave the inference that while it is found that respondent did not ship 20 cases of eggs to appellant which were mixed in quality and grade, and containing a *large* quantity of eggs which were old, stale, and decayed, that these cases might have contained a number of bad eggs, although not necessarily a "large quantity" thereof. This is followed by finding No. 14, which states in part:

> "It is not true that *any* shipment of eggs was not of the kind and quality contemplated in the contract entered into between the plaintiff and the defendant. * * *"

Finding No. 12 contains the following statement:

> "Plaintiff was at all times herein mentioned, ready and willing to carry out, on its part, the terms and provisions embodied in said contract; * * * and that, at all times subsequent to the 14th day of December, 1923 (defendant) refused to accept any further delivery of processed eggs as agreed upon in said contract, and refused to live up to the terms and conditions of said contract on its part."

The fifteenth finding is to the effect that all of the allegations of the answer in conflict with the findings of the court are untrue.

[8-13] The chief issue in the present case is whether the respondent was able to furnish the appellant with sound and merchantable eggs pursuant to the contract. The implied warranty that the eggs were sound and merchantable became a part of the contract by the provisions of sections 1771 and 1775, Civil Code, as completely as though that warranty had been incorporated therein. 22 Cal. Jur. 992, § 66. The probative fact to be determined by the court therefore was the question as to whether the undelivered eggs were sound and merchantable. The specific findings that "plaintiff was at all times * * * ready and willing to carry out * * * the terms and provisions embodied in the contract," and that "it is not true that *any* shipment of eggs was not of the kind and quality contemplated in the contract," necessarily implies that all shipments of eggs complied with the contract, and that, except for a minimum number, they were all sound and merchantable. The mere fact that the court inadvertently found, by the adoption of a negative pregnant, that some of the eggs which had been supplied were "old, stale, and decayed," will not re-

quire a reversal of the case for the reason that every presumption of the law favors a liberal construction of the findings so as to uphold the judgment rather than to defeat it. 2 Cal. Jur. 871, § 511. Following these well-established rules of law, it must be assumed that merely a minimum number of eggs were defective. There is a recognized distinction between the trade terms of "fresh eggs" and "processed eggs." It is a well-known fact that processed eggs are not presumed to have the high degree of quality possessed by fresh eggs. When a warranty is made as to a recognized grade of a commodity, it must be accepted in the light of the meaning of that term as it is known to the trade. It cannot reasonably be said that there is a breach of warranty as to the quality of processed eggs, merely because a case may contain a defective egg or two. To permit the cancellation of a contract for 750 cases of processed eggs merely because a minimum number thereof arrived at their destination unfit for use would violate the spirit of the legal maxim de minimis non curat lex. A technical defect in the form of the findings will not suffice to reverse a cause. Particularly is this true since the enactment of section 4½ of article 6 of the Constitution. In spite of the negative pregnant contained in the findings, we are of the opinion that they sufficiently support the judgment, and that the judgment is sustained by the evidence.

[14] After a partial performance and acceptance of a large number of eggs, the appellant is estopped from canceling his contract, in the absence of evidence that future shipments are likely to be in the same defective condition. Appellant had accepted and paid for 128 cases of eggs from an entire contract for 750 cases before he undertook to cancel his contract. The record is devoid of evidence showing that the undelivered 622 cases of eggs were in quality below the standard of processed eggs. Unless there is evidence that an entire order for a large number of eggs, to be shipped in installments as required over a long period of time, is of the same pack, character, and quality, the fact that shipments received contain a minimum of defective eggs will not warrant the conclusion that future shipments will also contain like defective eggs. In the absence of evidence as to the condition of future shipments of undelivered eggs, one may not accept and pay for a considerable portion of the commodity, and then cancel the contract because of the presence of a small percentage of defective eggs among those which have been accepted. The case of Baer Grocer Co. v. Barber Milling Co. (C. C. A.) 223 F. 969, 972, which is in accordance with the weight of authority, states the rule applicable to the circumstances of the present case. In that case the defendant contracted for 5000 barrels of "White Satin Flour" to be delivered as called for by him. Shipments aggregating 1650 barrels were made between September, 1910, and the following March. As in the present case, there had been a sharp slump in the market value of flour. The defendant then declined to accept further shipments on the ground that the flour did not comply with the contract. The court said:

> "The defendant, after thus ordering the flour under its contract, and continuously for some months receiving the same thereunder, ought not in good faith and fair dealing, having partly performed the contract, to be permitted to rescind the same at its option, because of the alleged defect in the quality of some of the flour furnished. Its remedy, if any, under such circumstances, would be by way of offset or recoupment from the purchase money, or a suit for damages for breach of the contract." Guernsey v. West Coast Lumber Co., 87 Cal. 249, 25 P. 414; Scott v. Kittanning Coal Co., 89 Pa. St. 231, 33 Am. Rep. 753; Cahen v. Platt, et al., 69 N. Y. 348, 25 Am. Rep. 203; Clark v. Wheeling Steel Works (C. C. A.) 53 F. 494; 2 A. L. R. 663, note; 29 A. L. R. 1517, note.

In opposition to the foregoing general rule of law, appellant relies on the cases of Coburn v. California, etc., Co., 144 Cal. 81, 86, 77 P. 771, and Bobrick Chem. Co. v. Prest-O-Lite Co., 160 Cal. 209, 116 P. 747. Neither of these cases conflicts with the foregoing rule. In the Coburn Case, supra, the plaintiff contracted to purchase clay which was "suitable for the manufacture of cement." For a period of time he accepted shipments of clay, and attempted to use it by mixing it with clay of another quality, which was procured elsewhere. But the undelivered clay which was contracted for came from the same pit, and was of the same defective quality as that which had been delivered. None of the clay from defendant's pit was suitable for the manufacture of cement. Defendant was therefore utterly unable to comply with his contract. It was therefore properly held that in spite of an acceptance of a quantity of this clay, the plaintiff was entitled to rescind his contract. In the Bobrick Chemical Co. Case, supra, the defendant contracted to purchase a device guaranteed to properly inflate tires, which he agreed to sell as an agent for a period of three years. After accepting and paying for a considerable number of these contrivances, the defendant discovered that they were inherently defective and would not perform the service for which they were purchased. The undelivered devices were as inherently defective and useless as those which had been accepted. Moreover, it appeared that while the plaintiff had received some complaints as to their deficiency, he did not know until after his acceptance of a number of the devices how utterly unsatisfactory and useless they really were.

There is a clear distinction between the acceptance and partial performance of a contract for a commodity containing only a minimum percentage of defective articles when no such defect is shown to exist in the undelivered portion and a contract for a device or commodity which is inherently and wholly defective and useless for the purpose for which it is purchased.

For the foregoing reasons, the judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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92 Cal. App. 523

CITY OF PASADENA v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 6017.)

District Court of Appeal, Second District, Division 2, California. June 13, 1928.

1. Prohibition ⚷5(1)—Action of judicial tribunal having jurisdiction may not be interfered with by prohibition.

Appellate court may not interfere by writ of prohibition with exercise of jurisdiction actually possessed by judicial tribunal, whose conduct is sought to be controlled.

2. Prohibition ⚷3(5), 10(1)—Court is not deprived of jurisdiction by fact that issue is res judicata, but may dispose of case accordingly; remedy by appeal being adequate.

Fact that question arising in suit is res judicata does not deprive court of jurisdiction, but court may pass on that issue and dispose of case accordingly, and in case of error remedy by appeal is available and adequate.

3. Prohibition ⚷9—Prohibition does not lie to prevent erroneous decision or control procedure, where former judgment is relied on as bar.

Where former judgment is relied on as a bar, writ of prohibition may not be utilized for the purpose of preventing the court from deciding the case erroneously, or for the purpose of regulating or controlling its procedure.

4. Prohibition ⚷5(3)—Prohibition held not to lie to prevent proceedings for trial of condemnation suit, notwithstanding previous judgment enjoining proposed improvement.

Where property owner in condemnation suit obtained injunction against city and subsequently moved to set the condemnation case for trial, city was not entitled to writ of prohibition to prevent trial court from taking further steps for the trial of the condemnation case, notwithstanding judgment in the injunction suit was res judicata of right of city to proceed with improvement.

Application by the City of Pasadena for writ of prohibition to be directed to the Superior Court in and for Los Angeles County, Hon. Victor R. McLucas, Presiding Judge. Peremptory writ denied.

R. C. McAllaster, City Atty., and Frederick G. Stoehr, Asst. City Atty., both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondents.

Warren E. Libby, of Los Angeles, amicus curiæ.

THOMPSON, J. In August of 1924 the petitioner herein commenced an action in the superior court of Los Angeles county, in which it sought to condemn certain property in the city of Pasadena for the purpose of widening Marengo avenue in that city. Thereafter, and on the 1st day of September, 1926, one of the defendants in the condemnation suit instituted an action against the city, wherein she sought to enjoin it from proceeding with the condemnation of her land, or levying any assessment against her property for the improvement contemplated by the ordinance of intention, in pursuance of which the complaint for condemnation was filed. After answer was filed and trial had in this latter action, the court rendered its judgment restraining and enjoining the city of Pasadena, its board of directors, city attorney, and city engineer from paying out any money for the widening of Marengo avenue under the ordinance of intention already mentioned, and from paying out any money in connection with the condemnation of land for that purpose, and from making and collecting or attempting to collect any assessment against plaintiff's property for the improvement contemplated by the ordinance of intention, and from taking any steps in pursuance of the ordinance. This permanent injunction was issued on December 30, 1926. Nothing further was done until February 3, 1928, when Linn A. J. Hutchinson, the defendant in the condemnation action and the plaintiff in the injunction suit, made a motion to set the first-mentioned cause on the trial calendar, stating to the court that she was entitled to have it placed upon the calendar for disposal in view of the refusal of the city to dismiss it. The trial court granted the motion and set the action for trial. This proceeding seeks to prohibit the respondent court from taking any further steps in connection with the motion to set or the order setting the case for trial.

[1-4] Our inquiry is directed by legal instincts to the question of whether the respondent court is without jurisdiction to do the things sought to be prohibited. The rule is so well understood that we may not interfere by prohibition with the exercise of jurisdiction actually possessed by a judicial tribunal that it requires no citation of authority to support it. Concededly, the re-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

spondent court had jurisdiction of the condemnation action at the time it was filed and until December 30, 1926, when the permanent injunction was issued. Was it either divested of or did it exhaust its jurisdiction by this judgment? It may be assumed that the judgment entered in the injunction action is a complete bar to the further prosecution of the condemnation suit, in so far at least that it was there found that the initial proceedings were null and void, and yet the inquiry is not ended. As this question ordinarily arises, the trial court is not necessarily divested of jurisdiction of an action by a judgment which is res adjudicata. It has jurisdiction in the first instance to pass upon that very question and make disposition of the cause accordingly. If it determines the matter erroneously the injured party has his remedy by an appeal, which has been uniformly held is an available and adequate remedy. Burge v. Justice Court, 11 Cal. App. 213, 104 P. 581; Conlan v. Superior Court, 12 Cal. App. 420, 107 P. 577; So. Pac. M. Co. v. Superior Court, 14 Cal. App. 240, 111 P. 625. In the ordinary case where a judgment is relied upon as a bar, the prohibitive writ could not be utilized for the purpose of preventing the court from deciding erroneously or for the purpose of regulating or controlling its procedure. Van Hoosear v. Railroad Com., 189 Cal. 228, 207 P. 903; Apartment, etc., Financing Co. v. Will, 69 Cal. App. 276, 231 P. 349, and cases there cited. In this regard we find nothing to distinguish this from the ordinary case. Undoubtedly, if the respondent court determines that the judgment rendered is a bar to the pending case, it will enter the proper judgment, but until it shall have rendered some judgment we are not free to interfere.

Peremptory writ denied.

We concur: WORKS, P. J.; CRAIG, J.

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92 Cal. App. 618

BOMAR et al. v. MT. OLIVE MISSIONARY BAPTIST CHURCH et al. (Civ. 3539.) ★

District Court of Appeal, Third District, California. June 19, 1928.

Rehearing Denied July 19, 1928. Hearing Denied by Supreme Court Aug. 16, 1928.

1. Religious societies 🔑25—Finding that unincorporated religious association never authorized formation of corporation held sustained by evidence in suit to compel reconveyance of church property.

In suit by trustees of unincorporated religious association to obtain reconveyance of property from corporation, finding that the association never authorized the formation of a corporation *held* sustained by evidence.

2. Fraud 🔑50—Actual fraud is presumed, where one takes advantage of trust at expense of confiding party.

Though testimony may state actual fraud, actual fraud will nevertheless be presumed, where one in whom confidence has been reposed has benefited himself by the trust at the expense of the trusting or confiding party.

3. Religious societies 🔑25—Where unincorporated religious association never authorized incorporation or transfer of church property to corporation secretly organized, church trustees could compel reconveyance on ground of actual fraud.

Where unincorporated church association never authorized incorporation or transfer of church property to corporation by trustees holding title for church's benefit, trustees had right to compel reconveyance of the property, on ground that the church property had been acquired by the corporation by actual fraud, where grant was made without knowledge of church's incorporation.

4. Religious societies 🔑18—Individual members of unincorporated religious association could hold title for church as trustees.

Trustees holding title to property of unincorporated religious association for the benefit of the church were not required to convey to church corporation to protect title, since unincorporated religious association may take title to property in names of individual members as trustees.

5. Religious societies 🔑24—Suit by trustees of unincorporated religious association to compel reconveyance of property from corporation secretly organized held not outside court's jurisdiction, as attack on corporate entity.

Suit by trustees of unincorporated religious association to compel reconveyance of property obtained after secret incorporation by minority *held* not outside jurisdiction of court, as an attack on corporation as a corporate entity.

6. Religious societies 🔑24—Suit by trustees to compel reconveyance of church property from secretly organized corporation held not outside court's jurisdiction, as attempted interference with church's control over members.

Suit by trustees of unincorporated religious association to compel reconveyance of property from corporation secretly organized by minority *held* not outside jurisdiction of court, as attempt to interfere with control of church over its members.

7. Appeal and error 🔑1010(1)—Finding of capacity of plaintiffs to sue, though based on testimony of single witness, held conclusive.

In suit to compel reconveyance to trustees of unincorporated religious association of property conveyed to secretly organized corporation, court's finding that plaintiffs were entitled to sue as duly elected, qualified, and acting trustees, though based on testimony of single witness, *held* conclusive.

Appeal from Superior Court, Los Angeles County; John F. Pullen, Judge.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

Action by Philip Bomar and others, as trustees of the Mt. Olive Missionary Baptist Church, an unincorporated religious association, against the Mt. Olive Missionary Baptist Church, Incorporated, and W. R. Hutchinson and others, as directors. Judgment for plaintiffs, and defendants appeal. Affirmed.

Hugh E. Macbeth, of Los Angeles, for appellants.

I. Henry Harris, of Los Angeles, for respondents.

PLUMMER, J. The second amended complaint filed in this cause sets forth that the plaintiffs are the duly elected, qualified, and acting trustees of the Mt. Olive Missionary Baptist Church, an unincorporated religious association having its principal place of worship at No. 3064 East First street, in the city and county of Los Angeles; that the membership of said church consists of 92 persons, of whom 71 are adults; that the association was organized and founded on or about the year 1909; that at the time of its organization it was agreed that Hiscox's Guide and Directory for Baptist Churches should be, and the same was, adopted as the rules by which the temporal affairs of the church should be guided; that since the organization of the church herein referred to, it has been governed as an unincorporated religious association in conformity with the rules and regulations set forth in Hiscox's Guide; that the rules and regulations set forth in said guide provide that the property of the church shall be held in the name of trustees, for the uses and benefit of the church; that on or about the 11th day of April, 1916, said unincorporated religious association acquired title to lot 8 in a certain tract known as the Corcoran tract in Los Angeles county, and thereafter, and on or about the 17th day of May, 1923, acquired title to lot 7 in said Corcoran tract, and thereafter, and on or about the 17th day of November, 1923, lot 9 in said Corcoran tract was purchased by said unincorporated religious association; that the title to lot 8 was taken in the names of H. T. Baucum, Charles Reed, and J. Buchanan; that the title to lots 7 and 9 was taken in the names of R. W. Willis, W. L. Bell, and Charles Reed, as trustees, for said unincorporated religious association; that the value of said lots was about $15,000; that the building in which the unincorporated religious association held its services was and is situated upon lot 8 of said Corcoran tract; that according to Hiscox's Guide and Directory the annual meeting of the church for the appointment of a pastor, the election of trustees, and the consideration of church affairs, was appointed to be held on the Friday next preceding the first Sunday in December of each year, and the installation of the pastor and the officers was appointed to take place on the first Friday preceding the first Sunday in January following the election, as just stated.

The complaint then sets forth the manner in which the right hand of fellowship may be withdrawn from a member and the members dismissed from such unincorporated religious association by the presentation of charges and the giving of an opportunity to be heard and a majority vote of a quorum of the church members required to effect a dismissal. The complaint then alleges that in the month of June, 1924, the defendants, in order to gain possession of the property owned by the unincorporated religious association, formed a religious corporation, and then and there represented to the Secretary of State of the State of California that they were authorized by said unincorporated association to incorporate under the laws of the state of California; that such statement was false; that no notice was given to a majority of the members of said association of any intention to form a religious corporation; that no meeting of the church was ever held which authorized the incorporation of said church; that said incorporation was brought about by said defendants and their families, including in all not over 18 or 20 persons; that said persons met and agreed to form a corporation, and that upon the representations of the defendants Willis, Bell, and Hutchinson a charter was granted by the state of California to the defendant the Mt. Olive Missionary Baptist Church, Incorporated; that thereafter, and in the month of June, 1924, the said defendants Willis, Bell, and Charles Reed, without any authority of said church or of a majority of the members thereof, conveyed lots 7 and 9 of said Corcoran tract to the defendant corporation; that thereafter the defendants represented to H. T. Baucum, J. Buchanan, and Charles Reed that it was the wish of the unincorporated association that lot 8 of said Corcoran tract should be deeded to said corporation, and said lot was thereupon so deeded; that at the time of the execution of said deed the said H. T. Baucum and J. Buchanan were unaware that there was any corporation, or that they were conveying said lot 8 to any corporation; that thereafter the corporation so organized adopted by-laws, and, purporting to follow the by-laws so adopted, purported to expel 18 members from said church, no notice thereof being given and no opportunity being had by the defendants for any hearing. The complaint then sets forth in detail that the proceedings herein referred to were all taken and had by the defendants for the purpose of wrongfully securing possession of the property of said unincorporated religious association. The prayer of the complaint asks that the property referred to herein be reconveyed to the trustees of said unincorporated religious association; that it be decreed that the plaintiffs are the duly elected, qualified, and acting trustees of the Mt.

Olive Missionary Baptist Church, an unincorporated religious association; that defendants be required to account for all moneys received and disbursed by them; that W. L. Hutchinson be restrained from acting as pastor of said church; that the defendants be required to turn over to the plaintiffs all the books and registers belonging to the Mt. Olive Missionary Baptist Church as an unincorporated religious association. The answer denies seriatim all the allegations of the complaint.

The court found all the allegations contained in specifications A, B, C, D, E, F, G, H, I, and J of paragraph 10 of the amended complaint to be true, which includes all the allegations by which the complaint sets forth that the defendants conspired, contrived, and wrongfully and fraudulently transmuted the title of the property belonging to the unincorporated Mt. Olive Missionary Baptist Church to the corporation organized by them, as herein referred to. The second finding of the court is to the effect that it was stipulated that the accounting of moneys asked for might be withdrawn without prejudice to the institution of another action. The third finding of the court is to the effect that it was admitted at the trial that the attempted expulsion of members was without authority and was void. The fourth finding is to the effect that at all the times mentioned in the complaint the plaintiffs owned the real property mentioned therein, and that the building situate thereon was occupied by and used as the place of worship first by the Mt. Olive Missionary Baptist Church, an unincorporated religious association, and, then, after the acts herein referred to and at the time of the trial, was in the possession of the defendant Mt. Olive Missionary Baptist Church, a corporation. The fifth finding is also to the effect that the records of said church belonged to the Mt. Olive Missionary Baptist Church as an unincorporated religious association. As a result of said findings and the conclusions of law based thereon, reconveyance of the real property herein referred to was ordered, and the plaintiff Mt. Olive Missionary Baptist Church, as an unincorporated association, awarded possession of the property. From this judgment the defendants appealed and assigned five different reasons why the judgment should be reversed, to wit: First, that the trial court had no jurisdiction, at the suit of private individuals, to determine whether the incorporation was legal or illegal; second, that the plaintiffs were estopped to deny the incorporation of the church; third, that the court erred in finding that the plaintiffs were the duly elected, qualified, and acting trustees of said religious society as an unincorporated religious association; fourth, that the findings from the first to the ninth, with the exception of the fifth, are unsupported by the evidence; fifth, that there was a fatal variance between the material allegations of plaintiffs' complaint and the proofs.

[1] As we read the record, it does not seem to us necessary to follow the argument of the appellants or the authorities cited to sustain the objection that the court had no jurisdiction to inquire as to whether the incorporation was legal or illegal. This case does not present for adjudication the legality or illegality of the alleged incorporation. The only question involved is whether a corporation formed under the circumstances disclosed by the record and as found by the court, by a small minority of the members of the association, without the authorization of a majority of the unincorporated religious association and the obtaining of conveyances to the real property held in trust by certain individuals for the benefit of the unincorporated religious association, without any previous authorization for such transfer, may be compelled to reconvey the property to the duly elected, qualified, and acting trustees of the unincorporated religious association, found by the court to be the beneficial owner thereof. The complaint sets forth that the forming of the corporation was simply a device or expedient for obtaining possession of the property by a few members thereof, to the intent and purpose that the pastor and a few members thereof might control the temporal affairs of the church, and the findings of the court are to the effect that the allegations setting forth these facts contained in the complaint are true and correct.

The record shows that at the time of the occurrences referred to in the complaint there were 71 adult members; that out of that number 54 went on the stand and testified that no notice of any meeting to consider the question of incorporation was ever given as required by Hiscox's Guide and Directory for Baptist Churches. This guide required public notice to be given by announcement from the pulpit by the pastor at the time public services were being held by the church. The record discloses the names of 10 persons only who were present at the time the incorporation was decided upon. The defendants called some 10 or a dozen witnesses, who testified that notice was given and that other persons were present than the names of those stated at the time the decision was had by those who assembled on or about the 2d day of June, 1924, to consider the question of incorporation. Thus the finding of the court to the effect that the Mt. Olive Missionary Baptist Church, an unincorporated religious association, never authorized the formation of the corporation, is amply sustained by the evidence. Fifty-four of the adult 71 members testified that they had no notice and were not present. The transcript shows that the record of the members of the unincorporated association is evidenced by signed cards, so that it was a very easy matter to ascertain and present in the testimony the names of all of those who were present at the gathering when incorporation was decided upon, and also to present testimony as to who were present, if any others were actually present, than the 10 names set forth in the testimony of one of the witnesses called by the defendants. Our attention has not been called to any testimony showing that the Mt. Olive Missionary Baptist Church, as an unincorporated religious association, ever authorized the transfer of the properties of the church from the trustees, who held the title thereto, to the incorporation.

There is also testimony in the record to the effect that no regular meeting was held on the 2d day of June, 1924, as is purported to have been done; that only a few persons were present; and that there was no truth in the recital of the certificate attached to the articles of incorporation that a regular meeting was held and directors elected; and it would appear that no regular business meeting of the church could be held, other than the annual meeting provided for, without giving notice thereof by announcement from the pulpit of the time and place of such meeting. The rules of the church provided for the holding of an annual meeting on the Friday next preceding the first Sunday in December of each year. The complaint so alleges, and there is no denial of this allegation in the answer. The meeting to which we have referred, at which the incorporation of the defendant was considered, was held in the month of June, and not at a time provided in the rules of the church for the holding of an annual business meeting, or for the holding of any meeting other than that which, in ordinary language, would be called a special meeting.

[2-5] We do not deem it necessary to set forth herein the testimony in the transcript indicating a fraudulent purpose on the part of the defendants, for the simple reason that, though the testimony may show actual fraud, actual fraud will nevertheless be presumed from the fact that one in whom confidence has been reposed has availed himself or benefited himself of the trust at the expense of the trusting or confiding party. Lezinsky v. Mason, 185 Cal. 240, 196 P. 884; Williams v. Lockwood, 175 Cal. 598, 166 P. 587. As we have shown from the record the church, as a church, never authorized either the incorporation or the transfer of the property by the trustees who held title thereto for the benefit of the church, and, the property having been transferred without any such authorization, it amounted to an actual fraud upon the church and laid the basis for an action to compel reconveyance. The contention of the appellants that it was necessary for the trustees holding the title to the property for the benefit of the church to convey the same to the incorporation to protect the title is wholly unfounded. The case of Brittenbaker v. Buck, 58 Cal. App. 738, 209 P. 264, settles the question as to the power of an unincorporated religious association to take title to property in the name of individual members as trustees. Nor do we find any merit in the contention of the appellant that the trial court had no jurisdiction of the cause presented to it for determination. The attack is not made upon the corporation as a corporation. So far as the judgment of the court is concerned, the persons associated in the scheme of bringing the corporation into existence may go on with their corporation unhindered. The complaint is founded upon the wrongful acts of such persons in creating a corporation in whom the property of the church might be vested and the control of the temporal affairs of the church lodged, in such a manner as to deprive the body of the church of any voice or control in its management and to dispossess the church of its property. The gravamen of the charge is that all of these acts were performed by a very small minority of the church, and that the church, as an unincorporated religious association, never authorized or consented to any of them. To regain possession of the property thus taken away from the unincorporated religious association is not an attack upon the corporation as a corporate entity, but only seeks to undo the wrong found by the court to have been perpetrated. Under such circumstances quo warranto proceedings instituted by permission of the Attorney General were and are wholly unnecessary. The plaintiffs have no interest in the existence of the corporation; they seek only the restoration of what the court has found to be their own.

The case of Hendryx v. People's United Church Co., 42 Wash. 336, 84 P. 1123, 4 L. R. A. (N. S.) 1154, 7 Ann. Cas. 764, is directly in point. In the Hendryx Case there was involved an intent or purpose to wrongfully obtain possession of church property. It was there held that an action to cancel a deed would lie, and that no question as to ecclesiastical matters was presented for consideration. A number of cases are there cited which we do not need to review. In one of the cases we find the following pertinent language:

> "The bald question here is, Can a man or set of men, or a majority of the church organization, by chicanery, deceit and fraud, divert the property of a church organization to a purpose entirely foreign to the purposes of the organization, for their own selfish benefit, whether by the expulsion of members or in any other fraudulent manner? Neither the law nor public policy will sustain such a rule. Fraud vitiates all transactions and, if members are expelled for a fraudulent purpose to carry out a fraudulent scheme, the expulsion is a void act, and of no force or effect whatever. Equity will compel fair dealing, disregarding all forms and subterfuges, and looking only to the substance of things." Nance v. Busby, 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801.

In the instant case the court has found that the persons who contrived to secure possession of the church property constituted only a small minority of the membership.

[6] Another case relied upon by the appellants, but which we think supports the action of the court in the instant case, is that of Hatfield v. De Long, 156 Ind. 207, 59 N. E. 483, 51 L. R. A. 751, 83 Am. St. Rep. 194. The citations found in the opinion of this case are exceedingly numerous and show that the assertion of jurisdiction in such a case as the one at bar is not an interference with the control of the church over its members, and is a matter dealing purely with property and property rights. The findings show a stipulation in open court to the effect that the attempted expulsion of 18 members was absolutely void, and therefore we pass this question by. No question of estoppel was pleaded, nor is there anything in the record showing that the church, as a church, until shortly before the institution of this action, became aware that any incorporation had ever been formed, or that conveyances had been made of the property.

[7] There does not seem to be any merit in the appellant's contention that the plaintiffs have no capacity to sue. This alleged defect in the pleadings was not raised by demurrer, but the facts which we have hereinbefore referred to in this opinion, we think, established the capacity of the plaintiffs to maintain this action. The court found, upon sufficient evidence, that the plaintiffs were the duly elected, qualified, and acting trustees of the Mt. Olive Missionary Baptist Church, an unincorporated religious association; that they were elected at the regular meeting of the church held at the church at the time and place provided for in the rules and regulations governing the church. The appellants contend that this finding was based upon the testimony of only one witness. This statement is controverted by the respondents, but, if the necessary facts were testified to in this respect only by one witness, it would place it beyond the power of this court to disturb such finding. While not cited as determinative of any questions involved herein, we think the following taken from the opinion of the court in the case of Wheelock v. First Presbyterian Church, 119 Cal. 477, 51 P. 841, pertinent:

> "Notwithstanding incorporation the ecclesiastical body is still all-important. The corporation is a subordinate factor in the life and purposes of the church proper."

In any event, as held in that case, the corporation would be only the agent or instrument for holding title to property and managing its temporal affairs. The ecclesiastical body would still remain the real church. Under the circumstances disclosed, we think, in the present case, the unincorporated religious association known as the Mt. Olive Missionary Baptist Church at all times constituted the body entitled to control both its ecclesiastical and temporal affairs, and that the incorporation never acquired any legal or ecclesiastical right to the control of either of them.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

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92 Cal. App. 695

GOODRICH v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 6442.)

District Court of Appeal, First District, Division 2, California. June 22, 1928.

1. Contempt 🔑67—Petitioner for certiorari to review order adjudging him in contempt must see that return is filed and complete record made up.

Petitioner for certiorari to review order adjudging him guilty of contempt must see that return is filed and a complete record made up, since he is the party interested in having action of lower court reviewed.

2. Contempt 🔑67—Certiorari proceeding to review judgment of contempt should contain affidavits on which order to show cause was issued, and order and judgment sought to be reviewed properly certified.

In proceeding for certiorari to review order adjudging petitioner in contempt for refusal to obey writ of possession, return should contain the affidavits upon which the order to show cause was issued, the order and judgment sought to be reviewed, which should be certified by the clerk of the tribunal to which the writ has been directed.

3. Contempt 🔑67—Certiorari to review order adjudging petitioner in contempt would be denied in view of incomplete record.

Writ of certiorari to review order adjudging petitioner in contempt for refusal to obey writ of possession would be denied, where only paper purporting to be return to writ was transcript of court reporter's notes of what transpired at time of hearing, not certified by clerk or judge, and affidavit and order attached to petition not being certified by any person competent to make certification, and it not appearing whether affidavit was used at the hearing.

4. Contempt 🔑67—On certiorari to review order adjudging petitioner in contempt, court is limited to review of properly authenticated record of proceedings (Code Civ. Proc. § 1075).

On certiorari to review order adjudging petitioner in contempt for refusal to obey writ of possession, court is limited to a review of the properly authenticated record of the proceedings themselves under Code Civ. Proc. § 1075, and cannot rest its review upon any allegations of the petition which becomes "functus officio" upon issuance of the writ.

5. Contempt ⚷67—On certiorari to review order of contempt, presumption is that court proceeded with due regard for parties' rights.

On certiorari to review order adjudging petitioner in contempt in absence of showing to contrary, court must presume that court adjudging petitioner in contempt proceeded with due regard for rights of parties within its jurisdiction.

Application by Gregory M. Goodrich, individually and as administrator of the estate of Alice V. Auth, deceased, for certiorari directed to the Superior Court of the State of California in and for the City and County of San Francisco and another, to review an order adjudging petitioner guilty of contempt for refusal to obey writ of possession. Writ denied.

Reisner & Deming, of San Francisco, for petitioner.

Thomas M. Foley and Kington & Cunningham, all of San Francisco, for respondents.

NOURSE, J. Petitioner seeks a review of the order of the superior court adjudging him guilty of contempt for his refusal to obey a writ of possession issued pursuant to a judgment entered in the action entitled Whittier v. Auth, pending in the superior court in the city and county of San Francisco. The theory of the petition is that the court was without jurisdiction to try or adjudge petitioner for contempt because he was not a party to the proceeding in which the judgment was entered, but took possession of the premises under an independent claim of title. On behalf of the respondent it is argued that the petitioner, who is employed by Auth as janitor of the premises involved in the other action, is claiming possession in bad faith and in collusion with Auth.

[1] The record before us is incomplete in many particulars. Each party complains of the other's fault in not preparing a return, and counsel for both parties carry in their briefs more statements of fact than appear in the record upon which our review must rest. The petitioner is the party interested in having the action of the lower court reviewed, and it is his duty to see that the return is filed and a complete record made up, just as it is the duty of an appellant to perfect his record on appeal. 4 Cal. Jur. p. 1100; I. X. L. Lime Co. v. Superior Court, 143 Cal. 170, 175, 76 P. 973.

[2-5] In a proceeding of this kind the return should contain the affidavits upon which the order to show cause was issued, the order and the judgment, or order sought to be reviewed. These should be certified by the clerk of the tribunal to which the writ has been directed. 4 Cal. Jur. p. 1100. Here the only paper purporting to be a return to the writ is a transcript of the court reporter's notes of what transpired at the time of the hearing. This is not certified by the clerk of the court or by the judge of the court, respondent herein. An affidavit and order are attached to the petition herein, but these are not certified by any person competent to make certification, and it does not appear whether this affidavit was used at the hearing. The petition having become "functus officio" upon the issuance of the writ herein, we cannot rest our review upon any of the allegations found therein (Donovan v. Police Comm., 32 Cal. App. 392, 397, 163 P. 69), but we are limited to a review of the properly authenticated record of the proceedings themselves. (Borchard v. Board of Supervisors of Ventura County, 144 Cal. 10, 14, 77 P. 708; 4 Cal. Jur. 1107). If there should be any doubt upon this question, it is settled by section 1075, Code of Civil Procedure, which authorizes a reviewing court to conduct a review of the proceedings below "when a full return has been made." Manifestly, if the trial court found that the claim of title made by petitioner was fictitious and that he was acting solely as the agent, or tool, of the defendant Auth for the purpose of defeating the judgment, it has not exceeded its jurisdiction in adjudging him guilty of contempt. In the absence of a showing to the contrary, we must presume that the court proceeded with due regard for the rights of the parties within its jurisdiction.

The writ is discharged, the temporary restraining order heretofore issued herein is dissolved, and the proceedings are dismissed.

We concur: KOFORD, P. J.; STURTEVANT, J.

92 Cal. App. 298

LONDON GUARANTEE & ACCIDENT CO., Limited, v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 6240.)★

District Court of Appeal, First District, Division 1, California. May 31, 1928.

Rehearing Denied with Modification June 30, 1928.

1. Master and servant ⚷398—Payment of wages to injured employee while confined to hospital extended period for bringing compensation proceedings six months from last payment (Workmen's Compensation Act, § 11(c).

Under Workmen's Compensation Act (Deering's Gen. Laws 1923, Act 4749) § 11(c), providing that payment of compensation shall have effect of extending period in which proceedings for collection may be commenced, payment of wages to injured employee at time he was totally disabled and confined to hospital extended

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★Rehearing denied.

period six months from date of last payment, as constituting payment of compensation for injuries.

2. Master and servant ⇐391¼—Award of interest held error, without finding of unreasonable delay in paying compensation.

In the absence of any finding by the Industrial Accident Commission that there had been unreasonable delay on part of insurance carrier in paying compensation, part of award imposing payment of interest constitutes error.

Original application by the London Guarantee & Accident Company, Limited, for certiorari to annul an award by the Industrial Accident Commission in favor of Maurice G. Read. Award modified, and, as modified, affirmed.

R. P. Wisecarver, of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

KNIGHT, J. This is a proceeding in certiorari to have annulled an award made by the Industrial Accident Commission in favor of respondent Maurice G. Read and against the petitioner London Guarantee & Accident Company, Limited.

Read was employed as a soda fountain clerk by the Associated Students of the University of California, while attending the university as a student, and on August 17, 1926, in helping to lift a barrel weighing about 300 pounds, bruised his left knee. He considered the injury slight, just a bruise, and did nothing about it; but on September 15, 1926, the condition of the knee had not improved, and at that time he applied to the university infirmary, as a student of the university, for medical treatment. He was treated there two or three times a week until January 30, 1927, on which date it was ascertained that the bruise had started a growth on the knee, which appeared to be infected, and upon consultation the doctors connected with the university determined that an operation and possibly an amputation of the leg would be necessary. When Read learned it would be necessary to operate, he so notified his superior, who already knew of Read's injury and of the medical treatment he had been receiving at the infirmary, and they notified the insurance carrier, petitioner herein.

On February 2, 1927, the doctors operated, an amputation being unnecessary, but the bone was scraped, and Read was not discharged from the hospital until February 23d, at which time he returned to work. As stated, before entering the hospital notice of Read's injury and of his intention to undergo an operation at the hospital was given to the insurance carrier, and a few days afterwards the latter's representative conferred with Read and took his statement, but apparently did nothing further about the matter. Shortly after his discharge from the hospital, and on March 3d, Read inquired of the insurance company what it was going to do regarding his case, and was told that it would do nothing; that the company did not believe that the condition of his knee was the result of the injury; that it had not received a report thereof until January 24th, and in any event was relieved from all liability, because Read had not filed his claim within the period fixed by the statute of limitations. Thereupon, and on March 12th Read filed an application with the commission for an adjustment of his claim, and the matter came on for hearing on March 30th, at which time petitioner stipulated that it was the insurance carrier for Read's employer, and that if there was any liability it would assume the same. The evidence adduced at the hearing shows that Read's treatment at the infirmary was furnished to him as a student of the university without cost, but that the operations, X-rays, consultations, etc., amounting to $259, were charged for, and the award was applied for to cover the payment of these expenses. No claim was made for loss of time, because Read's wages were being constantly paid, even while he was totally disabled in the hospital. Subsequently, and on May 26th, Read's employer also paid $10 on the medical bills incurred by Read as a result of the operation.

The decision of the commission was rendered on October 22, 1927, it being found, among other things, that "the application herein was filed on March 12, 1927, more than six months after the date of the said injury, but on or about May 26, 1927, the said employer assumed and paid the sum of $10 on account of the medical expense incurred by the applicant, thereby assuming liability therefor, and the claim herein is not barred by the provisions of section 11 of the Workmen's Compensation Act (Deering's Gen. Laws 1923, Act 4749, § 11)," and an award was made in the sum of $249.

Petitioner contends that having stipulated at the hearing that it was the insurance carrier for the employer subrogated it to all of the rights of the employer, and that consequently the employer could not bind it by any payment afterwards made by the employer on the bill for medical attention, citing the case of Beverly v. Fairmont Hotel (Cal. App.) 259 P. 955, which holds that:

> "Benefits furnished by an employer, after an insurance carrier has assumed liability and the employee has accepted the benefits paid by it by reason of such assumption, * * * are not effectual to prevent the running of the statute of limitations against any claim which the employee might have against the insurance carrier."

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] However, aside from the merits of the foregoing contention, there are other grounds upon which we think the granting of the award must be sustained. Under the provisions of section 11 (c) of the Workmen's Compensation Act the payment of compensation shall have the effect of extending the period within which proceedings for its collection may be commenced, six months from the date of the last payment, and, as stated, the evidence here shows without dispute that, while Read was totally disabled in the hospital, his wages were being constantly paid by his employer. We are of the opinion that the payment of such wages, under the circumstances above related, constituted the payment of compensation for the injury, and that therefore, since Read's application was filed within six months after the last payment of such compensation, his claim was not barred by the statute of limitations.

There appears to be no case adjudicated by the courts upon this particular point, but it has long been the rule of the commission that where, as here, an employee is totally disabled, and his employer continues to pay him full wages during the period of his disability, such payments do not constitute wages or gratuities, but are payments of compensation which operate to toll the statute during their continuance (27 Cal. Jur. p. 458; Oders v. Great Western Electro Chemical Co., 6 I. A. C. 95); and we find nothing unreasonable in the construction thus placed upon the terms of the act.

The application of the foregoing rule depends, of course, upon the particular circumstances under which the wages are paid. For instance in the case of Hunt v. Industrial Accident Commission, 43 Cal. App. 373, 185 P. 215, the injured employee returned to work and was paid regular wages therefor, but he claimed before the commission that he was still suffering from his injuries and was not fully able to perform the duties of his position, and he sought to have the statute of limitations tolled upon the ground that the payment of such wages constituted the payment of compensation. In deciding the point adversely, the court stated that the applicant failed to show the existence of any agreement between himself and the employer to the effect that the pay he was receiving was to be in the nature of compensation for injuries; nor did he show that the work was unsatisfactory or that the compensation was more than his services were actually worth, and that therefore, "in the absence of such showing, it cannot be held that the mere fact that the employer permitted the employee to return to his old position at full pay and to continue therein for several months could give rise to a claim that a portion of the pay which he thus received was in the nature of compensation for his previous injuries." Here, however, the employee was totally disabled in the hospital, and performed no work whatever for which the sums paid him might be deemed wages.

[2] In the absence of any finding by the commission that there has been unreasonable delay in paying compensation, it would seem that that part of the award imposing the payment of interest cannot be sustained. Pacific Indemnity Co. v. Industrial Accident Commission (Cal. Sup.) 261 P. 987. Respondents stipulate, however, that the order for the payment of interest may be annulled without further proceedings being had before the commission.

Therefore, as thus modified, by striking out the order for the payment of interest, the award is affirmed.

We concur: TYLER, P. J.; PARKER, Justice pro tem.

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92 Cal. App. 615

PEOPLE v. REMSBERG. (Cr. 1599.)

District Court of Appeal, Second District, Division 2, California. June 19, 1928.

1. Criminal law 🔑1159(2)—Intent to commit forgery is for jury, whose verdict cannot be disturbed on appeal if evidence warranted inference of guilty intent.

The question of intent to commit crime of forgery is one for jury, and, if evidence is such that jury could reasonably draw therefrom the inference of guilty intent, its verdict cannot be disturbed by the appellate tribunal.

2. Forgery 🔑44(1)—Evidence held to show existence of intent to commit forgery by signing fictitious and fraudulent conditional sales contract.

Evidence in forgery prosecution *held* sufficient to show existence of intent to commit crime of forgery by filling in fraudulent and fictitious conditional sales contract of automobile for purpose of obtaining loan thereon.

3. Forgery 🔑7(1)—Fraudulent and fictitious conditional sales contract of automobile used to obtain loan held sufficient contract to be subject of forgery.

Where defendant signed a fraudulent and fictitious conditional sales contract of automobile for purpose of obtaining loan on contract, fact that contract was used to defraud one acting upon it as though it were genuine was sufficient to show that it was a contract which could be the subject of forgery.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

J. Walker Remsberg was convicted of forgery, and he appeals. Affirmed.

Arthur C. Verge and Harold F. Collins, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

THOMPSON, J. The defendant was convicted of the offense of forgery, and appeals from the judgment and an order denying his motion for a new trial.

In support of his appeal, the appellant asserts that the evidence was insufficient to warrant the jury in saying that the intent to commit the crime of forgery was present, and also that no forgery was committed because there was no contract which could be the subject of forgery.

The testimony discloses that the appellant and his father-in-law were engaged in the automobile business as partners at Santa Monica, doing business under the name of Smith Motors. They had in their employ as a salesman one Earl L. Crane. On March 29, 1927, Earl Crane signed a conditional sales contract in blank; i. e., at the time he signed the paper it did not contain a description of the automobile nor a statement of the terms. He signed the name of Earl Lewis to the paper, and said that he had some deals pending which would enable him to pay $600 down. The appellant signed the contract on behalf of the partnership, filled in the description of a 70 Chrysler sedan and the terms of $600 down and 12 monthly payments of $109.37, took the contract to one Claude Haworth, who was in the automobile finance business, and discounted it for $1,325. No part of the $600 was in fact paid by Crane, nor was delivery of the automobile made to him. Crane testified that he signed the name of Lewis to the paper, as he had on a former occasion, because he had some creditors around the bay and did not want an attachment run. He also testified that nothing was said about filling in the blank portions of the contract. Edward I. Bruck, an inspector for the motor vehicle department, testified that he called on appellant about April 19, 1927, and asked appellant why the department had received duplicate registration upon automobiles sold by Smith Motors, and that appellant, after consulting his auditor and their records, furnished him with a list of automobiles, in which was included a 70 Chrysler coupé, the motor number of which was G–167,371, which was the motor number given in the contract in question. The list further showed that "Haworth and Fredericks" had contracts on this machine. The witness further testified that "the question was asked Mr. Remsberg whether that was all the cars that were involved in the double financing, and he stated, 'Yes;'" and that appellant stated "that he had sold the cars for cash." Fred Zimmerman, another inspector, testified substantially to the same effect, clarifying it a bit by saying that "Mr. Remsberg stated that the cars had been sold for cash, that he owed Mr. Haworth the money for the cars, and that he had never paid for them to him; in other words, had never taken up the contracts and had not made any clearance to the purchasers of the cars." The appellant testified that the motor number inserted in the contract was a mistake; that they "didn't have a 70 sedan with that motor number."

[1, 2] It cannot be denied that the question of intent is one for the jury, and that, if the evidence is such that the jury could reasonably draw therefrom the inference of guilty intent, its verdict cannot be disturbed by the appellate tribunal. People v. Swalm, 80 Cal. 49, 22 P. 67, 13 Am. St. Rep. 96; People v. Rushing, 130 Cal. 449, 62 P. 742, 80 Am. St. Rep. 141. It is obvious from the circumstances of this case and the testimony which has been recited that the jury were reasonably justified in drawing the inference that the entire transaction with Crane, who signed as Lewis, was fraudulent and fictitious and took place for the sole purpose of enabling the appellant, on the strength of an apparently bona fide sale, to secure the sum of $1,325. In fact, no other suggested explanation rationally explains the sale or discount of the contract to Haworth without delivery of the automobile or the payment of any portion of the initial payment named in the writing.

[3] Appellant's second contention that there was no contract the subject of forgery is based upon the testimony that there was no such automobile as that described by motor number in the writing. However, the infirmity of the contract is not apparent on its face. It could be used and was in fact used to defraud one acting upon it as though it were genuine. This is the test as announced in the following authorities: People v. Gayle (Cal. Sup.) 259 P. 750; People v. Munroe, 100 Cal. 664, 35 P. 326, 24 L. R. A. 33, 38 Am. St. Rep. 323; and People v. James, 110 Cal. 155, 42 P. 479; People v. McGlade, 139 Cal. 66, 72 P. 600. These cases effectually conclude appellant's argument in this particular.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

92 Cal. App. 547

PEOPLE v. DAVIS. (Cr. 1033.)

District Court of Appeal, Third District, California. June 15, 1928.

1. Forgery ⇨44(1)—Defendant's guilty knowledge and intent to defraud held shown in prosecution for making and uttering fictitious check.

In prosecution for making, uttering, publishing, and passing a fictitious check, defendant's guilty knowledge and intent to defraud as part of corpus delicti *held* shown by his conduct in connection with fraudulent transaction.

2. Criminal law ⇨1036(1), 1044—Involuntary character of confession held not available on appeal, in absence of objection and motion during trial.

Error cannot be predicated on involuntary character of confession admitted in evidence, where there was no objection during trial on ground that confession was involuntary or motion to strike confession on such ground.

Appeal from Superior Court, Sacramento County; J. R. Hughes, Judge.

Douglas Davis was convicted of uttering, making, publishing, and passing a fictitious check, and from a judgment of conviction and the order denying a new trial he appeals. Affirmed.

J. S. Daly, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The information herein charges that the defendant "made, uttered, and published and passed a fictitious check," drawn on the Sacramento branch of the Bank of Italy. He was convicted, and his motion for a new trial was denied. This appeal is from the judgment of conviction and the order denying a new trial. In appellant's opening brief it is said:

> "Ernest Clink testified that defendant had called at his home at Sacramento and represented himself to be a steam shovel engineer and asked the witness if he wanted a job as fireman on the shovel at some place in Arizona. The defendant offered to pay the expenses of transportation, and after some discussion it was agreed that defendant and Clink should leave next morning for Arizona. In the morning defendant called for Clink and there was some talk about expenses. During this conversation Clink produced a Canadian bank note for $10, saying he would exchange it for American money and use it on the trip. Defendant said that would be unnecessary, and asked Clink to give it to him as 'a souvenir.' Thereupon Clink gave defendant the $10 note, and defendant indorsed the check set forth in the information, which purports to have been drawn in favor of John W. Wilkins by Charles Munn, and handed the check to Mrs. Clink in order to provide for the needs of the Clink family until Mr. Clink should obtain wages for work on the steam shovel. Soon after, defendant and Clink went toward the Southern Pacific depot in Sacramento, and on the way defendant told Clink that he had to stop at the Union Stage depot at Fifth and I streets for some baggage. Clink waited in the stage depot for about 15 minutes, and then, concluding that defendant had deserted him, went home, and obtained the check and endeavored to cash it at the bank, where he was told there was no such account. An employee of the bank testified that no such person as Charles Munn had an account at the Bank of Italy in either of its branches at Sacramento. A directory was allowed to be introduced in evidence to show there was no such person named therein."

During the examination by Mr. Johnson, deputy district attorney, of a police officer relative to a conversation between the officer and the defendant concerning the check in question, the following occurred:

> "Mr. Johnson: Q. What was said regarding the check?
>
> "Mr. Daly (Attorney for Defendant): That is objected to on the ground that it is incompetent at this time; it is hearsay; the proper foundation has not been laid.
>
> "The Court: Objection sustained.
>
> "Mr. Johnson: * * * When you are proving by affirmative testimony, unless it is used for the purpose of impeachment, you don't have to show the time and place, or persons present. * * *
>
> "The Court: Very well; let the objection be overruled then. * * *
>
> "Q. What, if anything, did the defendant say? A. He said Mr. Clink had told him he had this $10 Canadian bill, and he thought he would slip the check on him."

[1] Appellant contends that "guilty knowledge and intent to defraud are of the corpus delicti" and "cannot be established by extrajudicial admissions or confessions of the defendant" alone. Defendant's guilty knowledge and intent to defraud are clearly shown by his conduct in connection with the fraudulent transaction, without reference to his admissions or confession.

[2] No evidence was introduced to show that the defendant's confession was free and voluntary. Neither did the defendant even suggest at the trial that the confession was not voluntary. The objection quoted, under the circumstances shown, was insufficient. There was nothing in the question to which the objection was made to indicate that a confession was sought to be proved. The argument addressed to the court by the district attorney clearly shows that he understood the objection to relate to the time, place, and persons present when defendant's statement was made, a foundation which need not be laid for the proof of an admission not amounting to a confession, and the court evidently so understood, as indicated by the immediate change of the ruling. Under such circumstances, counsel for defendant should

have made his objection specific, or should have moved the court to strike out the answer on the specific ground that the confession was not shown to be voluntary. People v. Smith, 151 Cal. 619, 624, 91 P. 511; People v. Costa (Cal. App.) 253 P. 940, 941; People v. Willis, 70 Cal. App. 465, 469, 233 P. 812. Having failed to make such objection or motion, and having failed to suggest to the trial court that the confession was not voluntary, no error can be predicated on the ruling in question. No evidence whatever was offered by the defendant, and that introduced by the prosecution points unerringly to his guilt.

The judgment and the order are affirmed.

We concur: HART, J.; PLUMMER, J.

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92 Cal. App. 613

GRAY v. WOHLMAN MFG. CO. et al. (Civ. 5189.)

District Court of Appeal, Second District, Division 1, California. June 19, 1928.

1. Appeal and error 🔑1010(1)—Judgment on findings sustained by evidence will not be disturbed for insufficiency of evidence.

Where there is substantial evidence to support findings, judgment following findings will not be disturbed on appeal on the ground that evidence was insufficient.

2. Master and servant 🔑80(8)—Evidence as to reasonable value of services held inadmissible in action on contract specifying compensation.

Exclusion of evidence as to reasonable value of services performed under contract specifying compensation to be received therefor *held* proper in action for services based on contract.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Chalmers Gray against the Wohlman Manufacturing Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

E. Earl Crandall, of Los Angeles, for appellants.

Irvin C. Taplin, of Los Angeles, for respondent.

HOUSER, J. Defendants appeal from a judgment rendered against them in favor of plaintiff for unpaid salary and commission earned by plaintiff under a contract of employment of plaintiff by the defendants.

[1] The principal point on appeal is based upon the contention that the evidence was insufficient to sustain the findings of the court and its judgment thereon. That there was substantial evidence in support of the findings and that the judgment follows the findings is admitted by appellants. In such circumstances, the rule is unvarying that this court is unauthorized to disturb the judgment.

[2] Appellants also complain of alleged error committed by the trial court in its refusal to admit evidence offered by the defendants as to the reasonable value of the services performed by plaintiff. As, according to all the evidence in the case, including that of the witnesses for the defendants, the action was based on a contract which specifically provided for the amount of salary and commission to be paid to plaintiff for his services, the question of the reasonable value of such services was wholly immaterial.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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92 Cal. App. 504

MATTHIESSEN v. GRAND et al. (Civ. 6315.)

District Court of Appeal, First District, Division 2, California. June 13, 1928.

1. Easements 🔑5—Open, continuous, uninterrupted, adverse, and exclusive use of private right of way over another's land with his knowledge and acquiescence for five years creates "easement."

Open, continuous, uninterrupted, adverse, and exclusive use of private right of way over land of another with knowledge and acquiescence of owner for five years creates presumption of grant, and entitles one to "easement" in roadway by prescription.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Easement.]

2. Easements 🔑8(2, 3)—Permissive use will not support claim to easement over right of way by prescription.

Mere permissive use is not sufficient on which to base claim to easement over right of way by prescription, and, if use is consistent with rights of owner, no presumption of adverse possession is created.

3. Easements 🔑36(1)—One claiming easement by prescription must prove all essential elements.

Burden is on party claiming easement by prescription in right of way over another's land to prove all elements essential to establish such title.

4. Easements 🔑36(1)—Where one claiming easement by prescription shows essential elements, burden of proving use was permissive shifts to owner of land.

When necessary elements have been satisfactorily shown by one claiming easement in right of way over another's land by prescription, burden of proving that use of roadway was merely permissive shifts to owner of land.

5. Easements 🔑36(3)—Refusal to permit claimant of easement in right of way to alter traveled road, and maintenance of locked gates across way is persuasive evidence of permissive use.

Consistent refusal to permit claimant of easement of right of way to construct, repair, or alter traveled road, and persistent maintenance of gates across way which were always kept locked by owner, is persuasive evidence of mere permissive use.

6. Easements 🔑36(3)—Question whether use of roadway establishes easement by prescription, or is permissive, may be determined from relationship between parties in light of circumstances.

Question whether use of roadway establishes easement by prescription, or is proof of mere permissive use as neighborly accommodation, may be determined from relationship existing between parties in light of surrounding circumstances.

7. Appeal and error 🔑1010(1)—Findings as to whether use of roadway established easement by prescription, if supported by substantial evidence, will not be disturbed.

Where findings of court, relative to whether use of roadway established easement by prescription, or was permissive use by neighborly accommodation, are supported by substantial evidence, judgment will not be disturbed on appeal.

8. Easements 🔑36(3)—To establish easement to right of way by prescription, evidence of adverse possession should be clear and positive, and requirements strictly construed.

In order to establish easement to right of way by prescription, evidence of adverse possession must be clear and positive, and requirements should be strictly construed.

9. Easements 🔑6—Line of travel over roadway claimed by prescription must be certain and definite.

Line of travel over roadway which is claimed by prescription may not be shifting course, but must be certain and definite, and, while slight deviations from accustomed route will not defeat easement, substantial changes which break continuity of course of travel will destroy claim to prescriptive rights.

10. Easements 🔑36(3)—Evidence held insufficient to show prescriptive easement in right of way over plaintiff's land.

In action to enjoin trespass across plaintiff's land, evidence *held* insufficient to support findings establishing prescriptive title to easement in right of way over plaintiff's land.

11. Easements 🔑61(9½,12)—Findings and judgment quieting title in defendants to private roadway across plaintiff's land held at variance with evidence as to location of roadway.

In action to enjoin trespass acress plaintiff's land, findings and judgment quieting title in defendants to private roadway "in the Santa Cruz Canyon" across plaintiff's land *held* at variance with evidence as to location of roadway, which showed roadway did not follow canyon.

12. Easements 🔑61(9½)—Where defendants in action for trespass claimed right of way by prescription, plaintiff was entitled to have court determine issues as to definite description and location of roadway.

Definite description of roadway and location, particularly where alleged departures from old route existed, were issues which plaintiff was entitled to have court determine in action to enjoin trespass in which defendants claimed right of way by prescription.

13. Appeal and error 🔑1071(6)—Failure to find on material issues authorizes reversal of judgment.

A judgment will be reversed for failure to find on material issues.

Appeal from Superior Court, Santa Barbara County; Thomas A. Norton, Judge.

Action by F. W. Matthiessen against Maria Grand and others to enjoin a trespass. Judgment for defendants, and plaintiff appeals. Reversed.

Charles F. Blackstock, of Oxnard, and E. S. Gardner, of Ventura, for appellant.

Coleman E. Stewart, of Santa Barbara, for respondents.

THOMPSON, Justice pro tem. This is an appeal from a judgment in favor of defendants and cross-complainants, quieting title to a private roadway across plaintiff's land, and enjoining the maintenance of obstructions thereon.

Plaintiff brought an action to enjoin defendants from trespassing on his land. The defendants filed a cross-complaint claiming an easement by prescription to a twelve-foot roadway some ten miles in length across the premises of plaintiff from their adjoining ranch to a public highway beyond, and alleging that plaintiff had obstructed said right of way by constructing and maintaining a barrier across the roadway. The trial court found that plaintiff was the owner of the San Marcos rancho consisting of a 47,000-acre tract of land in Santa Barbara county, Cal., including sections 1 and 12 in township 6, north of range 29 west, and section 6 in township 6, north of range 28 west, and sections 29, 30, and 31 in township 7, north of range 28 west; that the defendants were the owners of 160 acres of land situated on the north and adjacent to the premises of plaintiff; and that—

"Defendants * * * are the owners, in possession and entitled to the possession of a private right of way over the lands of plaintiff, * * * from the lands of defendant * * * to the San Marcos road, said right of way being a well-defined and marked roadway approximately twelve feet in width, commencing at a point on the northeasterly line of said San Marcos road directly opposite the juncture of the Santa Ynes river and Santa Cruz creek (said river and said creek being nonnavigable streams flowing over the lands of plaintiff, * * * and said juncture being approximately 300 yards due west from said San Marcos road), and running thence in a northwesterly direction in the Santa Cruz Canyon over said sections 1, 12, 6, 29, 30, and 31 of plaintiff's lands to the northeasterly line of defendants' lands."

The court further found that defendants and their predecessors had used and claimed said private roadway adversely to plaintiff for more than five years preceding the commencement of this action; that the plaintiff had obstructed said road by erecting and maintaining a barrier across it. Thereupon the court denied relief to the plaintiff and enjoined him from interfering with the defendants' use and enjoyment of said roadway. From this judgment the plaintiff appealed.

The appellant contends (1) that the evidence fails to support the findings to the effect that the defendants acquired an easement by prescription in said private roadway; (2) that the description of the right of way is void for uncertainty and indefiniteness; (3) that the right of way was materially changed from the former course of travel; and (4) that the findings do not support the judgment.

The appellant's property is a large stock ranch ten miles in length, which is mountainous, rough, and adapted chiefly to grazing purposes, through the center of which flows the Santa Cruz creek. The evidence is undisputed to the effect that the San Marcos rancho was inclosed and cross-fenced to control the ranging of stock. For many years seven gates were maintained on the premises, two of which, at least, crossed the roadway in question. These gates were always closed with padlocks and chains, the keys to which were voluntarily supplied by appellant to the respondents and other neighbors. More than half a century ago the road began as a mere pack trail used by hunters and cowboys in search of stray stock. Like the ordinary mountain trail, it developed with the needs of the residents of that vicinity. Some years age it assumed the dignity of a dim, rough mountain road, over which wood sleds and carts passed with difficulty. Later it was improved to the extent that even an automobile has been known to have traveled its course. During all this time the owner of the ranch has maintained dominion and control over the roadway, permitting it to be used, however, without hindrance for the accommodation of the neighbors.

There is no conflict of evidence over the fact that the father of defendants and their predecessor in interest on several occasions either applied to the owner of appellant's ranch for permission to improve, reconstruct, or more permanently build the roadway in question, or they proceeded to do so, and, upon refusal to permit the same, abandoned and desisted from their plans and operations; that whatever substantial improvements or alterations of said roadway which do exist were made within five years preceding the commencement of the present action; that the roadway does not always follow the "course of the Santa Cruz Canyon," which alone is authorized by the findings, but sometimes traverses the adjoining hills, bluffs, or convenient mesa. The only evidence furnished, of the actual specific course of the roadway, appears from a blueprint map offered by appellant, which was drawn and testified to by a civil engineer. This map exhibits parallel lines indicating the course of the old, permanent roadway, while red lines show substantial departures from the original road at ten different points, varying from the former roadway distances of from 70 to 430 feet. These points of departure from the original road are corroborated by several of appellant's witnesses, and in one particular by at least one of respondents' witnesses, and are not contradicted by any of the witnesses, except two of the respondents themselves.

However, these numerous and radical changes are denied by the two defendants, and this furnishes substantial evidence which precludes this court from interfering with the trial court's findings on this particular issue, provided the evidence can be said to support a finding of adverse possession which is sufficiently definite to identify the termini and course of the roadway to which the respondents are awarded an easement by prescription. The appellant asserts that he has never objected to the permissive use of this roadway along its former course, and claims that the present controversy arose over an obstruction which he placed across a new grade established by the respondents outside of the former line of travel near the Santa Cruz cabin.

[1-7] The open, continuous, uninterrupted, adverse, and exclusive use and enjoyment of a private right of way over the land of another with the knowledge and acquiescence of the owner for a period of five years creates a presumption of a grant, and entitles one to an easement in the roadway by prescription. Kripp v. Curtis, 71 Cal. 62, 66, 11 P. 879; Thomas v. England, 71 Cal. 456, 12 P. 491; Clarke v. Clarke, 133 Cal. 667, 66 P. 10; 9 R. C. L. 772, § 33. Mere permissive use is not sufficient upon which to base a claim to an easement over a right of way by prescription. If the use of the roadway is consistent with the rights of the owner, no presumption of adverse possession is created. It is essential that there should be such an invasion of the rights of the owner in the claimant's use of the road, as to create grounds for an action against the intruder, in order to create a presumption of prescriptive rights. Franz v. Mendonca, 131 Cal. 205, 63 P. 361; 9 R. C. L. 777, § 36. The permissive use of a way over the land of another will never ripen into an easement by prescription, regardless

of how long the privilege may have been enjoyed. 1 Cal. Jur. 599, § 72; 19 C. J. 897, § 74. The burden is upon the party claiming the easement to prove all the elements essential to establish such a title. Costello v. Sharp, 65 Cal. App. 152, 157, 223 P. 567. When the necessary elements have been satisfactorily shown, however, the burden of proving that the use of the roadway was merely permissive as a neighborly accommodation shifts to the owner of the land. Pacific Gas & E. Co. v. Crockett L. & C. Co., 70 Cal. App. 283, 291, 233 P. 370; Costello v. Sharp, supra. Consistent refusal to permit a claimant of an easement in a right of way to construct, repair, or alter a traveled road, and persistent maintenance of gates across the way, which are always kept locked by the owner, is persuasive evidence of mere permissive use. 19 C. J. 898, § 75; Heenan v. Bevans, 51 Cal. App. 277, 288, 196 P. 802. It has been held that the question as to whether the use of a roadway establishes an easement by prescription, or is proof of mere permissive use as a neighborly accommodation, may be determined from the relationship existing between the parties in the light of surrounding circumstances, and, if the findings of the court are supported by substantial evidence, the judgment will not be disturbed on appeal. Wells v. Dias, 57 Cal. App. 670, 207 P. 913; Fleming v. Howard, 150 Cal. 28, 87 P. 908; Yuba Cons. Goldfields v. Hilton, 16 Cal. App. 228, 116 P. 712, 715; Costello v. Sharp, supra.

[8-10] Yet in view of the uncertainty of the location or course of this ancient trail ten miles in length, which meanders aimlessly through the midst of a large cattle ranch, running over hills and down dales, sometimes following a river canyon, clambering along an adjacent bluff, or skirting across a convenient mesa, with no attempt to definitely describe its course by measurements or survey; with convincing evidence of numerous substantial changes in the course, in spite of the defendants' contradiction of these changes; with proof of continuous maintenance by the owner of locked gates across the way, the evidence in the present case scarcely measures up to the specific requirements of the law with respect to the establishment of an easement by prescription. Upon the contrary, such circumstances strongly rebut the presumption created by the mere use of the roadway. The right to the unhampered use and enjoyment of one's own property, which is not in conflict with the rights acquired by others, may not be thus recklessly destroyed. To establish an easement to a right of way by prescription, the evidence of adverse possession should be clear and positive, and the requirements should be strictly construed. 9 R. C. L. 782, § 40.

The line of travel over a roadway which is claimed by prescription may not be a shifting course, but must be certain and definite. Slight deviations from the accustomed route will not defeat an easement, but substantial changes which break the continuity of the course of travel will destroy the claim to prescriptive rights. Vestal v. Young, 147 Cal. 721, 82 P. 383; Allen v. San Jose Land & W. Co., 92 Cal. 138, 28 P. 215, 15 L. R. A. 93; Oliver v. Agasse, 132 Cal. 297, 64 P. 401; 19 C. J. 899, § 77. A change of 20 feet in the location of a ditch has been held to defeat an easement. Vestal v. Young, supra; Felsenthal v. Warring, 40 Cal. App. 119, 180 P. 67. Although manifestly the distance to which a roadway may be changed without destroying an easement will be determined somewhat by the character of the land over which it passes, together with the value, improvements, and purposes to which the land is adapted. The maintenance of gates by the owner, across the roadway, when such gates are always kept locked, even though keys may be supplied to the neighbors as a matter of accommodation, is substantial proof of permissive use. Quinn v. Anderson, 70 Cal. 454, 11 P. 746; Heenan v. Bevans, 51 Cal. App. 277, 196 P. 802; Schulenbarger v. Johnstone, 64 Wash. 202, 116 P. 843, 35 L. R. A. (N. S.) 941, note. We are of the opinion that the evidence in the present case is insufficient to support the findings establishing prescriptive title, in view of the foregoing well-established rules of law. It therefore becomes necessary to reverse the judgment for lack of evidence in that regard.

[11] The appellant claims that the findings in the present case are too indefinite and uncertain as to the location of the right of way to support the judgment. Neither the cross-complaint, the findings, nor the judgment pretend to definitely describe the course of the roadway in which the respondents are awarded an easement by prescription. The chief issue in this case was confined to appellant's contention that respondents had made numerous material changes in the traveled route which destroyed the easement, if, indeed, they ever possessed one. The obstruction complained of by respondents, the maintenance of which was enjoined by the court, was placed across one of these departures from the old roadway, which change was claimed to have been made in 1922, two years before the action was commenced. The only evidence of the course of travel, the distances, or termini, or location of the alleged changes, was furnished by a surveyor's map which was offered by appellant. Neither this map nor the data furnished thereby is referred to in the findings or judgment. The only indication of the location or description of the disputed roadway to which the court awarded respondents an easement by prescription is:

The "well-defined and marked roadway approximately twelve feet wide, commencing at a point on the northeasterly line of said San Marcos road directly opposite the juncture of the Santa Cruz creek, * * * and running thence in a northwesterly direction *in the Santa Cruz Canyon* over said sections 1, 12, 6, 29, 30, and 31 of plaintiff's lands to the northeasterly line of defendants' lands."

It will be observed that the easement in the awarded right of way is confined strictly to the "Santa Cruz Canyon." The evidence indicates, without dispute, that this roadway was not confined to the canyon, but in part traversed the adjoining hills and bluffs. Mr. Haslam testified:

> "The old road follows around a hillside, and the change just simply takes it around the other side of the hill, with apparently no object in view. There is a hill—the old road goes around one side, and the new road on the other.
>
> "Q. Where on the map does the road go up the grade from the Santa Cruz Valley to the table land above it, known as the mesa? A. That is right here (pointing). * * *
>
> "Q. Describe the nature and character of the land (where the road is located). * * * A. It is a flat hillside. * * * The old road goes in a straight line up there, and the new road" * * * cuts off to one side and back to the road again. * * * It is a flat hill over which it runs.

Mr. Garrett testified:

> "We put a barrier across * * * that first change in the road.
>
> "Q. Where the road ascends the hill? A. Yes; where it leaves the valley and goes up the hill. * * * The old road went up a very steep incline * * * to the top of the next mesa, and the new road starts way back and makes an easy grade of it."

Speaking of this same grade, the defendant Pasqual Grand said:

> "There is a big bluff—very steep; and gradually they have filled that road up and made it higher, and kind of back up a little more. That gave me a grade so I could go up with my machine—but before, it was too steep. * * * Lifting this road up gradually, threw me away to one side, maybe a few feet. There is a big bluff there. That is the only change I made there. * * *
>
> "Q. Describe the position of the roadway? A. It comes along this way up here. Here is a tree. This is a very steep grade. Pretty near on top is a big sycamore tree. Pretty near to that tree, the road makes a turn, and there is a big bluff on this side."

[12, 13] The findings and judgment are therefore at variance with the evidence as to the location of the roadway, as it is apparent that the road does not traverse throughout its course the canyon of the Santa Cruz creek. The definite description of the roadway, and the location, particularly where the alleged departures from the old route existed, were issues which the appellant was entitled to have the court determine. This the court failed to do. A judgment will be reversed for failure to find upon material issues. 2 Hyatt on Trials, 1929, § 1984; Pon v. Wittman, 147 Cal. 280, 297, 81 P. 984, 2 L. R. A. (N. S.) 683. In 2 Hyatt, supra, at page 1930, it is said:

> "The parties are entitled to specific findings on all matters in issue as to which there is a reasonable controversy."

In the case of Crosier v. Brown, 66 W. Va. 273, 66 S. E. 326, 25 L. R. A. (N. S.) 174, which was an action to establish a private right of way by means of prescriptive easement, it was held that the line of travel must be particularly described. A statement that "Crosier is the owner of a right of way as appurtenant to his said tract of land over a portion of the land of the defendant Brown, about 500 yards in length, passing from near the western line of said tract through the western portion of said Brown's tract of land to the public road," was held to be too indefinite and uncertain upon which to base a claim of an easement by prescription in a private roadway.

It follows in the present case that the findings are inadequate with respect to the description of the right of way, and, for this additional reason, are insufficient to support the judgment.

The judgment is therefore reversed.

We concur: KOFORD, P. J.; NOURSE, J.

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92 Cal. App. 537

ROGERS v. SPRINGFIELD FIRE & MARINE INS. CO. (Civ. 6255.) ★

District Court of Appeal, First District, Division 1, California. June 15, 1928.

Hearing Denied by Supreme Court Aug. 13, 1928.

1. Interest ⟹22(5)—Where execution was issued on judgment entered on stipulation, objection that judgment was not due or interest bearing held untenable (Code Civ. Proc. § 577; Usury Law).

Where judgment was entered on stipulation of parties which made no mention of interest, and judgment made no provision for stay of execution, *held*, that since, under Code Civ. Proc. § 577, judgment is final determination of rights of parties, and, under Usury Law (St. 1919, p. lxxxiii), bears interest, to construe judgment entered to be not due or to be noninterest bearing would be to amend or to modify it in manner not authorized by law.

2. Judgment ⟹253(2)—It is not essential in contested case that, in order that judgment bear interest, interest be prayed for in complaint.

It is not essential in contested case that, in order that judgment bear interest, interest be prayed for in complaint.

★Hearing denied by Supreme Court.

3. Courts 🔑89—Decisions based on statute subsequently repealed, but in substance restored by initiative measure, did not lose force by reason of repeal (Civ. Code, § 1920; Usury Law).

Decisions based on Civ. Code, § 1920, subsequently repealed, but in substance restored by initiative measure known as Usury Law (St. 1919, p. *l*xxxiii), did not lose force by reason of repeal of Code section.

4. Interest 🔑22(5)—Interest held allowable on judgment based on stipulation which contained no mention of interest (Code Civ. Proc. § 682, subd. 1).

Where objection was made to order issuing execution on ground that interest was allowed on judgment which had been entered on stipulation of parties which did not provide for interest, *held*, that interest was allowable, under Code Civ. Proc. § 682, subd. 1, providing that, if execution be against property of judgment debtor it must require sheriff to satisfy judgment with interest.

5. Judgment 🔑91—There is no distinction in effect between judgment entered on trial of fact and one entered by stipulation or consent (Code Civ. Proc. § 577).

There is no distinction in effect between judgment entered on trial of fact and one entered by stipulation or consent, and in either case judgment is final determination of rights of parties in action or proceeding, by virtue of Code Civ. Proc. § 577.

6. Constitutional law 🔑70(3)—Appellate court must uphold provision in law declaring judgment bears interest, even though it inflict hardship (Usury Law).

As Usury Law (St. 1919, p. *l*xxxiii) declares that judgment bears interest, appellate court must uphold such provision, even though it might in some instances inflict a hardship, as such matters are for the Legislature, or for the people, by initiative measure to determine, and not for the courts.

7. Interest 🔑22(1)—Defendant, who could have avoided paying interest on judgment by depositing money in court, could not complain when compelled to pay interest thereon (Usury Law).

Defendant, who could have avoided paying interest on judgment, as provided by Usury Law (St. 1919, p. *l*xxxiii) by depositing money in court and letting different claimants adjudicate differences between themselves, could not complain that it was penalized by being compelled to pay interest.

8. Interest 🔑22(5)—Defendant held not entitled to complain of execution for amount, due with interest, on judgment based on stipulation.

Defendant, who objected to issuance of execution on judgment based on stipulation which provided that execution on whole of said judgment shall be stayed until such time as the correct amount of money now under attachment and assignments is ascertained, could not complain, where liabilities were ascertained, and execution was merely for amount due, together with interest, on judgment.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by N. G. Rogers against the Springfield Fire & Marine Insurance Company on policies of fire insurance. From on order directing issuance of execution, defendant appeals. Affirmed.

G. L. Aynesworth, of Fresno, for appellant.

M. K. Harris and James A. Burns, both of Fresno, for respondent.

CAMPBELL, Justice pro tem. Plaintiff filed an action to recover the sum of $5,000 from defendant, such being the amount claimed to be owing on two policies of fire insurance. Defendant appeared and filed an answer. On June 5, 1922, the cause came on for trial, at which time plaintiff and defendant entered into a stipulation as follows:

> "It is hereby stipulated that the above-entitled action be and the same is compromised as follows: That plaintiff shall have judgment for the sum of $2,200.00, lawful money of the United States without costs; that execution on the whole of said judgment shall be stayed until such time as the correct amount of moneys now under attachment by garnishments and a certain assignment to T. M. Crum served on the defendant is ascertained, and when said sums are ascertained, and the liability of the defendant under said garnishments and said assignment is definitely ascertained, then the said defendant will pay over to plaintiff to be applied on said judgment all moneys now due upon said judgment over and above the amount of defendant's liability under said garnishments and said assignment, and the execution shall be further stayed on the remainder of said judgment, as to such amount of defendant's liability under said garnishments and said assignment until the plaintiff shall procure a release of said defendant from all liability under said garnishments and assignment, and then and in that event the said defendant will pay over to the plaintiff the remainder due upon said judgment, and said judgment shall be fully satisfied, and as each attachment is settled by plaintiff, defendant will pay over to plaintiff the amount of such attachment, if the same is paid directly by plaintiff."

The court, pursuant to the stipulation, entered its judgment and likewise entered its order staying execution. On June 16, 1922, plaintiff gave notice of intention to move the court for an order directing the issuance of an execution. The motion came on regularly for hearing on July 16, 1922, and was by the court denied without prejudice. Three subsequent and similar notices and motions were made, which were likewise denied.

The assignment and garnishments referred to in the stipulation had been served on the defendant prior to the making of the stipulation upon which judgment was entered. Thereafter plaintiff engaged in a test case to determine the validity of the garnishments, and their validity was sustained. On May 4, 1826, plaintiff gave notice of intention to move for an order directing the issuance of an execution, and on June 18, 1926, the court made an order that an execution issue against the property of defendant in favor of W. M. Grady, the judgment creditor, for the sum of $1,217.13, the balance of principal and interest due—the court having found that the judgment as entered for $2,200 was subject to the liens of three attachments or executions aggregating $1,579.30.

After the commencement of the action plaintiff, N. G. Rogers, duly assigned all his right, title, and interest in and to his claim against defendant to W. D. Grady, who thereafter duly assigned all his right, title, and interest in and to the judgment to W. M. Grady, and the assignees have continued the cause in the name of the original plaintiff.

Appellant urges that the court erred in ordering the execution to issue for the following reasons: (1) That, since the garnishments levied on the appellant have not been paid as provided in the said stipulation, the said judgment is not due or enforceable; (2) that, since said judgment is not due or enforceable, the same does not bear interest; (3) that an execution for a portion of a judgment is unauthorized and erroneous.

[1, 2] It will be noted that the stipulation makes no mention of interest, and the judgment makes no provision for a stay of execution.

> "A judgment is the final determination of the rights of the parties in an action or proceeding." Code Civ. Proc. § 577.

To construe the judgment entered to be not due or to be noninterest bearing would be to amend or modify the judgment in a manner not authorized by law. Takekawa v. Hole, 170 Cal. 323, 149 P. 593; Benning v. Superior Court, 34 Cal. App. 296, 167 P. 291; Forrester v. Lawler, 14 Cal. App. 171, 111 P. 284. In Glenn v. Rice, 174 Cal. 269, 276, 162 P. 1020, 1023, it is held:

> "In entering a judgment, it is not necessary to declare therein that it shall bear interest. It bears interest at the rate of seven per cent. per annum from its date by force of the law, and not by reason of any declaration it may contain to that effect. (Civ. Code, § 1920; Code Civ. Proc. § 682."

In Sea v. Lorden, 37 Cal. App. 444, 174 P. 85, the court says:

> "The respondent is entitled to interest only from the date of the judgment, and he is allowed that by operation of law."

Nor is it essential in a contested case in order that a judgment shall bear interest that interest be prayed for in the complaint. Durbin v. Hillman, 50 Cal. App. 377, 382, 195 P. 274.

[3, 4] The decisions cited were based on section 1920 of the Civil Code in force when the decisions were rendered, which read:

> "Interest is payable on judgments recovered in the courts of this state, at the rate of seven per cent. per annum, and no greater rate, but such interest must not be compounded in any manner or form."

Subsequently in 1918, section 1920 of the Code referred to was repealed, but in substance was restored by the initiative measure adopted at the general election of November, 1918, known as the Usury Law (Stats. 1919, lxxxiii), the first section of which provides that the rate of interest upon judgments rendered in any court of this state shall be $7 upon the $100 for one year and at that rate for a greater or less sum or for a longer or a shorter time. The substance of section 1920 of the Civil Code being adopted in the Usury Law, the authorities cited lose none of their force by reason of the repeal of the Code section. Moreover, section 682 of the Code of Civil Procedure, subdiv. 1, provides:

> "If it [execution] be against the property of the judgment debtor, it must require the sheriff to satisfy the judgment, with interest. * * *"

[5] Appellant urges that the judgment was not entered upon a trial of fact, but by virtue of a stipulation, the express terms of which purport to limit and control the rights of the parties in the judgment. We can see no distinction in the effect of a judgment entered upon a trial of fact and one entered by stipulation or consent. In either case the judgment is a final determination of the rights of the parties in the action or proceeding. Code Civ. Proc. § 577.

[6, 7] Our attention has been directed by appellant to several cases to support its contention that, in view of the fact that it was compelled to withhold the payment to plaintiff because of garnishments served upon it, plaintiff is not entitled to interest. Stimson v. Dunham, Carrigan, Hayden Co., 146 Cal. 281, 79 P. 968, cited, is a case in which the court was considering the claim of a contractor, where filed liens prevented the owner from making direct payment. The court denied the demand of defendant Gardiner, the contractor, for a foreclosure of his lien, for attorney's fees, for interest, and for costs. In that case the court said:

> "If, for the purposes of this case, it be conceded that appellant can raise the question, we hold that plaintiffs were not liable for interest."

Neither in that case, however, nor in any of the cases cited by appellant, is the question of interest on a judgment discussed or passed upon, and, as the law declares that a judgment bears interest, we must uphold such provision, even though it might in some instances inflict a hardship, as such matters are for the Legislature, or for the people, by initiative measure to determine, and not for the courts. It cannot, however, be said, as claimed, that appellant will be penalized by being compelled to pay interest. Appellant could have avoided paying interest or paying more than once by depositing the money in court, as it did not deny owing it, and interpleaded and let the different claimants adjudicate their differences between themselves.

[8] As to appellant's other point that it was the duty of respondent to have discharged the garnishments before requiring payment to him by appellant, it may he said that the stipulation on which the judgment is based provides:

> "That execution on the whole of said judgment shall be stayed until such time as the correct amount of money now under attachment by garnishments and a certain assignment to T. M. Crum served on defendant is ascertained, and when said sums are ascertained and the liability of the defendant under said garnishments and said assignment is definitely ascertained, then the said defendant will pay over to plaintiff to be applied on said judgment all moneys now due upon said judgment over and above the amount of defendant's liability under said garnishments and said assignment," etc.

It is admitted that the liabilities of defendant were ascertained at the time the last motion for execution was made, and the execution was issued merely for the amount due over and above the amount to be paid to satisfy the garnishments and assignments, together with interest on the judgment.

The only real question presented is whether the judgment as rendered, or that portion over and above the amount of the garnishments and assignment, should bear interest. This question we have disposed of, and from such disposition it follows that the order appealed from should be, and it is, affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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92 Cal. App. 526

KEELE v. CLOUSER et al. (Civ. 5445.)

District Court of Appeal, Second District, Division 1, California. June 14, 1928.

1. Vendor and purchaser ⇨299(3)—Vendor's complaint held to state causes of action to quiet title, to recover possession, and to foreclose purchaser's rights under contract, as against demurrer.

Complaint alleging that defendants defaulted in paying monthly installments, that plaintiff notified tthem that she would declare contract forfeited if payment was not paid in three days, that thereafter she declared contract forfeited, that defendants denied liability under contract and asserted ownership, and praying for decree declaring forfeiture of contract, quieting plaintiff's title, and for possession, and specified sum as damages for the withholding thereof, *held* to state causes of action to quiet title, to recover possession and damages for withholding, and to foreclose defendant's rights under contract of sale, as against demurrer, notwithstanding complaint was entitled as being in unlawful detainer, nature of complaint being determined from its allegations; not from its caption.

2. Pleading ⇨18—Complaint alleging causes of action to quiet title, to recover possession, damages for withholding, and to foreclose purchasers' rights held not demurrable for uncertainty.

That complaint stated causes of action to quiet title to realty, to recover possession thereof with damages for withholding, and to foreclose defendant's rights under land contract, *held* not to render complaint demurrable as ambiguous and uncertain, where it clearly showed that plaintiff intended to assert all causes of action stated therein.

3. Action ⇨48(1)—Complaint stating causes of action to quiet title to realty, for possession, and for damages for withholding, and to foreclose rights under contract, held not demurrable for misjoinder of causes (Code Civ. Proc. §§ 380, 427, subd. 2).

Under Code Civ. Proc. §§ 380, 427, subd. 2, demand for relief by way of declaration of forfeiture of purchaser's rights under land contract, to recover possession, and for withholding property, were merely incidents to cause of action to quiet title and could be joined with it.

4. Appeal and error ⇨1040(10)—Any error in overruling demurrer for misjoinder of causes of action would not be reversible, where no miscarriage of justice resulted.

Any error in overruling demurrer to complaint for misjoinder of causes of action would not be ground for reversal, where no miscarriage of justice resulted therefrom.

5. Quieting title ⇨10(1)—Plaintiff suing to quiet title must prove title in herself.

In action to quiet title plaintiff must prove title in herself in order to recover.

6. Vendor and purchaser ⇨189—Vendee in possession under land contract cannot dispute vendor's title.

The general rule is that a vendee in possession under a contract of sale cannot dispute his vendor's title.

7. Vendor and purchaser ⇨299(3)—Vendee's acceptance and retention of possession is sufficient acknowledgment of vendor's title to support finding thereof in action between them (Code Civ. Proc. § 1963, subds. 11, 12).

Under Code Civ. Proc. § 1963, subds. 11, 12, action of vendee in accepting possession from his vendor and subsequently withholding possession is sufficient acknowedgment of vendor's title to support a finding thereof in action between them, at least in cases where vendee makes no claim or showing of title in any person other than his vendor.

8. Deeds 🔑54—Deed does not pass title unless delivered.

Deed is not effective to pass title unless delivered.

9. Deeds 🔑194(2)—Prima facie evidence of delivery of deed created by grantee's possession thereof or recording is not conclusive.

Though possession of deed by grantee or recording thereof is prima facie evidence of delivery, it is not conclusive and may be disputed.

10. Brokers 🔑94—Broker employed to find purchaser has no authority to deliver deed.

Broker employed to find purchaser for realty has no authority to make contract or conveyance in behalf of his principal unless special power is conferred on him for that purpose, and hence can have no authority to take any one of essential steps toward conveyance, such as delivery of deed.

11. Brokers 🔑94—Delivery of deed to broker to be put in escrow does not confer ostensible authority to deliver it to grantee; broker being "special agent" (Civ. Code, § 2297).

Delivery of deed to broker employed to find purchaser and for limited purpose of putting deed in escrow does not confer on him authority to convert deed into a conveyance by delivering it to grantee, unless there is some further act on grantor's part reasonably indicating to grantee that broker has such authority; broker in such case being special agent under Civ. Code, § 2297.

[Ed Note.—For other definitions, see Words and Phrases, First and Second Series, Special Agency or Agent.]

12. Vendor and purchaser 🔑299(3)—Purchaser's cross-complaint setting up vendor's fraud but not alleging damage or offer to restore property held not to state cause of action (Civ. Code, § 1691).

Purchaser's cross-complaint setting up vendor's fraudulent misrepresentations when sale was made *held* not to state cause of action, in absence of allegation that purchasers restored or offered to restore property to vendor or that they suffered any damage by reason of the fraud, as required by Civ. Code, § 1691, and evidence of such fraud was therefore properly excluded.

13. Appeal and error 🔑757(1)—Judgment will be affirmed if appellant fails to print in brief sufficient of record to justify reversal (Code Civ. Proc. § 953c).

Under Code Civ. Proc. § 953c, if appellant fails to print in his brief or supplement sufficient of record to justify reversal of judgment, it will be affirmed on ground that record fails to show error.

14. Vendor and purchaser 🔑299(1)—Where vendor's complaint for unlawful withholding of possession by purchasers alleged date when withholding began, she could not recover for withholding before such date.

Where vendor's complaint in action to quiet title to realty, and to recover possession thereof and damages for withholding possession, alleged that vendor exercised her option to declare contract forfeited on certain date and that defendant's withholding began as of such date, she could not recover damages on account of withholding previous to such date, since until she exercised option to declare contract forfeited defendant's possession was not wrongful.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Mary V. Keele, formerly Mary V. Haas, against Eugene Clouser and wife and others. Judgment for plaintiff, and defendant Clouser and wife appeal. Affirmed.

William A. Spill, of Pasadena, for appellants.

Simpson & Simpson, and Leon U. Everhart, all of Pasadena, for respondent.

SHAW, Justice pro tem. [1] This is an appeal by the defendants Clouser, hereinafter referred to simply as the defendants, from a judgment in favor of plaintiff. The first point made in support of the appeal is that the court erred in overruling their demurrer to the complaint. The complaint alleges that the plaintiff and the defendants on November 3, 1920, entered into a contract by which plaintiff agreed to sell and defendants agreed to buy a parcel of real property, defendants agreeing to pay the price in monthly installments; that the contract contained a provision making time of its essence; that defendants on and since March 3, 1925, have defaulted in payment of monthly installments of the price, "amounting at this time to the sum of $175"; that on June 26, 1925, plaintiff notified them of their default and that if the amount then due, $140, was not paid in three days, she would elect to declare the contract forfeited; and that on July 1, 1925, the plaintiff further notified the defendants that she declared the contract forfeited and canceled by reason of their said default. The complaint further alleges that the defendants have denied any liability under the contract and asserted title and ownership of the property in themselves; that "ever since July 1, 1925, plaintiff has been and now is the owner and entitled to the possession of said premises; that the defendants ever since said date have been and now are unlawfully withholding from plaintiff the possession of said premises"; that the value of the rents and profits is $40 per month, and plaintiff has been deprived thereof since July 1, 1925, by the detention of the property by defendants. The prayer is for a decree declaring a forfeiture of the contract and quieting plaintiff's title to the property, for possession of the premises, and for $340 damages for the withholding thereof. This complaint is entitled in its caption, "Complaint—Unlawful Detainer," and defendants' first objection to it is that a vendor of land cannot maintain an unlawful detainer proceeding against his vendee on account of the latter's default in payment of the price. This is no doubt true, but to determine the nature of the complaint we look not so much at its caption as at its allegations, and from the latter it clearly appears that this complaint is not one in unlawful detainer. It states a cause of action to quiet title to real property and to recover possession thereof with damages for the withholding, and also a cause of action to foreclose defendants' rights under the contract of sale. The general demurrer was therefore properly overruled.

[2-4] Further grounds of the demurrer are that the complaint is ambiguous and uncertain because it does not disclose upon which of the above-mentioned causes of action it is based, and that these several causes of action are improperly united. There is nothing in the claim of uncertainty. It is clear from the complaint that the plaintiff intends to assert all of the causes of action stated therein. The demand for relief by way of a declaration of the forfeiture of the contract is merely an incident to the cause of action to quiet title and may be joined with it. Bishop v. Barndt, 43 Cal. App. 149, 184 P. 901. Relief by way of recovery of possession is also incidental to an execution issued on a judgment quieting title to real property in favor of a plaintiff who is out of possession. Code Civ. Proc., § 380. Consequently an action to quiet title to real property, brought by one who alleges that he is out of possession, is in effect an action to recover possession of the property, and in an action of the latter character a recovery of damages for the withholding of the property may also be sought. Code Civ. Proc. § 427, subd. 2. We think all of the various kinds of relief sought by the plaintiff may be obtained in a single action, and hence the demurrer for misjoinder of causes of action was properly overruled. But even if there were error in this respect we cannot see that any miscarriage of justice resulted from it, and hence it would not be ground for a reversal.

[5-7] Defendants' next point is that, the action being in substance one to quiet title, the plaintiff must prove title in herself in order to recover and that she failed to do so. The rule referred to is well established, but there is not an entire failure of proof of title in plaintiff. There is no evidence or claim of title in any one else. In giving her testimony the plaintiff referred to the property as "my property." The evidence showed that at the date of the contract of sale she was in possession of the property. From this fact a presumption would arise that she was then the owner. Code Civ. Proc. § 1963, subds. 11 and 12; Davis v. Crump, 162 Cal. 513, 123 P. 294. Upon the making of the contract she delivered the possession of the property to the defendants, who went into possession under the contract. The general rule is that a vendee in possession under a contract of sale cannot dispute his vendor's title. Gervaise v. Brookins, 156 Cal. 103, 103 P. 329; Garvey v. Lashells, 151 Cal. 526, 91 P. 498. In Garvey v. Lashells the court said:

> "This rule is in full accord with the well-recognized doctrine that no one who goes into possession of land under another will be heard to dispute the title of that other during the continuance of the relation."

All the cases on this point which we have examined were actions of ejectment, but the language above quoted from Garvey v. Lashells would apply as well to an action to quiet title. There may be some ground for limiting the application of the rule in an action of the latter class, but the action of the vendee in accepting the possession from his vendor and subsequently holding that possession is a sufficient acknowledgment of his vendor's title to support a finding thereof in an action between them, at least in cases where the vendee makes no claim or showing of title in any person other than the vendor.

[8-11] The defendants allege in their answer that the plaintiff executed and delivered to them a deed of the property. It is claimed that such a deed was turned over to them and recorded, but the evidence showing this to be the fact is not printed in defendants' brief. The plaintiff testified that she signed this deed and intrusted it to a broker who had acted for her in procuring defendants to purchase the property, with instructions to put it in escrow with a bank, to be delivered to defendants when the payments on the contract had been completed. The complaint alleges that the payments have not been completed, and no denial of this allegation is called to our attention. The court refused to admit the deed in evidence, and found that it had never been delivered to defendants. They complain that this ruling was error and that the finding was not supported by the evidence. A deed is not effective to pass title unless delivered. While the possession of a deed by the grantee, or the recording thereof, is prima facie evidence of a delivery, it is not conclusive and may be disputed. Black v. Sharkey, 104 Cal. 279, 37 P. 939; Klose v. Hillenbrand, 88 Cal. 473, 26 P. 352. The plaintiff's testimony showed that her broker had no authority to make such delivery. His authority extended only to a deposit of the deed with the bank, there to remain in escrow, and hence if he gave possession of it to the defendants his act was not binding upon the plaintiff and did not constitute a delivery of the deed. Klose v. Hillenbrand, supra. A broker employed to find a purchaser for real property has no authority to make a contract or a conveyance in behalf of his principal, unless special power is conferred upon him for that purpose (4 Cal. Jur. 564, 565), and hence can have no authority to take one of the essential steps toward a conveyance, such as the delivery of the deed. The

delivery here cannot be held good under the doctrine of ostensible agency. The broker was a special agent (Civ. Code, § 2297), and it was therefore incumbent on the defendants to inquire as to the extent of his authority (1 Cal. Jur. 715, 744). The delivery of a deed to an agent for the limited purpose of putting it in escrow does not confer on the agent ostensible authority to convert it into a conveyance by delivering it to the grantee, unless there is some further conduct on the grantor's part reasonably indicating to the grantee that the agent has such authority. MacDonald v. Cool, 134 Cal. 502, 66 P. 727. The ruling excluding the deed from evidence and the finding that it had not been executed were therefore right.

[12, 13] The defendants filed a cross-complaint in which they attempted to set up fraudulent misrepresentations made to them by or in behalf of the plaintiff when the sale was made. The court refused to permit the defendants to make proof in regard to any of these representations but one, and they now assign this ruling as error. The record on appeal is in typewritten form, and it was therefore the duty of the defendants to print in their briefs, or in a supplement thereto, such parts of the record as they desired to call to the attention of the court. Code Civ. Proc. § 953c. Defendants' brief contains a short extract from their cross-complaint, including only its allegations that certain representations were made and that they were untrue, known to plaintiff to be untrue, and relied upon by defendants. Some of these representations related to matters of fact. The objection to the evidence proffered by the defendants seems to have been that the cross-complaint was insufficient to show fraud. If fraud was practiced upon the defendants in the sale it might afford ground for a rescission of the contract or be the basis of an action for damages. If they elected to rescind they must restore or offer to restore the property to the plaintiff. Civ. Code, § 1691. If they elected to sue for damages, they must show that they sustained damages by reason of the fraud. The portions of the cross-complaint printed in the defendants' brief contain no allegation that they restored or offered to restore the property to the plaintiff, or that they suffered any damage by reason of the fraud. Without one of these allegations the cross-complaint stated no cause of action, and the ruling excluding evidence of fraud was proper. If such allegations were in fact made, the defendants should have printed them. This court is not required to search the typewritten record in order to discover possible grounds for a reversal. If the appellant fails to print in his brief or supplement sufficient of the record to justify a reversal of the judgment, it will be affirmed on the ground that the record fails to show error. Estate of Berry, 195 Cal. 354, 358, 233 P. 330; Steineck v. Coleman, 72 Cal. App. 244, 236 P. 962.

[14] Finally, the defendants complain that the judgment for damages is excessive. The court found that since July 1, 1925, the plaintiff has been the owner and entitled to the possession of the premises and defendants have withheld the same from her since that date; that the value of the rents and profits is $20 per month; and that by reason of the said detention of the premises by the defendants the plaintiff has been deprived of the rents and profits "from July 1, 1925, to date hereof, amounting to the sum of $340." The date of the findings is May 14, 1926. Judgment was given in plaintiff's favor for $340. The finding that the value of the rents and profits is $20 per month is based on an admission in the answer, there being no evidence upon the subject. The concluding statement that they amounted to $340 at the date of the findings is under the circumstances a mere conclusion from the other facts stated, and is not supported by those facts. The plaintiff attempts to justify this amount on the ground that she is entitled to recover damages from the time when the defendants first made default in their payments under the contract, but such a judgment is beyond the issues. The complaint fixes the time when defendants' withholding began as July 1, 1925. The plaintiff exercised her option to declare the contract forfeited on that date, and until she did so defendants' possession was not wrongful, and hence she could not recover damages on account thereof. The amount of damages accruing at the rate of $20 per month from July 1, 1925, to May 14, 1926, would be $209.03.

The judgment is modified by reducing the amount of money thereby recovered by the plaintiff from $340 to $209.03, and as so modified it is affirmed; appellants to recover their costs of appeal.

We concur: HOUSER, Acting P. J.; YORK, J.

92 Cal. App. 636

REDMAN et al. v. WARDEN et al. ★
(Civ. 6171.)

District Court of Appeal, First District, Division 1, California. June 21, 1928.

Hearing Denied by Supreme Court Aug. 20, 1928.

Schools and school districts ⟹108(3)—When high school tax was levied on only part of district, tax was invalid and tax sale passed no title.

Where, in levy and assessment of tax for union high school district, one of the elementary school districts comprising the high school district was omitted and full tax levied and assessed on rest of the district, the tax was invalid and tax sale passed no title.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by E. C. Redman and another against Grace P. Warden and others to quiet title. From a judgment for the defendant named, plaintiffs appeal. Reversed.

Frank H. Snyder, of Glendale, for appellants.

U. S. Fitzpatrick, of Los Angeles, for respondent.

TYLER, P. J. Action to quiet title. The pleadings are in the usual form, plaintiffs alleging title and possession in themselves and an asserted claim of estate or interest in the property by defendants adverse to them without right, and defendants denying the allegations of the complaint and setting up ownership in defendant Grace P. Warden by virtue of tax-title deeds from the tax collector of the county of Los Angeles.

At the trial plaintiffs in support of their claim introduced the deed from their grantor in evidence, proved possession, and also proved that plaintiff Pearl H. Jarrett held a mortgage lien against the property. Plaintiffs rested and defendant's tax deeds were then considered in evidence. Defendants introduced no other evidence in support of their claim in title, relying solely upon the prima facie case made by these deeds, which recite that the property in question was sold for taxes levied in the year 1916. Plaintiffs, for the purpose of rebutting the prima facie case arising upon the tax deeds, introduced certain evidence going to show the illegality of part of the tax for which the property was sold. They proved by uncontradicted evidence that the property in controversy is situated in what is known as Redman Elementary school district; that it was assessed for taxation in the year 1916; that among the taxes so assessed for that year was included a tax for the support of the county free library; that at the time of the assessment the Redman school district was not a branch of the free county library, this evidence being offered on the theory that such district, by virtue of the maintenance by it of a free library, was exempt from the tax assessed against it in 1916 for support of the county free library (1 Gen. Laws [Deering] 1923, p. 982). They also proved that in the levy and assessment of a tax for the redemption of a bonded indebtedness created by the Antelope Union high school district one of the elementary school districts which comprised it, to wit, the Esperanza school district, was either inadvertently or designedly omitted, and the whole tax was levied and assessed upon the remainder of said high school district, of which the Redman school district was a part, the effect of which omission being to increase the proportion of such high school district tax assessed against the plaintiff's property.

Notwithstanding this condition of the record, the trial court made findings in favor of defendant Grace P. Warden and entered judgment quieting her title and awarding her possession of the property.

From this judgment the plaintiffs appeal, and they urge that the findings and judgment are unsupported by the evidence, inasmuch as the prima facie showing of title in said defendant made by her tax deeds was overcome by proof that the tax upon which it was founded was invalid for lack of equality and uniformity in its levy and assessment.

We think this contention must be sustained if not by reason of the inclusion of the Redman school district in the levy and assessment of the county free library tax, certainly for the exclusion of the Esperanza school district from the tax levied on the Antelope Union high school district for the payment of an installment due on its bonds.

The act to provide for the establishment and maintenance of county free libraries (Stats. 1911, p. 80; 1 Gen. Laws [Deering] 1923, p. 982) authorizes the levy and collection of taxes upon all property in the county "outside of incorporated cities and towns maintaining free public libraries, and *library districts* maintaining district libraries, and upon all property within incorporated cities, towns and library districts which have elected to become a part of such county free library system." Section 1 of "An act to allow unincorporated towns and villages to establish, equip and maintain public libraries," etc. (Stats. 1909, p. 815), authorizes the establishment of public libraries by a course of procedure prescribed by the act, the expense of maintenance of which is met by taxes levied upon the property within the district for which the library is established. Sections 1712–1717 of the Political Code provides for the organization of libraries in school districts, which must be open to the use of the teachers, pupils and residents of the district. The Redman school district library belongs

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

to this last-mentioned class. As noted, the exemption of property in a county from the county free library tax seems by the terms of the act above cited to be confined to cities, towns and *library* districts maintaining district libraries. But whether or not a school district maintaining a library is comprehended in the term "library district," used in the act mentioned, is not necessary to decide for the purposes of this case, since the contention of the appellants that the tax levied on the property of plaintiffs was invalid may be sustained because of the omission to include the Esperanza school district in the levy of the Antelope Union high school tax above mentioned. As said in 1 Cooley on Taxation (4th Ed.) § 317:

> "The constitutional requirement of equality and uniformity is violated by imposing a tax on one portion of the state for the benefit of the whole state, or on one portion of a county for the benefit of the whole county, or one part only of any taxing district for the benefit of the whole taxing district."

This is what seems to have been done in the present case, rendering the tax invalid. It follows that the defendant Grace P. Warden acquired no title to the plaintiff's property through her tax deed which had for its foundation a sale of the property for nonpayment of said tax.

The judgment is therefore reversed.

We concur: KNIGHT, J.; CASHIN, J.

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92 Cal. App. 593

PEOPLE v. HUDSON. (Cr. 1642.)

District Court of Appeal, Second District, Division 1, California. June 18, 1928.

1. Criminal law ⇒1189—Reversal of order denying new trial is equivalent to order of new trial.

Judgment of the appellate court reversing and denying a motion for a new trial is, in effect, the ordering of a new trial.

2. Criminal law ⇒292(1)—Plea of former jeopardy must specify date, place, and court wherein defendant was subjected to former jeopardy (Pen. Code, § 1017).

A plea of once in jeopardy which does not specify the time, place, or court wherein defendant has been subjected to any former jeopardy for the offense charged is insufficient, under Pen. Code, § 1017.

3. Criminal law ⇒1159(2)—Appellate court should not interfere with jury's finding of guilt supported by evidence.

Appellate court should not interfere with jury's finding of guilt based on sufficient evidence.

4. Criminal law ⇒1175—Defendant, convicted of second degree robbery, cannot complain that offense, if any, was first degree robbery.

A defendant convicted of second degree robbery cannot complain that, if guilty of any offense, it was robbery in the first degree.

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

F. J. Hudson was convicted of robbery, and, from judgment and order denying a motion for new trial, he appeals. Affirmed.

Joseph Rensch and A. S. Maloney, both of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

CONREY, P. J. On a former appeal in this action, the court reversed the judgment, and also reversed an order denying defendant's motion for a new trial. People v. Hudson (Cal. App.) 260 P. 887. The defendant having been convicted a second time, he now appeals from the second judgment and from an order denying his motion for a new trial.

The points on appeal are: (a) That this court on the former appeal did not remand the cause to the lower court for a new trial, and that therefore the court erred in proceeding with the trial of the action a second time; (b) that the defendant entered a plea of once in jeopardy, and that the jury did not pass upon that plea; (c) that defendant was erroneously convicted of second degree robbery, in this, that the information disclosed a charge of first degree robbery, and that the evidence proved that the guilty parties were armed with rifles, and that therefore they could not have been guilty of any offense other than first degree robbery; (d) that the evidence is not sufficient to justify the verdict.

[1] There is no merit in any of these contentions of appellant. A judgment of this court reversing an order denying a motion for a new trial is, in effect, the ordering of a new trial. People v. Lee Look, 143 Cal. 216, 220, 76 P. 1028.

[2] The plea of once in jeopardy as made by appellant did not specify the time, place, or court wherein appellant had been subjected to any former jeopardy for the offense charged. Pen. Code, § 1017; People v. Moronati, 70 Cal. App. 17, 232 P. 991; People v. O'Leary, 77 Cal. 30, 18 P. 856.

[3] We are satisfied that the evidence is legally sufficient to identify appellant as one of the two persons who committed the alleged robbery. While the identification of appellant by the complaining witness was on cross-examination deprived of some of its force, nevertheless that testimony, together with the circumstantial evidence connecting appellant with possession of one of the stolen bills, is enough to establish the fact, and, since

the jury believed the evidence thus produced by the prosecution, this court should not interfere.

[4] Appellant has no substantial ground of complaint that he was convicted of second degree robbery upon evidence which would have justified the jury in finding him guilty of the more serious offense of first degree robbery. People v. Muhlner, 115 Cal. 303, 47 P. 128; People v. Tugwell, 32 Cal. App. 520, 529, 163 P. 508.

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

HELLMAN COMMERCIAL TRUST & SAVINGS BANK v. ALDEN et al. ★

(Civ. 6167.)

District Court of Appeal, First District, Division 2, California. May 31, 1928.

Hearing Granted by Supreme Court July 30, 1928.

1. **Insane persons ⟹99—Ordinarily finding that one is unable unassisted to care for himself or property because of weakness of mind will not warrant conclusions that specific contract is void for lack of mental capacity.**

Ordinarily finding to effect that one is unable unassisted to properly care for himself or his property, by reasons of old age or weakness of mind, will not warrant conclusion that specific contract is therefore void for lack of mental capacity, and, in absence of adjudication of incompetency, it is necessary to allege and prove that transaction was void for lack of understanding of its nature and effect.

2. **Insane persons ⟹1—Term "unsound mind" is equivalent to non compos mentis.**

Term "unsound mind" is equivalent to term "non compos mentis," which includes all degrees of mental incompetency known to law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unsound Mind.]

3. **Insane persons ⟹72—One regularly adjudged incompetent becomes incapable of making valid contract, because decree is notice to world of incapacity.**

When court has regularly adjudged one incompetent, he thereby becomes incapable of making valid contract, and it is deemed to be void, not because he is unable unassisted to properly care for property or lacks understanding of nature and effect of particular transaction, but because decree of incompetency is notice to world of his incapacity to make valid contract.

4. **Insane persons ⟹26—Adjudication of mental incapacity applies to both insane and "incompetent" persons, regardless of character or degree of derangement, and is sufficient evidence of incapacity (Civ. Code, §§ 38, 40; Code Civ. Proc. § 1764).**

Adjudication of mental incapacity applies to both insane and incompetent persons, regardless of character or degree of mental derangement, and is sufficient evidence of incapacity under Civ. Code, § 40, providing that, after incapacity has been judicially determined, person of unsound mind can make no contract, and section 38, providing that person entirely without understanding has no power to contract, by virtue of Code Civ. Proc. § 1764, authorizing appointment of guardian of person in state of insane person and also of one who is merely incompetent; "incompetent" including insane and those less seriously afflicted.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Incompetent—Incompetency.]

5. **Insane persons ⟹99—Finding that cashier's check was indorsed by indorser adjudicated incompetent held tantamount to finding transaction was void for incapacity.**

Where court found that cashier's check was indorsed while indorser was laboring under adjudication of incompetency, *held* effect of this finding was tantamount to determination that transaction was void for incapacity.

6. **Insane persons ⟹77—Rescission held not exclusive remedy for avoiding effect of indorsement and transfer of cashier's check by one adjudicated incompetent (Civ. Code, § 39).**

Where indorser, under adjudication for incompetency, transferred cashier's check to indorsee, who deposited it in bank and secured funds, rescission provided by Civ. Code, § 39, *held* not only remedy, since, where affirmative relief is not sought, defense to action on contract may be made by setting up fraud or undue influence or mental incapacity.

7. **Insane persons ⟹77—Restoration of money paid by bank to indorsee held not necessary to rescission, where court found indorser was incompetent and received nothing of value for indorsement (Civ. Code, § 1691).**

Where court found that indorser of cashier's check, who had been adjudicated incompetent, received nothing of value for indorsement, it was not necessary for administratrix of indorser's estate to restore money paid indorsee, since, where no consideration is received as indorsement for execution of contract, no offer to restore is necessary, under Civ. Code, § 1691.

8. **Bills and notes ⟹366—Bank, accepting cashier's check from indorsee who had received it from indorser who had been adjudicated incompetent, held not bona fide "holder in due course"; "capacity" (Civ. Code, §§ 3133, 3138, 3142).**

Bank, receiving cashier's check from indorsee who had received it from indorser who had been adjudicated incompetent was not bona fide "holder in due course" pursuant to provisions of Civ. Code, § 3133, and entitled to be reimbursed under section 3138 and section 3142, providing drawer admits existence of payee and the then "capacity to indorsee" and engages he will pay amount thereof to holder, since language must be construed to mean that drawer admits mental capacity of payee at time instru-

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★Superseded by opinion of Supreme Court, 275 P. 794.

ment was drawn, not subsequent thereto, and holder means legal holder.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Capacity; Holder; Holder in Due Course.]

9. Bills and notes 🔑366—Holder obtaining check by transfer, void because indorser lacked capacity to indorse, has constructive notice, and cannot enforce payment.

Where transfer of check is void for lack of capacity to indorse instrument, holder is deemed to have acquired it with constructive notice of its infirmity, and is seized with no title upon which he may demand payment.

10. Contracts 🔑92—Mental ability to understand and consent to contract is necessary to its validity.

Mental ability to understand and consent to contract is absolutely necessary to its validity.

11. Interpleader 🔑10—Drawer of cashier's check paying money into court held relieved from liability and executrix of payee properly substituted, where check had been obtained by indorsement from payee adjudged incompetent (Code Civ. Proc. § 386).

Where cashier's check was indorsed by one who had been adjudged incompetent to indorsee who deposited it with bank obtaining money thereon, and drawer had paid money into court in compliance with Code Civ. Proc. § 386, *held* real controversy lay between payee indorser, the depositors and holder thereof; hence executrix of payee indorser was properly substituted for drawer, who was entitled to be relieved from further liability by payment of money into court.

12. Insane persons 🔑73—Indorsement by incompetent held not binding on estate, although at time appeal from adjudication of incompetency was pending (Civ. Code, § 40; Code Civ. Proc. §§ 1049, 1908, 1911).

Transfer by indorsement of cashier's check by one adjudicated incompetent *held* not valid and binding on estate of indorser because at time of transfer appeal from adjudication of incompetency was pending under Civ. Code, § 40, providing after incapacity has been judicially determined person of unsound mind can make no contract by virtue of Code Civ. Proc. §§ 1908, 1911, 1049, and 1765; rule being that judgment is not competent as evidence to prove facts therein recited, but that such rule does not affect inherent effect of judgment.

13. Insane persons 🔑26—Decree adjudicating indorser incompetent, affirmed on appeal before action was brought on indorsed check, held competent evidence of indorser's incapacity.

Where decree adjudging indorser to be incompetent was affirmed on appeal and became final before offered in evidence in action on indorsed cashier's check, *held* that it was competent evidence of indorser's incapacity.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by the Hellman Commercial Trust & Savings Bank against Greeley Kolts and others, in which the Security Trust & Savings Bank, a party defendant in a petition of interpleader pursuant to Code Civ. Proc. § 386, procured the substitution of Lena Alden, administratrix of the estate of W. L. Bundy, deceased, as a party defendant. From the judgment, the plaintiff appeals. Affirmed.

Page, Nolan, Rohe & Hurt, of Los Angeles (Henry S. Dottenheim, of Los Angeles, of counsel), for appellant.

Thomas B. Leeper, of Sacramento, for respondent.

THOMPSON, Justice pro tem. Plaintiff appealed from a judgment in this case relieving the estate of an incompetent person from liability on account of indorsing and transferring a cashier's check. The transferee deposited the check, thereby securing credit at the plaintiff's bank, and drew upon the account the sum of $5,000. On presentation of the check for payment, it was dishonored. The appeal is from the judgment roll. The evidence is not before this court for consideration.

January 15, 1919, a petition for the appointment of a guardian of the person and estate of William L. Bundy was filed in the superior court of the county of Sacramento, upon the ground that the alleged incompetent was unable to care for himself or his property on account of extreme age, disease, and weakness of mind, causing him to become susceptible to imposition by designing persons. March 6, 1919, a decree was rendered declaring him to have been incompetent from the date of the filing of the petition. March 18, 1919, the guardian duly qualified. On appeal, this judgment was affirmed November 28, 1919 (In re Bundy, 44 Cal. App. 466, 186 P. 811), and the remittitur was filed January 27, 1920. Pending the determination of the petition for guardianship, the Security Trust & Savings Bank of Los Angeles, on March 7, 1919, issued and delivered to William L. Bundy its cashier's check for the sum of $10,000, which was indorsed and transferred August 5, 1919, to the defendants Kolts & Stearns, who immediately presented and deposited the check for credit with the Hellman Commercial Trust & Savings Bank of Los Angeles, which banking institution thereby became the purchaser of said check in good faith, for value, in the regular course of business. The depositors then drew upon said account for the sum of $5,000, which was paid in good faith by the appellant. The following day, during banking hours, this check was presented for payment to the Security Trust & Savings Bank, which, having been previously notified of the adjudication of incompetency of Mr. Bundy, refused payment. August 7, 1919, notice of the dishonor of this check was served. The incompetent died February 8, 1920, and upon proper proceedings the respondent was appointed and qualified as administratrix of the estate of said deceased. Subsequently a creditor's claim for the amount in controversy was presented and filed. This action was then commenced. The Security Trust & Savings Bank was made a party defendant, and, in a petition of interpleader pursuant to section 386, Code of Civil Procedure, procured the substitution of the respondent as a party defendant, and paid the money in controversy into court. Judgment was rendered in favor of the respondent for the recovery of the money tendered. Appellant was given judgment against the defendants Kolts & Stearns, but was denied relief against both the Security Trust & Savings Bank and the administratrix of the estate of said deceased. From this judgment the plaintiff appealed.

The appellant contends that (1) the judgment is not supported by the findings, for the reason that the court failed to determine that Bundy was incompetent, or that he did not comprehend the nature or effect of the indorsement and transfer of the check, or that the transaction was void. The court merely found that a decree had been rendered adjudging the alleged incompetent to be unable, unassisted, to properly manage or care for himself or his property; that (2) the transaction was presumed to be valid, since the court found that it was performed during the pendency of the appeal and while the effect of the judgment was thereby suspended; that (3) the privity of contract between the Security Trust & Savings Bank, which was the drawer of the check, and the appellant as the holder thereof in due course, for value, without knowledge of the alleged infirmity, was bound under section 3142, Civil Code, to reimburse the holder of the check for the amount of money paid thereon; and that (4) the administratrix of the estate of Bundy was erroneously substituted as a party defendant in the place of the drawer of the check.

[1] These questions are squarely presented by the record. The court failed to specifically find that the incompetent lacked understanding of the nature or effect of the indorsement and transfer of the check in question, or that the transaction was void. But the court did find that "W. L. Bundy received nothing of value for his indorsement of said check," and that, "about the 6th day of March, 1919, said court made and entered its judgment, adjudging that the said W. L. Bundy was, on the 15th day of January, 1919, and for a long time prior thereto had been, and was at the time of said hearing, by reason of old age and weakness of mind, unable, unassisted, to properly care for himself or his property, and by reason thereof was likely to be imposed upon by designing and artful persons." The court further found that a guardian of the person and estate of said incompetent was thereupon appointed and duly qualified, that an appeal from said adjudication of incompetency was perfected, and that the judgment was affirmed by the District Court of Appeal on January 26, 1920. The respondent elected to rest her claim of the invalidity of the indorsement and transfer of the check in question solely upon a finding that an adjudication of incompetency had been duly made and was in force at the time of the transfer of the check. Ordinarily a finding to the effect that one is unable, unassisted, to properly care for himself or his property, by reason of old age or weakness of mind, will not warrant the conclusion that a specific contract is therefore void for lack of mental capacity. In the absence of an adjudication of incompetency, it is necessary to allege and prove that the transaction was void for lack of understanding of its nature and effect. In the case of Carr v. Sacramento C. P. Co., 35 Cal. App. 439, 442, 170 P. 446, the late Justice Burnett said:

> "* * * The test is: Was the party mentally competent to deal with the subject before him with a full understanding of his rights? Union Pacific R. Co. v. Harris, 158 U. S. 326, 15 S. Ct. 843, 39 L. Ed. 1003. Did he actually understand the nature, purpose, and effect of the contract?"

[2] One may be incompetent to some extent and yet have sufficient mentality to comprehend the nature and effect of a transaction and therefore execute a valid contract. An "unsound mind" has been defined by the Standard Dictionary to include one which is weak, diseased, abnormal, or defective. It is equivalent to the term "non compos mentis," which includes all degrees of mental incompetency known to the law. Jacks v. Estee, 139 Cal. 507, 73 P. 247. A contract which is challenged on the ground of incompetency is ordinarily not void, but merely voidable. Ripperdan v. Weldy, 149 Cal. 667, 87 P. 276; 6 Cal. Jur. 33, § 14; 9 Cal. Jur. 117, § 21; 1 Black on Rescission, 672, § 254. The author of Norton on Bills and Notes (4th Ed.) p. 295, says:

> "A man of weak mind, if not a lunatic or fool, can contract. An epileptic or imbecile mind has been held competent to convey property, * * * and no mere want of business capacity or even monomania will, in the absence of fraud, prevent a party from being bound upon a bill, note, or indorsement. The mental incapacity to avoid such a contract must amount to an inability to understand the nature of the contract and to appreciate its probable consequences."

[3, 4] It is the settled law of California that an adjudication of the incompetency of a testator is merely prima facie evidence of his incapacity to make a valid will. 1 Alexander on Wills, 449, § 335; Estate of Johnson, 57 Cal. 529; Estate of Johnson, 200 Cal. 299, 252 P. 1049. Section 1767, Code of Civil Procedure, defines "incompetent," "mentally in-

competent," and "incapable" to mean "any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and care for himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons." When, however, a court has regularly adjudged one to be incompetent, he thereby becomes incapable of making a valid contract, and it is deemed to be void, not because he is unable, unassisted, to properly care for his property, or lacked understanding of the nature and effect of the particular transaction, but because the decree of incompetency is notice to the world of his incapacity to make a valid contract. Section 40, Civil Code, provides that:

> "After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right, until his restoration to capacity. * * *"

Likewise, it is provided in section 38, Civil Code, that:

> "A person entirely without understanding has no power to make a contract of any kind, * * *."

[5] It is contended that section 40, Civil Code, supra, applies only to insane persons since the latter portion of the section permits the discharge and restoration to competency by means of a certificate from the medical superintendent of the asylum to which the patient has been committed. But evidently this section of the Code was not intended to be so restricted. Section 1764, Code of Civil Procedure, authorizes the appointment of a guardian of the person and estate of an insane person, and also of one who is merely incompetent. It seems evident that the term "incompetent" is intended to include not only the insane, but also those who are afflicted with less serious derangements of the mind. The adjudication of mental incapacity therefore applies to both the insane and the incompetent, regardless of the character or degree of the mental derangement. No further evidence of mental incapacity is required under our statute while such a decree remains in full force and effect. The proof of the adjudication of incompetency presupposes a lack of mental capacity to understand the nature and effect of a contract. While the court has not specifically found that the indorsement and transfer of the cashier's check which is involved in the present case was void for lack of understanding, it did find that the act was performed while Bundy was laboring under an adjudication of incompetency. The effect of this finding was tantamount to a determination that the transaction was void for incapacity.

[6] The appellant contends that the indorsement and transfer of the check in question could be avoided only by means of a proceeding for rescission, and that the transaction could not be rescinded without first offering to restore the money which it expended. Rescission is a proper remedy by means of which to avoid a contract which is the product of an unsound mind. Section 39, Civil Code, provides that:

> "A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission. * * *"

[7] But this is not the only remedy. Where affirmative relief is not sought, a defense to an action on a contract may be made by setting up fraud, undue influence, or mental incapacity, without the necessity of resorting to the equitable action of rescission. Simon Newman Co. v. Lassing, 141 Cal. 174, 74 P. 761; California Packing Corp. v. Larsen, 187 Cal. 610, 203 P. 102; Mundorff v. Ramm, 66 Cal. App. 553, 567, 226 P. 820; 12 Cal. Jur. 786, § 52. When the remedy of rescission is resorted to, it is necessary to show reasonable diligence, and, except where one is subject to duress or mental disability, it is necessary to offer to restore everything of value which has been received. Section 1691, Civ. Code. But in the present case it was not necessary for the respondent to offer to restore the money paid by appellant. The court found that "W. L. Bundy received nothing of value for his indorsement of the check." Where no consideration is received as an inducement for the execution of a contract, no offer to restore is necessary. McNeese v. McNeese, 190 Cal. 402, 405, 213 P. 36; Simmons v. Briggs, 69 Cal. App. 447, 231 P. 604; Mundorff v. Ramm, supra; Anglo-Californian Bank v. Ames (C. C.) 27 F. 727, 730.

[8-11] The appellant also contends that the court erred in permitting the substitution of the respondent in the place of the Security Trust & Savings Bank, which was the drawer of the check, and in releasing that bank from all responsibility to the holder of the check, asserting that, persuant to the provisions of section 3133, Civil Code, it was a bona fide holder, in due course, for value, and was therefore entitled to be reimbursed. Section 3138, Civil Code, provides that:

> "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

And section 3142, Civil Code, provides that:

> "The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that

of it be dishonored, * * * *he will pay the amount thereof to the holder.* * * *"

It will be observed that by the terms of section 3142, supra, the drawer admits only the "*then* capacity (of the payee) to indorse." This language must be construed to mean that the drawer admits the mental capacity of the payee at the time the instrument was drawn, and not subsequent thereto. And, where the same section provides that the drawer engages, if the instrument should be dishonored, upon presentment, to "pay the amount thereof to the holder," this must be construed to mean that under such circumstances he will pay the amount due to the *legal* owner or holder. Where the transfer is void for lack of capacity to indorse the instrument, the holder is deemed to have acquired it with constructive notice of its infirmity, and the holder is seized with no title upon which he may demand payment. The foregoing rules with respect to commercial paper do not obtain, when the instrument is absolutely void for lack of mental capacity to execute it. In 1 Joyce on Defenses to Commercial Paper, § 150, it is said:

> "It is a general rule that an idiot or insane person is not bound by his contract. And in an action on a bill or note the defendant may show that he was non compos mentis at the time of its execution. Nor as a general rule is a bona fide holder protected against this defense, as one who purchases such paper takes it charged with constructive notice of the legal disability of the maker. The rule of commercial law which protects commercial paper in the hands of a bona fide holder who has acquired it before its maturity, for value, does not apply to the case of paper signed by persons non compos mentis."

The mental ability to understand and consent to a contract is absolutely necessary to its validity. Jacks v. Estee, 139 Cal. 507, 73 P. 247; 6 Cal. Jur. 32, § 14. Section 151 of 1 Joyce on Defenses to Commercial Paper, supra, also says:

> "The indorsement of a certificate of deposit by an insane person creates no valid contract of indorsement, and an innocent purchaser is not protected against the defense of incapacity. * * * An indorsement of a promissory note by a payee is a contract which an insane person cannot make because he has not the power to give that consent which the law requires, and in an action by an indorsee against the maker the insanity of the payee and indorser at the time of the indorsement and transfer, is held to be a valid defense."

In the case of Anglo-Californian Bank v. Ames, supra, it is held that the indorsement of a certificate of deposit by an insane person in whose favor it was drawn, carries no title to the instrument, even in the hands of an innocent purchaser. The court says:

> "This was an action on a certificate of deposit. * * * The plaintiff claims as a bona fide purchaser of the paper. The bank, maker of the certificate, brought the money into court, and left the issues to be tried between the plaintiff and the defendant, Ames, the payee and indorser of the certificate. The jury found that Ames at the time of the indorsement was of unsound mind, and did not know what he was doing; that the indorsement was obtained by fraud and deception; and that Ames received no consideration therefor. Of these facts the bank was ignorant when it purchased. The question, therefore, is between a lunatic and an innocent purchaser of his paper. * * * Obviously, on principle, any promise of such a person lacks the essential element of a contract, to wit, assent. * * * Doubtless, it [the holder] is entitled to all the protection given to such a purchaser of negotiable paper; but such protection does not extend to an indorsement like this. There was no valid contract of indorsement created by defendant's signature on the back of the paper. It was no better than a signature written in a state of somnambulism, or even than a forgery. * * * While, in favor of a bona fide purchaser, inquiry is denied as to equities between prior parties, yet such protection does not cut off inquiry into the contractual capacity of those parties. Such, at least, is the better doctrine. * * *"

The last-mentioned authority quotes with approval from the case of McClain v. Davis, 77 Ind. 419, as follows:

> "There was nothing received in consideration of the contract under consideration, of which it can be said that restitution should be made before a disaffirmance should be permitted; and it is no objection that the note had passed, before maturity, into the hands of an indorsee. Commercial paper is not an exception to the rule which permits a disaffirmance by any one who was of unsound mind at the time of becoming a party thereto. The purchaser of such paper takes with constructive notice of all legal disabilities of the parties, * * * 1 Parsons on Notes and Bills, 149, 150; Edwards on Bills, 63, 69."

In 1 Daniel on Negotiable Instruments (6th Ed.) § 210, the author says:

> "No matter how perfect the note may be in form, it would be void in the hands of every person, however innocent, as against the imbecile or lunatic."

In the case of Shipman Banking Co. v. Douglas, 206 Ill. App. 586, it was held that the interest of an insane person who had indorsed and assigned a note to a third person without consideration, would be protected even in the hands of an innocent holder thereof for value. And in the case of Brumley v. Chattanooga S. & M. Co., 138 Tenn. 534, 198 S. W. 775, 777, it was held that an imbecile who had indorsed and transferred a certificate of deposit, which was held by an innocent purchaser for a valuable consideration, thereby conveyed no title to the instrument, and that it could be recovered on the theory that the holder was not a bona fide purchaser as against one who lacked capacity to negotiate it. From the foregoing authorities it appears that the appellant in the present case is deemed to have had constructive notice of the incapacity of the payee of the cashier's check in question; that the holder therefore had no legal title to the check, and that the drawer was a mere stakeholder of the money represented by the check, holding it for the real owner. The money due upon the check from the drawer thereof having been paid into court, the real controversy lay between the payee and endorser of the check, the depositors and the holder thereof. It necessarily follows that the respondent was properly substituted for the drawer, who upon payment of the full amount of money represented by the check, was entitled to be relieved from further liability under section 386 of the Code of Civil Procedure.

[12] Finally, the appellant contends that the transfer of the check by Bundy was valid and binding upon his estate, because at the time of the transfer, an appeal from the adjudication of incompetency was pending and the judgment was therefore not final. In other words, it is asserted that the appeal suspended the effect of the decree of incompetency, and that Bundy was presumed to be capable of executing a valid contract until the judgment was affirmed on appeal. This presents the question as to whether section 40, Civil Code, which provides that, "after his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract," refers only to a *final* adjudication of incompetency.

Section 1908, Code of Civil Procedure, provides that a judgment or decree is conclusive with respect to the personal relation or condition of an individual. The rule is that a judgment is conclusive as to all issues which appear upon its face to have been determined, or which were actually and necessarily included therein. Section 1911, Code Civ. Proc. While it is true that "an action is deemed to be pending from the time of its commencement until the final determination upon appeal" (section 1049, Code Civ. Proc.), this does not mean that a decree which directly passes upon the personal status of an individual and determines him to be non compos mentis is suspended and nullified in its effect pending an appeal therefrom. The general rule regarding the effect of an appeal upon a judgment is expressed in 2 Freeman on Judgments (5th Ed.), § 722, as follows:

> "The effect of an appeal, with proper bond to stay proceedings, is merely that it suspends the right to execution, but leaves the judgment, until annulled or reversed, binding upon the parties as to every question directly decided."

[13] This rule is modified in the jurisdiction of California, to the extent that a judgment is not competent as evidence to prove the facts therein recited until it has become final. But this is a mere rule of evidence, and does not change the inherent effect of the judgment. It is the undisputed rule in California that a judgment is not admissible in evidence to prove incompetency, or any other facts therein recited, until it has become final. Fry v. Baltimore Hotel Co., 80 Cal. App. 415, 424, 252 P. 752; Baker v. Eilers Music Co., 175 Cal. 652, 166 P. 1006; 2 Cal. Jur. 412, § 177. But in the present case this rule of evidence is not involved, for the decree adjudging Bundy to be incompetent was affirmed on appeal and became final January 26, 1920, when the remittitur was filed, and this judgment was not offered in evidence until the time of the trial in the present case on December 2, 1924. It was therefore competent evidence of his incapacity. Where a decree has been duly rendered in a proceeding instituted for the express purpose of determining the mental capacity or legal status of a person, it becomes constructive notice to the world of his incapacity, and he is thereafter incapable of making a valid contract or conveyance of property under the provisions of section 40, Civil Code, even pending an appeal from the judgment, at least if the judgment eventually proves to have been a valid one. In 2 Freeman on Judgments, supra, § 902, it is said courts regard a "* * * statutory proceeding for the appointment of a guardian for the person and property of a lunatic or mentally incompetent person as a proceeding in rem, designed to determine the legal capacity of the alleged incompetent to make contracts and to manage and dispose of his estate; * * * the appointment of a guardian determines his status in this respect as against the whole world, and is ordinarily conclusive. * * *" Kellogg v. Cochran, 87 Cal. 192, 196, 25 P. 677, 12 L. R. A. 104. In the case of Dulin v. Pacific W. & C. Co., 98 Cal. 304, 307, 33 P. 123, 124, discussing the office of the writ of supersedeas, the court says:

> "There are many judgments, however, which are self-executing, or which have an intrinsic effect, upon which there are no proceedings to be stayed, and which will not be affected by an appeal therefrom. A judgment * * * determining the status of an individual, etc., * * * are instances of such judgments. In Walls v. Palmer, 64 Ind. 496, a judgment had been rendered suspending the petitioner from practicing as an attorney, and it was urged that an appeal therefrom had the effect of restoring him to his right to practice during the pendency of the appeal. The court, however, held that to give that effect to the appeal would be to reverse the judgment of the suspension before the appeal was judicially decided. * * * The only effect of an appeal to a court of error, when perfected and while pending, is to stay execution upon the judgment from which it is taken. * * * The appeal suspends its force as a conclusive determination of the rights of the parties, but the stay of proceedings consequent upon the appeal is limited to the enforcement of the judgment itself, and does not destroy or impair its character."

In support of its contention that an appeal from an adjudication of incompetency has the effect of restoring the incompetent to normal capacity and validating his contracts and acts pending the appeal, the appellant relies chiefly upon the case of Coburn v. Hynes, 161 Cal. 685, 120 P. 26. That case involved an application for a writ of supersedeas to prevent a guardian who had been appointed by the court from taking charge of the property of the ward pending an appeal from the decree. The question of suspending the effect of the adjudication of incompetency was not involved in that case. The court merely held that, since the statute did not authorize a guardian to take charge of the estate pending an appeal, he had no such power. But the powers of a guardian as a trustee appointed by law are purely statutory, while the status of an individual with respect to his legal capacity to execute a valid contract is quite another thing, and depends upon the formal adjudication of a court. The suspending of the effect of such a decree pending an appeal would be likely to result in great damage and injustice to the incompetent and his estate. Recognizing this fact, and the necessity for statutory authorization for a guardian to take charge of an estate pending an appeal, section 1765, Code of Civil Procedure, which defines the powers of a guardian, was amended to authorize him, in the discretion of the court, to take charge of both the person and estate of an incompetent person, pending an appeal from the order appointing the guardian. We are of the opinion that the indorsement and transfer of the cashier's check after the adjudication of incompetency and pending the appeal was therefore void, and that the court's finding of the existence of this adjudication of incompetency was equivalent to holding that the transaction was void for lack of capacity.

The judgment is therefore affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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92 Cal. App. 596

HEWITT v. KLAGES et al. (Civ. 3543.) ★

District Court of Appeal, Third District, California. June 18, 1928.

Hearing Denied by Supreme Court Aug. 16, 1928.

1. Exchange of property 🔑3(1)—Exchange may be rescinded for fraud, though defendant did not know representation was false at time it was made (Civ. Code, § 1572, subd. 2).

In suit for rescission of exchange contract on ground that plaintiff was induced to convey property by defendant's false representations, it was unnecessary to prove that defendant knew that representation was false at time it was made, since positive assertion in manner not warranted by information of person making it of that which is not true, though he believes it to be true, by party to contract, with intent to induce another to enter into contract, is actual fraud, under Civ. Code, § 1572, subd. 2.

2. Exchange of property 🔑3(1)—To rescind exchange for fraud, false statement need not have been sole inducement.

In suit for rescission of exchange contract for fraudulent representations, it is sufficient to show that false statement was inducement to make exchange of property, without showing that it was sole inducement.

3. Exchange of property 🔑3(1)—That additional lien could have been discovered by examining record did not preclude rescinding exchange for misrepresentations as to incumbrances.

Plaintiff *held* not precluded from maintaining action for rescission of exchange contract on ground defendant's false representations that property was clear of all incumbrances, except certain amount, by fact that existence of additional lien could have been discovered by examination of record in office of county recorder.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Suit for rescission of contract by Nettie F. Hewitt against Minnie Klages and others. Judgment for plaintiff, and the named defendant appeals. Affirmed.

A. J. Bledsoe, of Los Angeles, for appellant.

Irvin C. Taplin and Clifford Crail, both of Los Angeles, for respondent.

FINCH, P. J. March 12, 1924, the plaintiff conveyed real property in the city of Los Angeles to the defendant Minnie Klages in exchange for a leasehold interest in an apartment house and the furniture and household goods therein. The bill of sale of such personal property provides that it is "to be free and clear of all incumbrance, except a mortgage of $1,875, which the party of the second part agrees to assume and pay." It was stipulated at the trial that Mrs. Klages, prior to and at the time of the exchange, "represented that it was clear of all incumbrance, except $1,875." There was at the time another mortgage lien on the property for a large amount, of which the plaintiff had no knowledge. Early in May, 1924, the plaintiff discovered the existence of this other lien. She immediately informed Mrs. Klages thereof and the latter indignantly denied that there was such a lien. On the 20th of that month Mrs. Klages executed a deed of gift of the real property in question to her daughter, defendant Agnes Jarvis, and conveyed all other property owned by her to her sons. On the 28th of the month the plaintiff served notice of rescission on the ground of the false representation mentioned and offered to restore all that she had received under the contract of exchange. Mrs. Klages refused to rescind and this suit fol-

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★Hearing denied by Supreme Court.

lowed. The court found that the plaintiff was induced to convey the real property to Mrs. Klages by the latter's false representation and that the deed from Mrs. Klages to her daughter was fraudulent and void. Judgment was entered accordingly in favor of the plaintiff, canceling the deed executed by her, and restoring her to possession. Mrs. Klages has appealed from the judgment, but Agnes Jarvis has not appealed. Appellant's contentions will be considered in the order stated in her opening brief, without expressly enumerating them.

[1] The court found that the appellant knew that the alleged false representation was false at the time it was made. The proof of such knowledge on her part is not strong, but such proof was unnecessary. "The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true," by a party to a contract, with intent to induce another party thereto to enter into the contract, is actual fraud. Civ. Code, § 1572, subd. 2; Lombardi v. Sinanides, 71 Cal. App. 272, 278, 235 P. 455.

[2] A real estate agent acted for both parties and received a commission from both for his services in bringing about the exchange of properties. The plaintiff testified that she relied on the agent "to look up everything," and also that she relied upon the representation made by the appellant. She testified: "I relied on her as much as him." In a case such as this it is sufficient to show that the false statement was an inducement to make the exchange, without showing that it was the sole inducement. Macdonald v. De Fremery, 168 Cal. 189, 201, 142 P. 43.

[3] The fact that the plaintiff could have discovered the existence of the additional lien in question by an examination of the record thereof in the office of the county recorder does not preclude her from maintaining this action. Lillis v. Silver Creek, etc., Water Co., 21 Cal. App. 234, 241, 131 P. 344; Teague v. Hall, 171 Cal. 668, 670, 154 P. 851.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

92 Cal. App. 639

DAHLBERG v. DAHLBERG. (Civ. 6089.)

District Court of Appeal, First District, Division 2, California. June 21, 1928.

Judgment ⚷303—**Where court's intention appeared on face of decree, but was not clearly expressed, court could amend decree to remove uncertainty.**

Where intention of court regarding fees awarded for services of counsel and referees in partition suit appeared on face of decree, but was not clearly expressed, court could amend decree to remove uncertainty.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Partition suit by Emma Dahlberg against Andrew Dahlberg. From an order amending the final decree with reference to fees of counsel and referees, defendant appeals. Affirmed.

Herbert Chamberlin, of San Francisco, for appellant.

Gerald C. Halsey and Frederic T. Leo, both of San Francisco, for respondent.

NOURSE, J. This is an appeal from an order amending a final decree of partition in so far as it related to fees awarded for services of counsel and referees employed in the litigation.

The interlocutory decree found that both plaintiff and defendant had incurred and expended reasonable counsel fees for the common benefit and recited that the matter of fixing the costs of partition, including counsel fees, should be reserved for the final decree. When the final decree was made, the reasonable value of the services of counsel and of the referees was determined, but the trial court, through inadvertence, ordered such fees to be paid directly to the counsel and referees rather than to the parties to the litigation. Thereafter the decree was amended in so far only as the decree purported to award fees *directly* to the counsel and referees. Thereafter, on motion of plaintiff, the decree was again amended to read that these awards should be to the parties alone—$1,250 to the plaintiff, with a lien for one-half thereof on the property partitioned to the defendant; $1,000 to the defendant, with a lien for one-half thereof on property partitioned to the plaintiff; and $300 to plaintiff to cover fees of the referees, with a lien for one-half thereof on property partitioned to the defendant. The appeal is taken from this last order.

The interlocutory decree properly found and recited that the allowance for counsel and referee fees should go to the respective parties, but the final decree inadvertently made the award to the counsel and referees directly. The first amendment merely modified this decree in so far as it gave a direct award to counsel and referees. The second amendment, the order appealed from, merely cleared the uncertainty arising from the decree as amended and made the decree speak the true intention of the court. Such an amendment is not a correction of judicial error, but is one coming within the rule of Estate of Willard, 139 Cal. 501, 504, 73 P. 240, 64 L. R. A. 554, where it was held that, where the intention of the court appears on

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the face of the decree, but is not clearly expressed, the court may amend the decree to remove the uncertainty.

Before appellant had taken his appeal from the order he and the respondent had paid in full the fees awarded to the referees, and the appellant had paid to the respondent one-half of the fees awarded her counsel. There is nothing involved in this appeal but the award of $1,000 to appellant to reimburse him for the fees of his own counsel. He is not a party aggrieved by the order appealed from.

The order is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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92 Cal. App. 722

COTTER v. COTTER et al. (Civ. 5662.)

District Court of Appeal, First District, Division 2, California. June 25, 1928.

Deeds ⟹208(2)—Finding that deed among grantor's papers in bank at his death was never delivered held sustained by evidence.

Finding that deed to grantee's son, which at time of grantor's death, with his will and bonds belonging to him, was held by a bank as depository, was never delivered though at time it was signed and acknowledged grantee and others had it in their hands, *held* sustained by the evidence, deceased having stated to his attorney that he did not want to part with the title in his lifetime, there being no evidence that he made any manual delivery or gave any direction that the deed should be taken possession of by any one, and it having been deposited in the bank and placed with his other papers very soon after its execution.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Delia M. Cotter against Stephen A. Cotter and another. Judgment for plaintiff, and the defendant Cotter appeals. Affirmed.

Louis J. Trabucco, of Mariposa, and James C. Walsh, of Oakland, for appellant.

H. Raymond Hall, of Oakland, for respondent.

STURTEVANT, J. This is an action to quiet title. Delia M. Cotter, the surviving wife, commenced the action against Mary McKeever, as executrix of the estate of the deceased husband, David Cotter, and also against Stephen A. Cotter and certain fictitious defendants. In her complaint the plaintiff claimed an undivided one-half interest in the property in dispute. Mary McKeever appeared and answered. She set forth denials of all the allegations in the plaintiff's complaint, and she alleged affirmatively that the property described in the plaintiff's complaint was the separate property of the decedent and from the date of the purchase in 1875 remained his property down to the date of his death. Stephen A. Cotter appeared and answered, and in his answer he set forth the same denials and alleged affirmatively that he was the owner in fee of the property. A trial was had in the trial court before the court sitting without a jury. The trial court made findings in favor of the plaintiff and against Mary McKeever. In doing so it found that the property was community property, that the surviving wife was the owner of one-half thereof, and that Mary McKeever, as executrix, had no right, title, or interest in or to said one-half interest. From a judgment entered on the said findings Mary McKeever has not appealed. The trial court also found that Stephen Cotter had no right, title, or interest in the said undivided one-half interest so found to be vested in the plaintiff, and it also found that a purported deed by David Cotter to Stephen A. Cotter was never delivered and that Stephen A. Cotter was never the owner of the property described or any part thereof. From a judgment entered on said findings Stephen A. Cotter has appealed.

On this appeal Stephen A. Cotter presents several points, one of which is that the finding that the deed above mentioned was never delivered is not sustained by the evidence. If he is mistaken in this contention it becomes unnecessary to discuss the other points presented in his brief. We have carefully examined the transcript. The facts regarding delivery or nondelivery may be stated briefly. On the 12th day of February, 1922, David Cotter was a patient in a hospital at Hayward. Pursuant to appointment there met in his room in the hospital on that day Frank H. Arb, Mary McKeever, William T. Knightly, and Stephen A. Cotter. Frank H. Arb was an attorney at law and notary public. Mary McKeever was a lifelong friend of the decedent and Stephen A. Cotter. William T. Knightly was a representative of the Bank of Italy, with which institution the decedent transacted business, and he was a friend of the decedent and of Stephen A. Cotter. The person last mentioned is a son of the plaintiff and the decedent, and at the time of the trial was an adult of the age of 44 years or thereabouts. Each one of those persons was examined and cross-examined regarding the execution of the deed and what was thereafter done with it. There was no dispute but what the decedent signed and acknowledged it. There was no dispute but what the decedent stated to his attorney that he did not want to part with the title during his lifetime. There was no evidence produced to the effect that the decedent made any manual delivery or that he gave any direction to the

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

effect that the deed should be taken possession of by any one. There was some evidence to the effect that care should be taken of it. There was some evidence to the effect that Stephen A. Cotter had the deed in his hands, and the same may be said regarding Mary McKeever, Frank H. Arb and William T. Knightly. From the moment of its execution, or very soon thereafter, the deed was deposited with William T. Knightly of the Bank of Italy and was by him placed with other papers, including decedent's will and some bonds which the Bank of Italy held as the gratuitous depositary of the decedent. All of those papers, including the deed, were so held till after the death of David Cotter. Under these facts the finding that there was no delivery to Stephen A. Cotter was entirely correct. As no deed was delivered to him, no estate vested in Stephen A. Cotter. It is therefore immaterial, so far as this appeal is concerned, whether the property was community or separate property.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

92 Cal. App. 641

BLEDSOE v. PACIFIC READY CUT HOMES, Inc., et al.

PACIFIC READY CUT HOMES, Inc., v. BLEDSOE et al.

(Civ. 6325.)

District Court of Appeal, First District, Division 2, California. June 21, 1928.

1. Vendor and purchaser 🔑187—Permanent waiver of payment under contract for sale of realty must be supported by consideration.

Permanent waiver of payment required by contract for sale of realty must be supported by consideration, as in such case there would be a novation.

2. Vendor and purchaser 🔑82—New contract altering written contract for sale of realty must be authorized, written, and supported by consideration.

Where original contract for sale of realty is in writing, any new contract purporting to alter it must be authorized, written, and supported by consideration.

3. Vendor and purchaser 🔑101—Vendor denying waiver of payment was not bound to notify purchaser of termination thereof.

To avoid waiver of payment, required by contract for sale of realty, vendor was bound to give notice before proceeding to foreclose, make formal demand therefor, and wait a reasonable time for purchaser to comply with contract, but was not bound to admit waiver, which it contended had never occurred, by notifying purchaser of termination of such waiver.

4. Vendor and purchaser 🔑187—Vendor giving numerous notices and making numerous demands for overdue payment held not to have permanently waived payment.

Vendor giving purchaser numerous notices and making numerous demands for payment of amount due before starting to foreclose contract, without reply other than letter from purchaser's agent over year after due date disclaiming liability on ground that payment had been waived, *held* not to have permanently waived such payment, though never seeking to create default because of mere delays in making payments.

Appeals from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by Marie E. Bledsoe against the Pacific Ready Cut Homes, Inc., and another, and action by the Pacific Ready Cut Homes, Inc., against Marie E. Bledsoe and husband, in which defendants filed a cross-complaint. From the judgments for Marie E. Bledsoe and husband, the Pacific Ready Cut Homes, Inc., appeals. Reversed.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

A. J. Bledsoe, of Los Angeles, for respondents.

STURTEVANT, J. Marie E. Bledsoe commenced an action against the defendant to obtain a decree setting aside a sale made by a trustee under a deed of trust. The defendant appeared and answered. A trial was had before the trial court sitting without a jury. The trial court made findings of fact in favor of the plaintiff. The defendant has appealed.

The defendant commenced an action in ejectment against the plaintiff and her husband. The plaintiff and her husband appeared and answered and filed a cross-complaint. The latter pleading appears to plead the same facts in the same manner which are set forth by the plaintiff in the action first designated. The defendant answered the cross-complaint and by stipulation of the parties the latter action was tried with the action first designated. The trial court made findings in favor of Marie E. Bledsoe and her husband, and from a judgment entered thereon, the Pacific Ready Cut Homes, Inc., has appealed.

Both appeals are contained in one set of transcripts and one set of briefs. In deciding the appeals it will not be necessary to confuse the subject-matter by numerous repetitions of capacity. We will refer to Marie E. Bledsoe as the plaintiff and to Pacific Ready Cut Homes, Inc., as defendant.

The plaintiff purchased from the defendant on an executory contract a house and lot in Beverly Hills for $9,000. She paid down $400. She executed a mortgage on the house and lot in the sum of $3,600. She executed a

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

trust deed to secure the payment of a promissory note in the sum of $4,600. The installment note for which the deed of trust was executed as security required the payment by the plaintiff of $69 on the first of each and every month. It also required the payment of $500 on November 1, 1924, and every six months thereafter. The $69 payments were made June 2, 1924, and March 11, 1925, and the record presents no question regarding them. The $500 payable November 1, 1924, was never paid and the failure to pay it constitutes the sole question presented in the litigation. In the trial court and in this court it was the contention of the plaintiff that the payment of $500 was waived. That contention the defendant at all times controverted. The trial court made a finding to the effect that the payment had been waived. If that finding is supported by the evidence, the judgment in each case should be affirmed. If it is not supported by the evidence, the judgment in each case should be reversed.

The plaintiff's husband sent his secretary, Mrs. Berg, to make payments for the plaintiff. In doing so Mrs. Berg went to the office of the defendant. She was directed to go to the desk of Mr. Norridge. He was the auditor. Whenever she called, Mr. Norridge accepted the payment and executed a receipt therefor, and delivered it to Mrs. Berg. On October 6, 1924, a payment in the sum of $69 was due. Taking a check for that amount Mrs. Berg made a call on Mr. Norridge as usual. Before making the payment to him she testified that she stated to him that there would be a $500 payment due November 1, 1924, and that Mrs. Bledsoe would not be able to make it, and Mr. Norridge said the defendant would be satisfied if she kept up the monthly payments and made the interest payments on the mortgage. Thereafter the plaintiff paid $69 on each of the following dates: November 7, 1924; December 13, 1924; January 1, 1925; February 2, 1925; March 11, 1925. Each payment was accepted and Mrs. Berg states that no objection to the acceptance was made to her.

The defendant replies that Mr. Norridge never made the statement testified to by Mrs. Berg; that it did receive and was entitled to receive under the terms of the contract each monthly payment of $69 which was made between October 6, 1924, and March 11, 1925; and the defendant asserts that on December 12, 1924, it wrote the plaintiff asking that the $500 be paid "at once," but the plaintiff did not answer the notice; that thereafter other written notices were sent to the plaintiff on January 6, 1925, January 8, 1925, January 17, 1925, January 24, 1925, January 28, 1925, February 3, 1925, and February 21, 1925. The plaintiff admits that she received all of said notices, but contends that the defendant had waived the payment, and she cites and relies on Boone v. Templeman, 158 Cal. 290, 110 P. 947, 139 Am. St. Rep. 126. The defendant concedes the rule there announced, but contends that it has no application to the facts of this case. It claims that there was no waiver because Mr. Norridge had no authority to waive, and, whether he had or did not have such authority, the life of the waiver was terminated by the written notices sent by the defendant to the plaintiff.

[1-3] The defendant further contends that there was no consideration supporting the waiver. The plaintiff replies that none was necessary. That reply is too broad. In so far as a temporary waiver in making payments, it may be conceded that no consideration therefor was necessary. But if the plaintiff claims that by the word of mouth uttered by Mr. Norridge there was a permanent waiver, the claim may not be sustained, for in that event there would be a novation. There would have been a new and different contract created as between the parties. As the original contract was in writing, any new contract purporting to alter it must have been authorized, it must have been in writing, and there must have been a consideration supporting it. Both in the trial court and in this court the plaintiff contended that it was, under the facts, incumbent on the defendant to plead and prove that after November 1, 1925, it gave the plaintiff a notice, in substance:

> "That on October 6, 1924, it waived the payment of $500 due every six months and in particular on November 1, 1924; that such waiver is hereby terminated; and that plaintiff will have ——— days within which to make said payment."

Such is not the law. Hoppin v. Munsey, 185 Cal. 678, 198 P. 398. To avoid being charged with a waiver, the defendant was bound to give notice before proceeding to foreclose. As the defendant did not collect the $500 payable November 1, 1924, it was bound to make a formal demand therefor. It was bound to stay its hand a reasonable length of time so that the plaintiff could comply with the terms of the contract. But it was not bound to admit as a fact things which it contended had never taken place.

[4] The first notice given to the plaintiff was given December 12, 1924. Acting under the terms of the deed of trust, it did not declare a default until March 14, 1925—over three months thereafter. The trustee's sale was not had until August 8, 1925. The plaintiff claimed that she was absent from Los Angeles county between July 8, 1925, and August 8, 1925. No other excuse was tendered. The record shows that the defendant never at any time sought to create a default because of any mere delays in making payments. But it did seek to recover payments expressly designated in the contract. Before starting to foreclose it gave numerous notices and made numerous demands. All notices

and demands were ignored by the plaintiff and, furthermore, through her agent on January 7, 1925, she wrote a letter in which she flatly disclaimed any liability to pay $500 every six months, claiming that such payments had been wholly waived. In this legal conclusion she was mistaken. There was no evidence of a permanent waiver. In so far as the language of the findings may be construed as holding that there had been a permanent waiver, the findings are wholly unsupported by the evidence.

In her pleadings the plaintiff alleges that between the 11th day of March, 1925, and the 15th day of March, 1925, the defendant did not serve any notice or demand on her. The allegation is admitted. However, the fact appears to be wholly immaterial. Our attention has not been called to any provision contained in the trust deed or in any other paper which called upon the defendant to give any notice during that particular period.

The judgments are reversed.

We concur: KOFORD, P. J.; NOURSE, J.

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92 Cal. App. 570

LAGUNA LAND & WATER CO. v. GREENWOOD et al. (Civ. 6317.)

District Court of Appeal, First District, Division 2, California. June 16, 1928.

1. Vendor and purchaser 🔑214(2)—Under contract prohibiting erection of house costing less than $1,500 and requiring grantor's consent to assignment, compliance with covenant was condition precedent to consent to assignment.

Where contract for sale of realty provided that no house should be erected thereon, except for temporary purposes costing less than $1,500, and that contract could be assigned only with written consent of grantor, grantor had right to insist upon compliance with such covenant as condition precedent to consenting to assignment of contract.

2. Specific performance 🔑115—Cross-complaint praying for specific performance of land contract held fatally defective because adequacy of consideration was not pleaded or proved; "adequate consideration."

Where cross-complaint prayed for specific performance of land contract, but failed to allege value of property or adequacy of consideration, *held* that specific performance of contract could not be enforced, in absence of pleading and proof that it is founded upon "adequate consideration," which means that it shall be reasonably just and equitable.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Adequate Consideration.]

3. Courts 🔑89—Where cross-complaint sought specific performance and adequacy of consideration was not referred to, cases cited determining such issue furnished no precedent.

Where cross-complaint prayed for specific performance of contract to sell realty, and adequacy of consideration or fairness of contract was not referred to in evidence or mentioned in findings, such matters were not in issue, and cases cited determining such issues furnished no precedent upon which to support present judgment.

4. Appeal and error 🔑1170(3)—Constitution did not furnish remedy for absence of pleading or proof of adequacy of consideration in cross-complaint praying for specific performance (Const. art. 6, § 4½; Civ. Code, § 3391).

Where cross-complaint prayed for specific performance of contract to sell real property, but did not allege that consideration was adequate as required by Civ. Code, § 3391, Const. art. 6, § 4½, furnished no remedy for failure to plead and prove such element.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by the Laguna Land & Water Company against Emery Greenwood and another. Cross-complaint by Anna Westminster. From a judgment upon the cross-complaint awarding specific performance of a contract to sell real property, the plaintiff appeals. Reversed.

John E. Biby and Harry C. Biby, both of Los Angeles, for appellant.

Marshall A. Stutsman, of Los Angeles, for respondents.

THOMPSON, Justice pro tem. This is an appeal from a judgment upon a cross-complaint awarding specific performance of a contract to sell real property. The appellant filed its complaint to quiet title to the east 30 feet of lot 836 of plat 3398, recorded in Book 37 of Maps, p. 43, Los Angeles Records. To this complaint the respondent filed an answer and cross-complaint, alleging that four years prior to the commencement of this action appellant executed a written contract of sale of said lot to the defendant Emery Greenwood for the sum of $635, to be paid in equal monthly installments of $6.25; that the defendant Greenwood thereupon entered into possession of the premises and constructed a dwelling house thereon at a cost of $1,000; and that he performed all of the covenants of said contract on his part. The contract was made a part of the cross-complaint, and among other covenants which it contained was a provision prohibiting the buyer from erecting or maintaining a dwelling house on the property which would cost less than $1,500, except for temporary purposes, in which event it was necessary to obtain the written consent of the grantor. The contract also provided that it could be assigned only by the written consent of the grantor. Time was made the essence of the contract, and a forfeiture was declared for the breach of any of its covenants. The value of the land was not alleged in the cross-complaint, and nowhere in the pleadings does it appear that the consideration for the sale of the property was adequate, or that the contract was just and reasonable. It was further alleged that on June 9, 1923, the respondent agreed to purchase said lot, together with the improvements thereon, for the sum of $1,100, upon which the sum of $525 was paid to the defendant Greenwood. On July 25, 1923, the respondent tendered to appellant the sum of $300, which was the balance unpaid upon the purchase price, which the appellant refused to accept until the respondent agreed in writing to conform to the contract and erect a dwelling house on said premises at a cost of at least $1,500. This was at first declined, and six months later this action to quiet title was commenced.

[1] The evidence shows that the contract between appellant and the defendant Greenwood was made as alleged, and that substantially $300 of the purchase price remained unpaid; that Greenwood was a poor old soldier; and that while appellant frequently urged him to comply with the covenant not to build a house upon the premises of less value than $1,500, this requirement was not enforced against him. A memorandum of agreement to sell the premises to respondent for $1,100 was signed by defendant Greenwood, and he acknowledged the receipt of the sum of $525 as part payment, but he never executed an assignment of the contract or a conveyance of the property. Both the respondent and Greenwood did, however, call upon appellant, notifying it of the proposed transfer, and requesting its written consent to the same. Appellant refused to consent to the assignment until respondent agreed in writing to remove the house and construct one which complied with the requirements of the contract. This was never done, the consent to transfer was never given and the assignment was never executed. Soon afterward the defendant Greenwood disappeared. His whereabouts were unknown, and summons was published against him. Neither the value of the property nor an averment of adequacy of consideration was mentioned in the pleadings, the evidence, or the findings. Appellant's demurrer to the cross-complaint was overruled.

[2] The appellant had a right to insist upon compliance with the specific provision of the contract prohibiting the construction or maintenance of a dwelling house of a value less than $1,500, and it was entitled to insist upon the fulfillment of this covenant as a condition precedent to the granting of its consent to an assignment of the contract. Moreover, the cross-complaint is fatally defective for failure to allege the value of the property or the adequacy of consideration. The judgment is not supported by findings or evidence of such value or adequacy of consideration.

Specific performance of a contract may not be enforced in the absence of pleadings and proof that it is founded upon adequate consideration and that it is just and reasonable. Section 3391, Civ. Code; Windsor v. Miner, 124 Cal. 492, 57 P. 386; Bishop v. Barndt, 43 Cal. App. 149, 157, 184 P. 901; Valentine v. Streeton, 9 Cal. App. 640, 643, 99 P. 1107; 5 Bancroft's Code Pl. 4225, § 2328; 23 Standard Ency. of Proc. 1046. By the term "adequate consideration" it is not meant that the price shall necessarily measure up to the full market value of the property, but merely that it shall be reasonably just and equitable to the party against whom the contract is sought to be enforced. Schader v. White, 173 Cal. 441, 160 P. 557; Estate of Brix, 181 Cal. 667, 675, 186 P. 135; 23 Cal. Jur. 442, § 17. In the case of Bishop v. Barndt, supra, which was quite similar to the present case, specific performance was decreed upon the answer of the defendant in a suit to quiet title. The judgment was reversed for failure to allege or prove an adequate consideration. Mr. Justice Waste, writing the opinion, says:

> "Specific performance in this case was decreed upon the answer of defendant Coward. Even though she were in position to seek such relief, her answer does not state sufficient facts, for it is not alleged therein that the consideration to be paid plaintiff for the land is adequate, or that the Barndt contract is just and reasonable. White v. Sage, 149 Cal. 613, 614, 87 P. 193. No evidence was received upon this subject, and there is no finding in regard to it. A decree for specific performance cannot be supported in the absence of allegation and finding that the contract was just and reasonable, and the consideration adequate. Civ. Code, § 3391; Gibbons v. Yosemite Lumber Co., 172 Cal. 714, 716, 158 P. 196."

To avoid the application of this well-settled rule the respondent relies upon the case of Baker v. Miller, 190 Cal. 263, 212 P. 11, where, in spite of an allegation in the complaint that "at or about the date of the contract the estate of said deceased was of the appraised value of $22,753, and said contract was in all respects just and fair and liberal in its provisions in favor of said defendant," the court held that the complaint was insufficient, saying:

> "Viewed as a whole, we feel there is no escape from the conclusion that the complaint is insufficient and the general demurrer interposed by the defendant should have been sustained."

Yet the court upheld the judgment in that case upon the ground that after the demurrer was overruled an answer was filed "denying generally and specifically the averment of the complaint attempting to allege the adequacy of the consideration and the fairness of the contract," and added:

> "The greater part of the testimony was directed in support of her contention that the consideration was inadequate and that as to her the contract was unjust."

[3, 4] But in the present case there was no attempt to allege an adequacy of consideration or fairness of the contract. Nor was the subject of adequacy of consideration or fairness of contract referred to in the evidence or mentioned in the findings. These matters were not an issue in the present case, and the case last cited therefore furnishes no precedent upon which to support this judgment. Nor can it be said that article 6, § 4½ of the Constitution furnishes a remedy for an absolute absence of pleadings or proof of a necessary element required in a particular cause of action. This constitutional provision is intended to supply the omission in imperfect or defective pleadings, or error in the rejecting or admission of evidence, so as to prevent a miscarriage of justice. Any other construction would convert this provision into an engine for the accomplishment of a miscarriage of justice, and destroy the rules of pleading and evidence which are the crystallization of ages of judicial wisdom. J. I. Case T. M. Co. v. Copren Bros., 32 Cal. App. 194, 162 P. 647; Evans v. Wixom, 38 Cal. App. 542, 176 P. 873; People v. Schiaffino, 73 Cal. App. 357, 360, 238 P. 725; Podrat v. Oberndorff (Cal. App.) 267 P. 750.

The judgment is reversed.

We concur: KOFORD, P. J.; NOURSE, J.

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92 Cal. App. 534

PEOPLE v. KHAN. (Cr. 1030.)

District Court of Appeal, Third District, California. June 14, 1928.

Hearing Denied by Supreme Court Aug. 13, 1928.

1. Assault and battery 🔑91—Evidence held to sustain conviction of simple assault.

Evidence *held* to sustain conviction of simple assault, where defendant fired three shots at prosecuting witness and one of them took effect.

2. Assault and battery 🔑87—Admitting pleadings, in civil action, charging defendant with alienation of affections of complainant's wife, held not error in prosecution for assault.

In prosecution for assault with intent to commit murder, where prior to assault prosecuting witness had instituted action against defendant for alienation by latter of affections of former's wife, admitting pleadings in such action, wherein complaint averred that defendant had had sexual intercourse with prosecuting witness' wife, to prove that the charges were made and consequent ill feeling probably engendered thereby in defendant's mind, *held* not error.

3. Criminal law 🔑811(5)—Instruction singling out prosecuting witness and laying down rules for determining his credibility held properly refused.

In prosecution for assault with deadly weapon with intent to commit murder, instruction singling out prosecuting witness and laying down rules for determining his credibility *held* properly refused.

4. Criminal law 🔑778(9)—Refusing instruction that law presumes defendant to be of good character held not error, under evidence.

In prosecution for assault with deadly weapon with intent to commit murder, refusing instruction that law presumes defendant to be of good character, where no testimony bearing on his good character was offered, *held* proper.

5. Criminal law 🔑811(6)—Instruction singling out defendant, and stating rules for weighing his testimony, held properly refused.

In prosecution for assault with deadly weapon with intent to commit murder, instruction singling out defendant, and stating rules for weighing his testimony, *held* properly refused.

Appeal from Superior Court, Merced County; Stanley Murray, Judge.

R. A. Khan was convicted of simple assault, and he appeals. Affirmed.

Luke Howe and O. F. Meldon, both of Sacramento, and H. K. Landram, of Merced, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was charged with the crime of assault with a deadly weapon with intent to commit murder. He was convicted of simple assault and his motion for a new trial was denied. This appeal is from the judgment of conviction and the order denying a new trial.

[1] The evidence is sufficient to justify the conviction. The prosecuting witness testified that while he was running away from the defendant the latter fired three shots at the former, the second shot taking effect. Another witness testified that shortly after the shooting he found the prosecuting witness lying in the road; that "he was shot in the right shoulder"; and that he said: "Khan shot; Khan shot." This witness notified the sheriff, who reached the scene of the shooting a few minutes later. The sheriff testified that the prosecuting witness "had been shot."

[2] Prior to the shooting the prosecuting witness had instituted an action against the defendant for the alienation by the latter of the affections of the former's wife. The case was on trial during the day of the shoot-

ing, the shooting taking place in the evening. For the purpose of showing motive, the prosecution introduced in evidence, over the defendant's objections, the complaint, summons, and answer in that action. The complaint, among other allegations, averred that at various times the defendant had sexual intercourse with complainant's wife. The answer denied all allegations of wrongful conduct. The prosecuting witness testified that immediately prior to the shooting he was approached by the defendant, who said: "You know who I am; you take me in court." This testimony tends to show that the defendant's desire to injure the prosecuting witness was aroused by the prosecution of the civil action against him. It was material for the prosecution to show the nature of the civil action and the seriousness of the charges made therein against the defendant, not for the purpose of establishing the truth of the facts charged, but of proving that the charges were made and the consequent ill feeling probably engendered thereby in the mind of the defendant. People v. Colvin, 118 Cal. 349, 351, 50 P. 539; People v. O'Bryan, 165 Cal. 55, 59, 130 P. 1042; People v. Argentos, 156 Cal. 720, 724, 106 P. 65; People v. Gibson, 106 Cal. 458, 475, 39 P. 864; People v. Holloway, 28 Cal. App. 214, 217, 151 P. 975. See, also, People v. Soeder, 150 Cal. 12, 15, 87 P. 1016; People v. Cook, 148 Cal. 334, 339, 83 P. 43; People v. Brown, 130 Cal. 591, 594, 62 P. 1072; People v. Botkin, 9 Cal. App. 244, 253, 98 P. 861. The rule admitting such testimony is not unlike that applicable to the impeachment of a witness on account of ill feeling against a party or interest in the result of the trial. In such cases the extent of the difficulty causing the ill feeling or the extent of the interest of the witness may be shown. Wigmore on Evidence, § 951; People v. Fleming, 166 Cal. 357, 383, 136 P. 291, Ann. Cas. 1915B, 881. Doubtless the court would have instructed the jury, had the defendant so requested, that the pleadings in the civil action were not to be considered as evidence of the facts therein alleged. It must be presumed that the jurors were men of ordinary intelligence, and, if they were, they knew that such pleadings were not to be so considered.

[3-5] Appellant complains of the court's refusal to give three instructions requested by him. The first singles out the prosecuting witness and lays down rules for determining his credibility. The second states that the law presumes the defendant to be of good character. However, no testimony bearing on his good character was offered. The third singles out the defendant and states rules for weighing his testimony. It has been held so often that it is not error to refuse to give instructions to the effect stated, under the circumstances shown, that it is deemed sufficient to call attention to the text and cases cited in 8 California Jurisprudence, pp. 294, 344, and 356.

The judgment and order are affirmed.

We concur: PLUMMER, J.; HART, J.

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92 Cal. App. 610

PEOPLE v. ESPALIAN. (Cr. 1666.)

District Court of Appeal, Second District, Division 1, California. June 19, 1928.

1. Burglary ⚷2—One entering lodging house with intention of committing larceny was guilty of burglary (Pen. Code, § 459).

Under Pen. Code, § 459, one entering a lodging house with intention of committing either grand larceny or petit larceny was guilty of burglary.

2. Burglary ⚷41(2)—Evidence held to prove corpus delicti in burglary by entry of lodging house with intent to commit larceny.

In prosecution for burglary by entering a lodging house with alleged intent to commit larceny, evidence *held* sufficient to prove corpus delicti.

3. Criminal law ⚷1186(4)—Error, if any, in admission of evidence in burglary prosecution that witness had heard doors tried held not to have resulted in miscarriage of justice (Const. art. 6, § 4½).

In prosecution for burglary by entry of lodging house with intent to commit larceny, error, if any, in admitting testimony of lodger that immediately preceding discovery of defendant her door was tried and then she heard door tried across hall *held* not to have resulted in miscarriage of justice, under Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Edward Espalian was convicted of burglary, and he appeals. Affirmed.

Joseph R. Marquette, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the crime of burglary, and from an order denying his motion for a new trial.

The principal contention of appellant is that the evidence was insufficient to prove the corpus delicti. In brief, the evidence showed the presence of defendant in one of the corridors on the second floor of a lodging house at the hour of 4:30 o'clock a. m. One of the witnesses testified that: "He (defendant) ran around the corner (of the corridor), and I knew he didn't belong in the house, and I stopped him and wanted to know what he was doing in the house." At the time defendant was discovered, he was standing within two feet of the door of one of the rooms in the lodging house, which door was then slowly closing. On being questioned, defendant stated that he was a roomer in the lodging house, and that he was "looking for a toilet." He was not a roomer there; nor did it appear that he used the toilet after his discovery. On the trial he admitted that before the time in question he had never been inside the lodging house and had no personal knowledge of the location of any of the toilets therein. It was shown that in order to arrive at the place at which defendant was discovered it would have been necessary that he pass at least four different toilets. Following his arrest defendant made conflicting statements regarding the place of his residence. More particularly, with reference to the room in the lodging house which defendant claimed to occupy, one of the witnesses testified:

> "Well, then I questioned him, and he said, 'I live there;' and I says, 'Where?' And we went to the end of the hallway, and there is a stairway there, and then he took a look and sneaked down the stairs as fast as he could run, and we went right after him. * * * Why, I was going to question him, and all of a sudden he went down the back stairs and we went after him. He went out the door and slammed the door."

The court ordered stricken from the record the words "as fast as he could run" and "sneaked." The witness continued:

> "Mr. Watt and myself were right behind him, and finally Mr. Watt caught up to him at Second and Bunker Hill, and he turned around and flashed a big knife right about like that (indicating). I don't know just how long, but, oh, a two or three inch blade, and he said, 'You come near me and I will kill you.' He was going to stick me, and I picked up a big garbage can—I had nothing else—and I hit him right in the head with it, and he finally gave in."

On being searched, a passkey of the kind known as a "pick" was found on defendant's person, and it appeared in evidence that the lock on the door which was closing at the time defendant was first discovered in the lodging house was one which could have been readily unlocked with the key in defendant's possession. Over the objection of defendant, one of the witnesses for the prosecution testified in substance that she occupied a room "on the other side of the hall" from the door which she was closing at the time defendant was first discovered in the lodging house, and that at about 4 o'clock in the morning of that day "first my door was tried. Then I heard the door tried across the hall. * * * I heard the door tried across the hall from me. Then I heard a voice come through the hall and say, 'What are you doing here?'"

[1] The final determination of whether the corpus delicti was proved depends upon the motive which actuated defendant in entering the lodging house. If, as defendant claimed, his only purpose was to visit a toilet, no crime would have been committed. On the other hand, if defendant entered the lodging house with the intention of committing either grand or petit larceny he was guilty of the crime of burglary. Section 459, Pen. Code. From the circumstances of the case, it would appear that evidence tending to establish the corpus delicti, as well as evidence of the fact that defendant was the person, if any, who committed the crime of burglary, was so interwoven that evidence to the effect that the crime of burglary had been committed would also point to defendant's guilt.

[2] It is manifest that, notwithstanding the denial of defendant of any intention on his part to steal anything while he was in the lodging house, the question of what was his intent was one to be solved by the jury from the evidence in the case; and while other than defendant himself no one could testify regarding his intention in the premises, the jury had the right from the conduct of defendant and the surrounding circumstances to draw the inference that his intention on entering the lodging house was to commit the crime of grand or petit larceny, which, by the terms of the statute, constituted the crime of burglary. Considering the facts as portrayed by the evidence, this court is of the opinion that the corpus delicti was sufficiently established.

[3] Appellant also complains of the admission in evidence, over his objection, of the testimony of the witness to the effect that at about 4 o'clock in the morning, immediately preceding the discovery of defendant in the lodging house, first her door was "tried" and then she "heard the door tried across the hall." Taking into consideration the early hour at which the door of each of the two rooms was "tried," as well as the surrounding circumstances, it would seem clear that evidence of the character in question had a tendency to prove that some one was attempting surreptitiously to enter one or the other, or possibly both, of such rooms. But conceding (without deciding) the point with reference to the inadmissibility of the statement that "first my door was tried," we think the alleged error could have had no effect on the conclusion reached by the jury. In other words, after an examination of the entire cause, including the evidence, this court is of the opinion that the error of which complaint is made did not result in a miscarriage of justice. Section 4½, art. 6, Const.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

92 Cal. App. 679

BUSCH PIPE & SUPPLY CO. v. KEMBLE et al.

BUSCH PIPE & SUPPLY CO. v. ARROWHEAD LAKE CO. et al.

(Civ. No. 3546.)

District Court of Appeal, Third District, California. June 21, 1928.

Appeal and error ⚷1011(1)—Finding on conflicting evidence as to whether plaintiff sold materials to certain company held conclusive in action to foreclose materialman's lien.

In action to foreclose materialman's lien, finding of trial court on issue as to whether materials involved were sold to certain company *held* conclusive on appeal, where evidence was in substantial and irreconcilable conflict.

Appeals from Superior Court, San Bernardino County; Jesse Olney, Judge.

Actions to foreclose materialman's liens, brought by the Busch Pipe & Supply Company against W. H. Kemble, also known as William H. Kemble, and others, and against the Arrowhead Lake Company and others. Judgments for plaintiff, and defendants appeal. Affirmed.

Musick, Burr & Pinney and Bicksler, Smith & Parke, all of Los Angeles, for appellants.

Young & Young, of Los Angeles, for respondent.

FINCH, P. J. Plaintiff brought the above-entitled actions to foreclose liens claimed by it for materials alleged to have been sold to the defendant Comstock & Howard and used by that corporation, as contractor, in the construction of buildings at Arrowhead Lake for the defendants Kemble and Arrowhead Lake Company, respectively. The two cases were tried together on the same evidence, and separate judgments were entered in favor of the plaintiff as prayed for. Separate appeals have been taken from the judgments, the defendants Arrowhead Lake Company and Title Insurance & Trust Company being the appellants in both cases. The record on appeal is contained in a single transcript and both appeals have been argued together.

Comstock & Howard was a corporation. All of its capital stock except one share was owned by C. G. Comstock, F. W. Howard, and MacNeal Swasey. Prior to the sale of the materials for which the plaintiff claims a lien, Comstock & Howard had entered into contracts with Kemble and Arrowhead Lake Company, respectively, for the construction of the buildings in question, which involved large expenditures of money. "They handled the jobs on a percentage contract." Howard testified that in order to make a profit on materials furnished for the buildings and to have a "supply that would be available in quantity," the stockholders of Comstock & Howard organized the defendant Lakewood Lumber Company, a corporation. The stockholders in the two corporations were the same, except that one share of stock in the latter corporation was held by a person who was not a stockholder in the former, the purpose evidently being to qualify such person to act as a director. The connection between the two corporations was so close that Howard testified that he could not say for which corporation he was acting in ordering plumbing materials from the plaintiff, "because, as we all know, the interests of these two corporations were combined so closely I never considered who I was acting for." The two corporations kept separate books of account, however, and the Lakewood Lumber Company sold some materials to other contractors than Comstock & Howard. A director of the Lakewood Lumber Company testified that "99% of the business done by the Lakewood Lumber Company was with Comstock & Howard." The former company made a profit of from 25 per cent. to 40 per cent. on the materials furnished to the latter.

The court found that the two corporations were "identical and possessed practically the same officers, the same stockholders, and had the same corporate purposes, and that all the acts of the defendant Lakewood Lumber Company in connection with the purchase of the materials mentioned in plaintiff's complaint from plaintiff were done and performed by it as a dummy for the defendant Comstock & Howard," and that such materials were purchased from plaintiff by Comstock & Howard. The only ground urged by appellants for a reversal of the judgments is that these findings are not supported by the evidence. If such materials were in fact sold by the plaintiff to Comstock & Howard, the contractors, for use in the buildings in question, then plaintiff's liens are valid, whether the two corporations mentioned are separate or identical entities; it being admitted that the materials were used in such buildings.

Van Buren Jarvis, secretary and sales manager of the plaintiff, testified positively that—

> The materials were sold directly to Comstock & Howard for use in the buildings mentioned; that the plaintiff "was requested (by Comstock & Howard) to invoice this material to the Lakewood Lumber Company. * * * They told me * * * the Lakewood Lumber Company was to be a receiving depot for Comstock & Howard's use to store material that they were to use at Lake Arrowhead. * * * They (the materials) were all ordered by Comstock & Howard, * * * all the orders being verbal and being made in person or over the telephone. * * * The name of Lakewood Lumber Company * * * was never mentioned to me in connection with any purchasing or ordering of goods except at the second conversation when I was requested to have all invoices made out in the name of and sent to the Lakewood Lum-

ber Company. * * * The invoices were mailed in care of the office of Comstock & Howard. * * * All merchandise * * * was first ordered verbally by either Mr. Robinson (who was general plumbing superintendent of Comstock & Howard and was not an employee of Lakewood Lumber Company) or Mr. Howard, and then several days later a writing purporting to confirm the verbal order was received from the Lakewood Lumber Company. In every instance that a confirming order was received, the merchandise described therein had been theretofore verbally ordered. My dealings on behalf of the plaintiff were entirely with Comstock & Howard. * * * The plaintiff is a wholesale plumbing and supply house and does not sell direct to the retail trade. We have no cut and dried policy, however, and sell sometimes direct to large corporations, but, generally speaking, do not sell to customers. * * * In a great many instances the merchandise was shipped long before this so-called confirmation was received at our office. * * * There was never any ledger sheet kept by the plaintiff corporation (with?) Comstock & Howard. * * * We have sold merchandise to Comstock & Howard where Comstock & Howard paid us for it with their own check. * * * That would not be carried on a ledger sheet. * * * No ledger sheet is ever made for any material for which we receive cash or checks."

A ledger sheet of the plaintiff, designating Lakewood Lumber Company as debtor, marked "special account," was introduced in evidence by the defendants. It specifies the buildings which Comstock & Howard were constructing as those in which the materials were to be used. Jarvis testified that the notation, "special account," was to call "attention to the fact that the actual merchandise was not sold to the Lakewood Lumber Company."

Howard testified that the Lakewood Lumber Company had "a contract with Comstock & Howard * * * to furnish all lumber and other building materials which were needed by Comstock & Howard for its various contracts at Lake Arrowhead"; that the materials involved herein "were being bought for the use of Comstock & Howard"; that they were not bought "for general stock purposes for the Lakewood Lumber Company. * * * The fixtures that went into these two jobs were bought for those particular jobs."

A witness for the defendant testified that the materials in question were not sold to Comstock & Howard, but to Lakewood Lumber Company. The invoices for such materials were made out to Lakewood Lumber Company, but they specify the particular buildings for which the materials were furnished.

Subsequent to the purchase of the materials, both Comstock & Howard and Lakewood Lumber Company were adjudged bankrupts. Thereafter the plaintiff filed a claim in the bankruptcy proceedings against Lakewood Lumber Company for the same materials involved herein. In the claim it is stated that such materials "were sold to the Lakewood Lumber Company * * * and to Comstock & Howard"; that liens had been filed against the property on which the materials were used; that the claims of lien were about to be litigated; and that any recovery thereon would be credited on the claim filed in the proceeding in bankruptcy. It does not appear whether or not a similar claim was filed in the bankruptcy proceeding against Comstock & Howard. While this testimony tends to weaken the case made by the plaintiff, it goes only to the weight of the evidence and does not necessarily require a finding in favor of the defendants. There is other testimony tending to support or to discredit the claims of the respective parties, but enough has been stated to show that the evidence is in substantial and irreconcilable conflict as to whether the materials involved were sold to Comstock & Howard or to Lakewood Lumber Company. The finding of the trial court on that issue, therefore, is conclusive on appeal, and it is unnecessary to determine whether the finding that the two corporations were identical has sufficient support in the evidence.

The judgments in both cases are affirmed.

We concur: PLUMMER, J.; HART, J.

204 Cal. 488

JENNINGS et al. v. WEIBEL et al. (Sac. 4013.)

Supreme Court of California. July 6, 1928.

Negligence 🔑134(4)—Evidence held sufficient to sustain finding that defendant negligently permitted fire on his premises to spread to and destroy plaintiffs' property.

Evidence *held* sufficient to sustain finding that defendant negligently suffered a fire burning on his premises to spread into inflammable weeds and grass on his lands, and thence to lands of plaintiffs, resulting in destruction of plaintiffs' poultry and poultry raising equipment.

Department 1.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by James D. Jennings and another against F. H. Weibel and another. Judgment for plaintiffs against named defendant, and said defendant appeals. Affirmed.

Butler, Van Dyke & Desmond, of Sacramento, for appellant.

White, Miller, Needham & Harber, of Sacramento, for respondents.

SEAWELL, J. Plaintiffs had judgment in the court below against defendant F. H. Weibel for the sum of $1,900, which sum the court found to be the value of certain poultry and poultry raising equipment destroyed by a fire found by the court to have been negligently permitted to escape by said defendant Weibel from premises owned and occupied by him and his wife, Mary Weibel, to the adjoining property of plaintiffs. The sole inquiry upon this appeal is confined to the sufficiency of the evidence to sustain the finding to the effect that appellant negligently suffered a fire burning on his premises to spread into inflammable weeds and grass on his lands and onto lands of plaintiffs. The court, it would appear, was of the opinion that no satisfactory evidence was introduced in support of the allegation of the complaint that defendant negligently set fire to the rubbish pile, and it made no finding as to the latter allegation.

Appellant Weibel and respondents owned adjoining tracts of land situate near the town of Roseville in the county of Sacramento. The conflagration occurred on August 6, 1925, at a time when grasses and grain fields are dry and highly inflammable. The fire originated in a rubbish pile on appellant's ranch at a distance of 175 to 200 feet from his poultry house.

Said rubbish pile consisted of three months' accumulation of dry waste and other refuse, such as papers, rags, strings, and boxes raked into a heap. Appellant testified that he was working on the premises throughout the day; that he first discovered the fire in the rubbish pile between 2:30 and 3 o'clock in the afternoon; that the entire pile was then on fire; he called to his son, and together they attached a hose to a nearby hydrant and wet the ground around the pile to prevent the fire from spreading. A water drain ran past the pile a few feet to the south. Due to seepage from said drain, a strip of ground about two and one-half feet in width was covered with a high, dense growth of green grass, and, according to appellant, the dry grass between the rubbish pile and the green grass had entirely burned over when he discovered the fire. Immediately south of the drain was plowed ground and a green alfalfa field. After having wet the ground around the pile, appellant did not deem further assistance from his son necessary, and he remained alone to guard the blaze.

Appellant soon noticed that a new fire had broken out at a distance of fifteen or twenty feet from the edge of the wet ground around the pile, and beyond the range of the hose. He immediately called his family, consisting of his wife, son, and daughter, and they used wet sacks in their attempts to quench the fire, but their efforts were unavailing. The fire got beyond their control, and spread to respondents' premises, causing the damage complained of.

Appellant and his son stated by way of surmise and conjecture that they were of the opinion that there must have been dry foxtail intermixed with the green growth about the drain, through which the fire crept to the point where it later broke out. Appellant did not apprehend a spread of the fire in the direction of the drain, as he believed the ground there more or less damp from seepage from the drain, and the wind was not blowing in the direction of the drain. He had not wet the ground south of the rubbish heap in the direction of the drain, nor had he extinguished the fire in the pile. He was fearful of the spread of the fire to several empty gasoline tanks in another direction and to some dry bushes 15 or 20 feet from the pile which he was wetting when he noticed the second outbreak of fire.

Witnesses on respondents' behalf united in testifying that the day was hot and very windy, and stated that they had noticed heavy smoke coming from the direction of the Weibel place at a point back of Weibel's poultry house before the hour of 2:30 o'clock, the time Weibel claims he first saw it. Mrs. Neilsen testified that she observed it between 12 and 12:30, and the witness A. C. Neilsen testified that he first observed the smoke about 10:30 or 11 o'clock in the morning.

The court below was the judge of the credibility of the witnesses and of the weight, effect, and sufficiency of the evidence. From the testimony briefly outlined above, the trial court may have concluded that the fire was burning in the rubbish heap before the hour of 2:30, when appellant claims to have discovered it, under such circumstances that appellant and the members of his family, in the exercise of a due concern for their own interests and those of others, should have been aware of it, and, had they used due diligence and care, would have extinguished it. Or the court may have concluded that Weibel's lack of due care lay in failing to further investigate the condition of the grass surrounding the drain, which proved to contain dry grasses, with a view to ascertaining the possibility of the fire passing through it. It appears that he did not water the grass around the drain nor the ground between the pile and the drain south of the pile. Although the wind may not have been blowing in that general direction, the presence of a wind, which is frequently variable, blowing to the north should have prompted the exercise of the utmost vigilance to cut off all avenues of escape. Neither did Weibel extinguish the smoldering fire in the rubbish pile. A spark from the rubbish heap may have caused the second outbreak. We have read the evidence as set forth in the transcript, and are of the opinion that it furnishes a sufficient basis for the judgment.

The judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.

204 Cal. 432

HARRIS v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

(S. F. 12867.)

Supreme Court of California. June 26, 1928.

1. Master and servant 🔑398—Plea of limitations, filed on day to which workman's compensation hearing was continued before time to answer expired, held timely (Workmen's Compensation Act, § 11).

Plea, filed on day to which further hearing of compensation proceeding was continued on date of original hearing before expiration of time to answer, that application was barred by limitation prescribed in Workmen's Compensation Act, § 11 (St. 1917, p. 841), *held* timely and hence not waived.

2. Master and servant 🔑398—Time for compensation proceeding is tolled while employee is totally disabled and bedridden as result of injury (Workmen's Compensation Act, § 11; Code Civ. Proc. § 328).

Period within which injured employee must begin proceedings for compensation under Workmen's Compensation Act, § 11 (St. 1917, p. 841), is tolled during time that he is totally disabled and bedridden as result of injury, where immediate or not, especially in view of Code Civ. Proc. § 328, tolling general statutes of limitations while exceptions are in operation, though prolonged for as much as 20 years.

3. Courts 🔑92—Court's comment on statutory exception, tolling period for commencing compensation proceeding while employee is totally disabled and bedridden, in case involving applicant not so disabled, held obiter dictum (Workmen's Compensation Act, § 11).

Appellate court's comment on meaning of exception in Workmen's Compensation Act, § 11 (St. 1917, p. 841), tolling period within which proceedings for compensation must be commenced while applicant is totally disabled and bedridden, in case wherein applicant was never so disabled for any prolonged time during such period, was obiter dictum, which courts are not required to follow nor Legislature to regard.

In Bank.

Proceedings for compensation under the Workmen's Compensation Act by Joseph A. Harris, employee, opposed by the San Francisco Bridge Company, employer, and the Federal Mutual Liability Insurance Company, insurance carrier. To review an order of the Industrial Accident Commission denying compensation, the employee applies for certiorari. Order set aside, and cause remanded.

F. W. Sawyer and Sawyer & Sawyer, all of San Francisco, for petitioner.

G. C. Faulkner and R. P. Wisecarver, both of San Francisco, for respondents.

RICHARDS, J. The petitioner for a writ of review herein was at the time of the injuries for which he sought an award an employee of the respondent San Francisco Bridge Company, of which its correspondent, Federal Mutual Liability Insurance Company, was at said time the insurance carrier. The petitioner's injuries were caused by his being struck by a plank on the head while in the course of his employment on or about the 31st day of March, 1927. No immediate disability followed, and he continued in his usual employment until June 2, 1927, when he became paralyzed and bedridden and totally disabled, and so continued thenceforth and down to and including the hearing of his cause before the commission. The undisputed evidence presented at such hearing showed that his paralyzed and bedridden and totally disabled condition was the direct result of his injuries received as aforesaid.

[1] The claim of the applicant for an award was not filed before the commission until November 1, 1927, and not within six months after the date of his injury, and the main defense of the respondents, his employer, and its insurance carrier, upon the hearing before the commission, consisted in the plea that the belated application of the petitioner for an award was barred by the limitation prescribed by section 11 of the Workmen's Compensation Act. The commission in denying the applicant relief based its findings and order solely upon that ground, and also denied the application of the petitioner for a rehearing presumably upon the same ground. In his said application for a rehearing said petitioner urged, and also urges in his application for this writ, that the respondents have waived their right to plead the bar of the limitation prescribed in section 11 of said act by their failure to present said plea upon the first hearing before the commission, the basis of his said contention being that according to the record of said hearing before the commission his application for compensation was filed on November 1, 1927; that notice of the hearing thereon was given on November 7, 1927, wherein the date of November 23, 1927, was the day fixed for said hearing. The record, however, discloses that at the date of such hearing the time of the respondents to answer had not expired, and that while the respondents appeared at such hearing and some rather informal proceedings were had upon that day, the further hearing was continued until December 6, 1927, at which time the written answer of the respondents containing their plea to the effect that the applicant's claim was barred by the aforesaid provision of the statute was filed. In this state of the record we are of the opinion that under a liberal interpretation of the Workmen's Compensation Act the respondents' plea of the bar of the statute was timely, and that there is therefore no merit in the petitioner's first contention.

[2] The second contention upon which the petitioner strongly relies is that the commission was wholly in error in holding that the claim of the applicant for an award was filed too late and in denying him relief upon that sole ground. Section 11 of the Workmen's Compensation Act (Stats. 1917, pp. 831–841) provides as follows:

> "(b) The periods within which proceedings for the collection of compensation may be commenced are as follows:
>
> "(1) Proceedings for the collection of the benefit provided by subsection (a) of section nine or for the collection of the disability payment provided by subsection (b) of said section nine must be commenced within six months from the date of the injury, except as otherwise provided in this act. * * *
>
> "(c) * * * Provided further, that the provisions of this section shall not apply to an employee who is totally disabled and bedridden as a result of his injury, during the continuance of such condition or until the expiration of six months thereafter."

It is the contention of the respondents herein that the foregoing provision of section 11 of the Workmen's Compensation Act, embodying as it does a period of limitation within which proceedings for the collection of the benefits provided for in said act must be commenced, is to be given the same interpretation that has been uniformly applied to similar statutes of limitation from the time of the ingrafting of such statutes upon the common law of England down to the present time, and which interpretation is to the effect that when the prescribed period of a statute of limitation begins to run it continues to run, with certain specified and limited exceptions, during the prescribed period of limitation, and that unless the party entitled to commence an action or proceeding does so within the period so prescribed his right of action, unless it can be brought within the aforesaid exceptions, is forever barred. There can, of course, be no question as to the correctness of the respondents' position and of the authorities which are cited to sustain it as applicable generally to those statutes of limitation which we have inherited from the laws of England and which may be found embodied in the various provisions relating thereto in our Code of Civil Procedure. But notwithstanding that fact a very serious question arises as to whether the Legislature intended that the foregoing rigid rule of interpretation applied generally to the limitation of actions should be given application to the particular provision of the Workmen's Compensation Act which is here under review. That the Legislature intended that the Workmen's Compensation Act as to any part or portion thereof which it should come within the province of the court to interpret should be liberally construed by such court for the purpose of extending the benefits of the act for the protection of the persons injured in the course of their employment is made plain by section 69a of said act, which so expressly provides. With this admonition in mind we now turn to section 11 of the Workmen's Compensation Act with a view to determining its real intent and meaning.

We note at the very outset a marked distinction between the terms of the limitation embraced therein and those employed in the various provisions of the Code of Civil Procedure which relate to the limitations of actions and proceedings thereunder. The Code provisions relating generally to the time within which civil actions and proceedings must be commenced are embraced in part 2, tit. 2 of said Code, and in each instance wherein a period of limitation is prescribed for the commencement of a particular action or proceeding such action or proceeding can only, with certain exceptions, be commenced within the periods prescribed in said title "*after the cause of action shall have accrued.*" The provisions of said title which embody the exceptions to the general rule also expressly refer and relate to the time "when the cause of action accrues." Had the Legislature intended, in the adoption of the Workmen's Compensation Act, to provide in the period of limitation embodied therein that as to the exceptions thereto the rigid rule of the general law relating to the running of limitations should be given application, it could most easily and effectively have done so by adopting the language of the general law above referred to or words of similar import. When, however, we turn to the provision of the Workmen's Compensation Act as contained in section 11 thereof, we find that the Legislature not only did not adopt the provisions of the general law relating to the exceptions to the period of limitation therein prescribed, but, on the contrary, carefully avoided so doing. By reference to the portions of section 11 of said act above quoted it will be seen that when the time is fixed within which proceedings for the collection of the benefit provided for in said act are to be commenced it is stated that such proceeding "must be commenced within six months *from the date of the injury*"; but when in the later portion of said section the exception to said limitation is set forth it is provided "that the provisions of this section shall not apply to an employee who is totally disabled and bedridden *as a result of his injury.*"

The difference in statement between the limitation and the exception to it is marked and plain, since, had the lawmakers intended that the totally disabled and bedridden condition of the employee resulting from his injuries was to have its inception at the date of his injury in order to operate to toll the limitation, it would have employed in the exception the same phraseology which it used in fixing the time when the limitation would commence to run; i. e., "from the date of the injury." To interpret the clause in the exception to mean that the totally disabled and bedridden condition which would entitle the employee to the benefit of the exception must be the immediate consequence of his injury is not only to do violence to its terms, but is to give the section itself a meaning wholly contrary to the spirit of the act, and particularly to that portion thereof above quoted which enjoins liberality of interpretation in the interest of and for the benefit of the employee. But in addition to this it may be stated that while it is true that in fixing a comparatively brief period of limitation within which proceedings for the collection of the benefits provided for in the Workmen's Compensation Act must be begun, the Legislature had in mind the general principle underlying statutes of limitation, it may not be said that in the insertion of the exception here under review the Legislature was confronted with a situation either identical or similar to that provided for in the law regulating generally the limitation of actions, since in such laws a totally disabled or bedridden condition of a litigant has never been held to furnish a reason for tolling the period of limitation applicable to his cause of action.

In dealing with the rights and benefits accruing to injured employees under the provisions of the Workmen's Compensation Act the lawmakers were dealing with a unique situation wherein the parties to the proceedings provided for in said act do not stand in the position of dealing at arm's length with each other as in the case of ordinary litigants, but, on the contrary, occupy the relation of employer and employee wherein during the existence of that relation the employee has been to a greater or less degree incapacitated by reason of injuries received in the course of his employment; and while for such injuries it is entirely fitting that a brief period of limitation should be fixed upon as the time within which he must commence the proceedings before the commission through which he is to receive, if entitled thereto, the benefits to which in consequence of such injuries he is entitled, it would be altogether unreasonable and out of accord with the spirit of the act to hold that unless the employee's injury was so severe as to place him immediately in a totally disabled and bedridden condition he could derive no benefit from the exception here under review. The phrase in the exception, "as a result of his injury," is not qualified by the condition, either expressed or implied, that such result shall be immediate, and the instant case would seem to furnish a most apt and striking reason why the exception in question should not be given any such strained and narrow interpretation.

It is our conclusion, therefore, that a liberal interpretation of section 11 of said act requires us to hold that whenever it is made to appear that if at any time during the period of limitation provided for in said act the injured employee has become "totally disabled and bedridden as a result of his injury," the period of limitation within which he must begin proceedings before the commission for the collection of the benefit to which he is entitled under said act is tolled during the continuance of such condition.

It is argued by the respondents herein that such an interpretation would have the effect of prolonging unreasonably the period within which such proceedings must be begun. We see little force, however, in this suggestion, for the twofold reason that traumatic injuries as a result of which persons become totally disabled and bedridden are not in ordinary circumstances followed by any great prolongation of such conditions, and for the further reason that with regard to statutes of limitation generally the tolling of the statute continues during the period when the exceptions to it are in operation even though that period may be prolonged for as much as 20 years. Code Civ. Proc, § 328.

[3] The respondents herein have relied strongly upon the case of Rose v. Petaluma & Santa Rosa Railway Co., 64 Cal. App. 214, 221 P. 406, as not only sustaining their contention herein, but as having been decided in the year 1923, since which time several state Legislatures have convened and wherein the Workmen's Compensation Act, while amended in other respects, has not been changed in respect to the provision of section 11 thereof so as to alter the interpretation of said section imputed to it in that case. An examination of the record, however, in that case discloses a state of facts the existence of which would have debarred the injured employee from the benefit of the exception to section 11, which the court in that case undertook to interpret and apply. Upon the facts as stated in said opinion the applicant for an award was never at any time during the period of limitation in any or at most any prolonged situation which could be described as a "totally disabled and bedridden condition." This being so, the exception provided for in section 11 of said act could have had no application to the applicant's case, and hence whatever comment the court in that case made upon the meaning to be accorded to the language of said exception was obiter dictum, which the courts were not required to follow nor the Legislature to regard. A fuller consideration of the subject leads us to the conclusions above set forth, from which it follows that the rule of interpretation adopted by the appellate tribunal in the case last above cited must be disapproved.

It follows from the foregoing that the decision of the commission denying the petitioner a hearing and award for the reasons therein stated must be set aside and the cause remanded to said commission for further proceedings in accord with the views expressed in this opinion.

It is so ordered.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.

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204 Cal. 485

HILBERT v. KUNDICOFF. (L. A. 9477.)

Supreme Court of California. July 5, 1928.

1. Breach of marriage promise ⚷3—There can be no recovery for breach of marriage promise, if promisee knew of promisor's pre-existing marriage when promise made.

There can be no recovery for breach of promise to marry when, at the time the promise was made, promisee knew of promisor's pre-existing marriage.

2. Breach of marriage promise ⚷3—Promisor's pre-existing marriage, unknown to promisee, is no defense to action for breach of marriage promise.

Where fact of promisor's pre-existing marriage is unknown to promisee when promise of marriage is made, it furnishes no defense to action for breach of promise.

3. Breach of marriage promise ⚷3—Where plaintiff had no doubt of defendant's ability to marry when he promised, subsequent doubt did not defeat right to recover for breach of promise.

Where, when defendant originally promised to marry plaintiff, latter had no doubts as to defendant's ability to marry her, defendant's subsequent statement suggesting delay of ceremony until he could definitely ascertain his marital status did not defeat plaintiff's right to recover for breach of marriage promise, in view of de-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

fendant's subsequent renewal of promise after doubt was removed.

4. Appeal and error ⚩969—Trial ⚩22—Necessity of interpreter is question for judicial determination of court, whose ruling will not be disturbed except for clear abuse of discretion (Code Civ. Proc. § 1884).

Question of necessity of appointing interpreter under Code Civ. Proc. § 1884, is one for the judicial determination of the court, and its ruling will not be disturbed, unless the record clearly discloses an abuse of discretion.

Department 2.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action by Fannie Hilbert against John Kundicoff. From a judgment for plaintiff and from an order denying his motion for a new trial, defendant appeals. Affirmed.

Royal S. Riddle, of San Pedro, and Halverson & Price, of Los Angeles, for appellant.

Clement L. Shinn, Walter J. Little, and William B. Gilroy, all of Los Angeles, for respondent.

TYLER, Justice pro tem. [1] Action for damages for breach of promise to marry. Trial was had by jury, which resulted in a verdict in favor of plaintiff in the sum of $5,000. Motion for new trial was made and denied. This appeal is prosecuted from the judgment and order. It is claimed as ground for reversal that the evidence shows the alleged promise to be void because of the fact that plaintiff knew at the time it was made that defendant was a married man. It is further urged that the trial court erred in not granting appellant's request for an interpreter, and that it likewise erred in denying his motion for a new trial. There is no merit in any of these contentions. It is true that there can be no recovery for breach of a promise to marry when at the time the promise was made, the promisee knew of the pre-existing marriage of the promisor. This principle is a salutary one, and courts should not, in the slightest degree, modify it. Smith v. McPherson, 176 Cal. 144, 167 P. 875, L. R. A. 1918E, 66.

[2, 3] It is equally true, however, that, where the fact of the marriage of the promisor is unknown to the promisee at the time the promise is made, it furnishes no defense to an action for breach of the promise. 9 C. J. 325. Here so much of the evidence as is necessary to support the judgment shows that the parties hereto had entertained more or less intimate relations toward each other from the time that they first became acquainted. Defendant was a boarder in plaintiff's family when she was living with her husband. Plaintiff subsequently secured a decree of divorce, and plaintiff and defendant thereafter continued their intimate relations. During this period they discussed the question of marriage, and defendant entered into the alleged agreement. Plaintiff was advised to ascertain if defendant was a single person, and she thereupon questioned him concerning his marital status, and was assured that, while he had contracted a marriage in Russia some years previously, his former wife had been married for about eight years, and that he was free to marry. After this promise was made, and at a time when the parties were contemplating immediate marriage, defendant suggested that the ceremony be delayed until he could definitely ascertain his marital status. He subsequently learned that he was no longer a married man, and he again promised plaintiff that he would marry her. Several witnesses testified as to defendant's promise. Even if we assume that the statement of defendant as to his doubt concerning his status be true, and was sufficient to raise a question in plaintiff's mind at that time as to defendant's ability to marry, it can here have no controlling effect, for, when the promise was originally made, plaintiff had no doubts upon the question, and, when all doubt was removed, defendant again made the promise relied on. A renewal of such a promise after removal of the disability, if one exists, will support an action for a breach. Pyle v. Piercy, 122 Cal. 383, 55 P. 141; 9 Corpus Jur. 325.

[4] Where a single woman receives the addresses of a married man who for good reasons she believes to be single, and an engagement follows, the man cannot set up against her his wrong in making the marriage promise. Here there is evidence to show that plaintiff at all times when the different promises were made had no reason to believe defendant was a married man, and she had the right to expect a fulfillment of his promise, and a right to recover for the disappointment when, as here, he failed to keep his promise, and married another. Nor was there any irregularity, as claimed in the proceedings of the trial, because of the circumstances surrounding the use of an interpreter to aid appellant in giving his testimony. After the trial had proceeded, an interpreter was had, but during the examination it became evident to the court that appellant understood and spoke the English language, whereupon the services of the interpreter were dispensed with. Under section 1884, Code of Civil Procedure, the court is required to appoint an interpreter in those cases only where the witness does not understand or speak the English language. The question is one for the judicial determination of the court, and its ruling will not be disturbed, unless the record clearly discloses an abuse of discretion, and here there is no

such showing. People v. Morine, 138 Cal. 626, 72 P. 166. There is no merit in the appeal.

The judgment is affirmed.

We concur: SHENK, J.; RICHARDS, J.

204 Cal. 460

UNITED BANK & TRUST CO. v. FIDELITY & DEPOSIT CO. OF MARYLAND et al.

(Sac. 4044.)

Supreme Court of California. June 30, 1928.

1. Pleading ⇨37—Failure of pleader to allege compliance with statute requiring order of court for suit on receiver's bond authorized inference that he did not conform thereto (Pol. Code, § 982).

Failure of plaintiff to allege compliance with Pol. Code, § 982, requiring receivers' bonds to be payable to the state of California and authorizing suits thereon upon order of court, authorized inference that he did not conform to its requirements.

2. Mortgages ⇨471—Complaint against receiver in mortgage foreclosure proceeding because receiver permitted owner of cattle subject to agister's lien to remove them from premises held demurrable as not showing duty to mortgagor's assignee (Pol. Code, § 982).

Complaint, brought against receiver appointed at instance of mortgagee for damages because he permitted owner of cattle, without discharging lien for pasturage, to remove them from premises, contrary to court's instructions, held not to state a cause of action under Pol. Code, § 982, because not showing that receiver was officially chargeable with any duty with respect to lien claimed by assignee.

3. Limitation of actions ⇨180(2)—Complaint held to show action against receiver of mortgaged realty on theory that he permitted owner of cattle on which plaintiff claimed agister's lien to remove them barred by three-year limitations (Code Civ. Proc. § 338, subd. 1).

Complaint, in assignee's action for damages against receiver appointed at instance of judgment creditor holding mortgage on realty, on theory that receiver was liable on his bond because he permitted owner of cattle on which lien was claimed to remove them from premises, *held* to show on its face that action was barred by Code Civ. Proc. § 338, subd. 1, creating a three-year period of limitations.

4. Pleading ⇨34(3)—Fact may appear by inference in pleading.

A fact may appear by inference as well as by direct allegation in pleading.

5. Pleading ⇨72—Prayer of complaint may be resorted to in determining amount plaintiff seeks to recover.

Prayer of a complaint may be resorted to to determine the amount which plaintiff seeks to recover.

Department 1.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by the United Bank & Trust Company against the Fidelity & Deposit Company of Maryland and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Everts, Ewing, Wild & Everts and L. W. Young, all of Fresno, for appellant.

Redman & Alexander, of San Francisco, and Sherwood Green, of Berkeley, for respondents.

SEAWELL, J. This appeal is taken from a judgment entered against appellant after an order made sustaining a demurrer to appellant's complaint without leave to amend.

The facts herein considered are taken from the complaint, it being the only record by which the question of the sufficiency of the facts as stating a cause of action may be judged. The plaintiff and appellant herein asserts the right to maintain this action and appeal by reason of successive assignments of claim of agister's lien, which, it is claimed, originally accrued to the owners of the real property, to wit, San Joaquin Agricultural Corporation, on account of cattle which were pastured upon the lands of the latter corporation, and which claim was assigned first to the Union National Bank, a corporation, and latterly to the appellant, United Bank & Trust Company, a corporation.

On April 18, 1922, there was due and owing from one Charles F. Silva to said San Joaquin Agricultural Corporation, on account of pasturage of cattle, the sum of $11,166.33. Said cattle were held and possessed on said day by said corporation under an agister's claim of lien. Upon the application of the Mercantile Trust Company of California, the holders of a mortgage and deed of trust upon said real property upon which said cattle were and had theretofore been pastured—pending a foreclosure proceeding theretofore commenced by said Mercantile Trust Company of California against said San Joaquin Agricultural Corporation—the superior court appointed one Walter P. Coombs receiver in said foreclosure proceeding and he duly qualified and filed a bond for the faithful performance of his duties as receiver, which bond was made and executed by respondent Fidelity & Deposit Company of Maryland, a corporation. Said undertaking provided that said Coombs would obey all orders of court made in said matter of receivership. Said Coombs, as such receiver, thereafter took possession of said real property, and, under order of court, took possession of all cattle upon which said San Joaquin Agricultural Corporation had its lien for pasturage. On or about July 17, 1922, upon the petition of the Union National Bank, a corporation, the assignor of appellant, said superior court, by its written order duly made and served upon said receiver, instructed him to refuse permission to said Charles F. Silva, or any of his agents or other persons, to remove from said real property cattle belonging to said Silva, upon which said San Joaquin Agricultural Corporation had a lien for pasturage, until the sum of $11,166.33, as for the pasturage of said cattle, had been paid and the lien thereby released. It is alleged that thereafter and without permission of the court or of appellant or any of its assignors, the said receiver, Walter P. Coombs, permitted said Charles F. Silva to withdraw from the possession of said receiver said cattle, contrary to the order of the court theretofore made, to the loss and damage of appellant in the sum of $11,166.33. The insolvency of Charles F. Silva, who is not made a party, is alleged on information and belief.

A number of objections were made to the sufficiency of the complaint in the court below, one or more of which must have been deemed by the trial court as well placed. The most important of said objections was aimed at the failure of the complaint to allege that an order of court was made in the original proceeding in which the receiver was appointed, authorizing the action to be prosecuted for the benefit of appellant's assignor. Section 982, Political Code, provides:

> "All bonds or undertakings given by trustees, receivers, assignees, or officers of a court in an action or proceeding for the faithful discharge of their duties, where it is not otherwise provided, must be in the name of and payable to the state of California; and upon the order of the court where such action or proceeding is pending, may be prosecuted for the benefit of any and all persons interested therein."

[1] The obligee named in the bond in the instant case is the state of California. The language of the statute is clear and explicit. It must be taken as true, by reason of the failure of the pleader to allege compliance with the statutory provision, that he did not conform to its requirements. Because of appellant's failure to allege compliance with said statute, respondents take the position that the trial court was warranted in refusing to entertain the cause. There is much force in respondents' position, but we think it is not necessary to pass upon this question nor upon the kindred question of whether or not the instant case presents facts which constitute an exception to the rule of equitable remedies to the effect that in cases where a suit is brought against a receiver in his official capacity, as is the fact in the instant case, leave should be obtained by the court by which he was appointed in the absence of statutes authorizing suits without such leave. 5 Pomeroy's Equity Jurisprudence (3d Ed.) p. 329; High on Receivers (4th Ed.) p. 293.

[2] The action was brought upon the theory that the receiver was liable upon his bond as such officer because he permitted Silva, the owner of said cattle, to remove them from said premises belonging to the San Joaquin Agricultural Corporation pending a proceeding to foreclose a mortgage upon and sell said premises, contrary to the instruction of the court that said receiver refuse permission to said Silva to remove said cattle from said real property until he paid to said receiver the amount of said pasturage indebtedness, to-wit, $11,166.33. The receiver was appointed at the instance of the judgment creditor to protect its rights in all property appurtenant to the mortgaged real property, and no claim or pretense is made that ambulatory personal property which chanced to be upon the premises was included in the foreclosure action. The complaint contains no allegation which tends to show that the trial court had any power to make an order affecting the ownership or rights in or to personal property which was in no sense related to the subject-matter of the action in which the receiver was appointed. The lien which existed in favor of appellant's assignor as an agister of said cattle was not extinguished by the appointment of said receiver in the foreclosure proceeding, and the right to enforce said lien was not affected thereby. The lien claimant made no effort to enforce its lien either before or since the cattle were taken by Silva, nor did it attempt by any possessory action to repossess them. If Silva, the owner, came into possession of said cattle by fraud or by mistake, the lien claimant could have recovered and held them as against him.

The complaint does not state a cause of action against the receiver and his bond, for the reason that it does not appear from the face thereof that the receiver was officially chargeable with any duty with respect to the lien claimed by appellant as the assignee of the San Joaquin Agricultural Corporation. The receiver, as such, could not be charged by order of court, or otherwise, as a keeper of personal property not included within the issues of the action in which he was appointed, nor in any manner related thereto. Neither was an action brought in replevin or in claim and delivery against Coombs, who acted without authority of law and was therefore a trespasser, nor a petition presented to the superior court for leave to maintain any sort of action.

[3-5] A number of other points are made by respondents in substantiation of their claim of insufficiency of the complaint, one of which is that the action is upon a liability created by statute and is barred by the provisions of section 338, subd. 1, Code of Civil Procedure, citing County of Sonoma v. Hall, 132 Cal. 589, 62 P. 257, 312, 65 P. 12, 459; Norton v. Title Guaranty, etc., Co., 176 Cal. 212, 168 P. 16; Hellwig v. Title Guaranty,

etc., Co., 39 Cal. App. 422, 179 P. 222. Such being the law, the specific question before us is whether it appears from the face of the complaint that the action is barred by the three-year period. It is alleged by the complaint that on April 18, 1922, the receiver was appointed and qualified and filed his bond; that on July 17, 1922, the court made its order instructing said receiver to refuse delivery of said cattle to said Silva until he paid said sum of $11,166.33, etc.; that thereafter, and without permission of plaintiff, said receiver permitted said Silva to withdraw said cattle from said premises, etc. Upon the face of the complaint no specific allegation is made as to the time said receiver permitted Silva to gain possession of the cattle. The prayer of the complaint, however, indicates that the act or omission complained of occurred on April 18, 1922, the day the receiver qualified, as it prays for interest on the amount of damages claimed dating from April 18, 1922. We think it would not be indulging in a strict construction against the pleader to hold that the natural and only reasonable inference that may be drawn from the pleading is that the act complained of occurred April 18, 1922, and is therefore barred by the statute. A fact may appear by inference as well as by direct allegation. The prayer of a complaint may be resorted to under certain circumstances, one of which is to determine the amount which the plaintiff seeks to recover. The amount prayed for is estimated, on the injury complained of, as having been sustained on April 18, 1922. The complaint was filed October 20, 1925. The only reference made by the complaint as to the date of the alleged wrongful act of the receiver is found in the prayer, which fixes it as of April 18, 1922. This being so, the action would be barred by section 338, subd. 1, Code of Civil Procedure.

Judgment affirmed.

We concur: CURTIS, J.; PRESTON, J.

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204 Cal. 470

PEOPLE v. HICKMAN. (Cr. 3116.) ★

Supreme Court of California. July 5, 1928.

Rehearing Denied Aug. 2, 1928.

1. Jury 🔑21(1)—Trial under law relating to plea of not guilty by reason of insanity held not in violation of constitutional provision guaranteeing jury trial (Pen. Code, § 1016, et seq.; Const. art. 1, § 7).

Requiring defendant to plead and go to trial under form of procedure prescribed by Pen. Code, § 1016 et seq., authorizing, in addition to other pleas, the plea of not guilty by reason of insanity, *held* not in violation of Const. art. 1, § 7, guaranteeing right of trial by jury, since jury trial is accorded on only issue tendered relative to sanity at time of commission of crime and such plea may be joined with plea of not guilty if desired.

2. Jury 🔑10—Constitutional right of jury trial is only for opportunity therefor in cases in which it is exercised according to common law (Const. art. 1, § 7).

Right guaranteed by Const. art. 1, § 7, providing that right of trial by jury shall be secured to all persons and shall remain inviolate, is only that citizens of the states shall have an opportunity to be tried by a jury in cases in which it is exercised in administration of justice according to common law.

3. Jury 🔑31(1)—Making reasonable regulations as to right of trial by jury is not denial or impairment of such right (Const. art. 1, § 7).

Making of reasonable regulation as to mode of enjoyment of right to trial by jury is not denial or impairment of right to jury trial as guaranteed by Const. art. 1, § 7.

4. Criminal law 🔑737(1)—Essence of jury trial is that controverted facts shall be decided by jury.

The essence of trial by jury is that controverted facts shall be decided, since unless facts are controverted there is no issue for submission.

5. Criminal law 🔑311—Person charged with crime is presumed sane until contrary is established.

A person charged with crime is presumed to be sane until the contrary is established by preponderance of the evidence.

6. Criminal law 🔑331—Requiring defendant to prove insanity does not shift burden of proof, but only burden of introducing evidence.

Requiring defendant, where insanity is interposed, to prove it by preponderance of the evidence, *held* not to shift burden of proof from people to defendant, but only to shift burden of introducing evidence and declaring amount or quantum of evidence which he must produce to overcome presumption of sanity.

7. Constitutional law 🔑250, 257—Criminal law 🔑286—Law providing for plea of not guilty by reason of insanity held not in violation of "due process" and equal protection clause of federal Constitution (Const. U. S. Amend. 14; Pen. Code, § 1016 et seq.)

Pen. Code, § 1016 et seq., relating to pleas which may be entered on indictment or information and providing for plea of not guilty by reason of insanity, *held* not in violation of due process and equal protection clause and Const. U. S. Amend. 14; there being nothing in such amendment to prevent a state from adopting a reasonable regulation or procedure in regulation of jury trials, the term "due process" as used therein referring to law of land which derives its authority from inherent and reserved powers of states.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

★Rehearing denied.

8. Constitutional law ⟹251—Any legal proceeding enforced by public authority, which regards and preserves principles of liberty and justice, constitutes "due process of law."

Power to legislate must not be exercised in arbitrary or despotic manner, by any legal proceeding enforced by public authority, whether sanctioned by age and custom or newly devised in discretion of legislative power in furtherance of general public good, which regards and preserves principles of liberty and justice, must be held to be due process of law.

9. Constitutional law ⟹250, 257—State may make different procedure for trials of even same class of offenses (Const. U. S. Amend. 14).

A state may make different procedure for trials in even the same class of offenses; Const. U. S. Amend. 14, merely requiring that all persons subjected to such legislation shall be tried alike under like circumstances and conditions both in privileges conferred and in liabilities imposed.

10. Judges ⟹51(1)—Presiding judge properly ordered trial to proceed before another judge, after trial judge consented to retire on objection on ground of bias and prejudice (Const. art. 6, § 7; Code Civ. Proc. § 170).

Where trial judge, after objection on ground of bias and prejudice against defendant, consented to retire from case, presiding judge having authority under Const. art. 6, § 7, to distribute business of court among judges and prescribe order of business, properly ordered that trial proceed before another judge of superior court within district in accordance with Code Civ. Proc. § 170.

11. Jury ⟹138(2)—Allowing prosecution to exercise peremptory challenge after defendant had exhausted challenges held merely irregularity.

Trial court's allowance of right of prosecution to exercise a peremptory challenge, after defendant had exhausted all of peremptory challenges allowed by law, *held*, under circumstances, merely an irregularity not affecting any substantial right of defendant nor to require reversal.

12. Jury ⟹138(3)—Refusal to grant peremptory challenge to defendant, after allowing state to exercise such challenge after defendant had exhausted challenges, held not error.

Refusal to allow defendant, having used all of peremptory challenges, to exercise a peremptory challenge after first permitting state to do so after defendant had exhausted all such challenges, *held* not error, in absence of showing of prejudice by reason of such action.

13. Criminal law ⟹286—Instruction, after plea of not guilty by reason of insanity, that only issue was determination of defendant's insanity, held proper (Pen. Code, § 1016 et seq.).

In prosecution for kidnapping and murder, wherein defendant interposed a plea of not guilty by reason of insanity in accordance with provision of Pen. Code, § 1016 et seq., instruction that sole issue for jury to determine was whether defendant was sane or insane at time of alleged commission of acts charged in indictment *held* proper.

14. Criminal law ⟹977(1)—Trial court, after plea of not guilty by reason of insanity, had jurisdiction to determine degree of murder and fix penalty (Pen. Code, §§ 190, 1157).

Under Pen. Code, § 190, trial court, after plea of not guilty by reason of insanity, had right to determine degree of murder committed by defendant and fix penalty therefor; section 1157 having no application.

15. Criminal law ⟹645—Defendant interposing plea of not guilty by reason of insanity was not by reason thereof entitled to open and close argument (Pen. Code, § 1016 et seq., and §§ 1093, 1369).

Defendant, after plea of not guilty by reason of insanity in accordance with provision of Pen. Code, § 1016 et seq., was not entitled by reason of such plea to open and close argument to jury on ground that burden of establishing insanity rested on defendant, since under section 1093, jury having been impaneled and sworn, trial must proceed in order therein prescribed, unless otherwise directed by court; section 1367 relating only to procedure to be followed in inquiry into insanity of defendant before trial or after conviction.

16. Criminal law ⟹977(1)—Judgments of conviction and sentence, after plea of not guilty by reason of insanity, held not void because reciting defendant duly pleaded guilty (Pen. Code, § 1016).

Judgments of conviction and sentence for kidnapping and murder, after plea of not guilty by reason of insanity, *held* not void because reciting that defendant duly pleaded guilty of crime charged, though technically not in strict accordance with procedure followed, since, though defendant did not actually in separate and distinct plea plead guilty as provided by Pen. Code, § 1016, result of action of plea of not guilty by reason of insanity was an admission that he committed offenses charged.

17. Criminal law ⟹741(1), 742(1)—Credibility of witnesses and weight of evidence is for jury.

Jurors have responsibility of determining credibility of various witnesses and weight to be given to the evidence.

18. Criminal law ⟹1160—Finding of court and jury as to defendant's sanity held conclusive when supported by evidence.

Finding of court and jury on question of defendant's sanity at time of commission of alleged offense *held* conclusive when supported by evidence.

In Bank.

Appeal from Superior Court, Los Angeles County; J. J. Trabucco, Judge.

William Edward Hickman was convicted of kidnapping and of murder in the first degree, and he appeals. Affirmed.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Jerome Walsh, of Kansas City, Mo., and R. H. Cantillon and F. A. Sievers, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., W. F. Cleary, and John W. Maltman, Deputy Attys. Gen., Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

WASTE, C. J. The defendant was charged with having kidnapped and murdered Marion Parker, a twelve year old Los Angeles school girl. He confessed to the commission of the offenses charged, and, the only defense in the case being that he committed the acts while insane, he entered a plea of "not guilty by reason of insanity" to both counts of the indictment. When the cause came on for trial, the prosecution rested its case upon the reading of the indictment and the pleas of the defendant thereto. The defendant and the prosecution thereupon introduced evidence bearing on the subject, and there was submitted to the jury the sole question whether the defendant was sane or insane at the time the offenses were committed. The jury returned its verdicts, finding the defendant was sane. Motions for a new trial and in arrest of judgment were denied, and the court found and determined the crime of murder committed by the defendant to be "murder of the first degree without extenuating circumstances." Defendant was thereupon sentenced to be imprisoned in the state's prison for the term prescribed by law for the crime of kidnapping, and sentenced to pay the extreme penalty for the murder committed. He appeals from the judgments and from the orders denying the motions for new trial and in arrest of judgment.

[1] The important question presented by the appeal, and the one to be first considered, is raised by the contention of the defendant that, when he was forced to plead and to go to trial under the form of procedure now prescribed by the Penal Code of this state (sections 1016 et seq.), relating to the kinds of pleas which may be entered to an indictment or information, and the procedure to be followed after the plea, he was deprived of his constitutional right to a trial by jury. He contends that by entering the plea on which he elected to stand, he denied his guilt as effectively as if he had entered a plea of "not guilty," and was therefore entitled to the trial guaranteed by the state Constitution upon all the issues involved in the case, as well as upon the issue of his sanity. That, he contends, he was denied.

Appellant fails to grasp the full import of the present statute. Prior to 1927, there were four kinds of pleas open to a defendant, to wit: A plea of (1) guilty; (2) not guilty; (3) a former judgment of conviction or acquittal; and (4) once in jeopardy. Pen. Code, 1016. The Legislature, in 1927, added another, viz., "(5) not guilty by reason of insanity," and further amended the Code section by providing that—

> "A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged, provided that the court may for good cause shown allow a change of plea at any time before the commencement of the trial. A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged."

Section 1017 of the Code was amended to provide that if the defendant plead "not guilty by reason of insanity," such plea shall be entered upon the minutes of the trial court substantially in the following form:

> "The defendant pleads that he is not guilty of the offense charged because he was insane at the time that he is alleged to have committed the unlawful act."

At the same time, there was added a new section (section 1026) to the Penal Code, in part reading as follows:

> "When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury, in the discretion of the court. In such trial the jury shall return a verdict either that the defendant was sane at the time the offense was committed or that he was insane at the time the offense was committed. If the verdict or finding be that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law."

Then follow provisions, not now material to this discussion, as to the procedure to be followed if the verdict or finding of the jury be that the defendant was insane at the time the offense was committed. Stats. 1927, pp. 1148–1150.

[2-4] While the Constitution of the state of California provides that the right of trial by jury shall be secured to all persons and shall remain inviolate (Const. art. 1, § 7), the only right which it guarantees is that the citizens of the state shall have an opportunity to be tried by a jury, in cases in which it is exercised in the administration of justice according to the common law, as that law is understood in the several states of the Union. People v. King, 28 Cal. 265, 271; People v. Powell, 87 Cal. 348, 356, 25 P. 481, 11 L. R. A. 75. It does not purport to direct what procedure is to be followed in the exercise of the right. The authorities in this and in oth-

er jurisdictions bear out the proposition that the making of a reasonable regulation of the mode of enjoyment of the right of trial by jury is not a denial or an impairment of that right. Conneau v. Geis, 73 Cal. 176, 178, 14 P. 580, 2 Am. St. Rep. 785; Frank v. Mangum, 237 U. S. 309, 339, 340, 35 S. Ct. 582, 59 L. Ed. 969. The essence of trial by jury is that controverted facts shall be decided by a jury. Unless the facts are controverted, there is no issue to submit to a jury. It has never been doubted in this state that, while a defendant charged with crime amounting to a felony cannot expressly waive a trial by jury, he may enter a plea of guilty to the indictment or information, instead of having a jury trial, even though charged with a crime which carries the death penalty upon conviction. The statute has always provided for such a plea. People v. Delany, 49 Cal. 394. Yet a confession of the offense by the party charged, by a plea of guilty, is the highest kind of conviction which the case admits, and submits him to precisely the same punishment as if he were tried and found guilty by a jury. State v. Almy, 67 N. H. 274, 28 A. 372, 22 L. R. A. 744. See, also, West v. Gammon, 39 C. C. A. 271, 98 F. 426. It was held, very early in our history, that there was no provision of the state Constitution, or of any statute, which prevented a defendant charged with murder from pleading guilty instead of having a trial by jury, and that if he elects to plead guilty to the indictment, the provision of the statute for determining the degree of guilt, for the purpose of fixing the punishment, does not deprive him of any right of trial by jury. People v. Noll, 20 Cal. 164; People v. Lennox, 67 Cal. 113, 7 P. 260, and People v. Chew Lan Ong, 141 Cal. 550, 75 P. 186, 99 Am. St. Rep. 88, are to the same effect. By a parity of reasoning, we are of the view that a statute which, in addition to the usual pleas, merely permits a defendant in a criminal case, if he is so advised, to plead guilty, in effect, by failing to deny the commission of the offense charged, but which preserves to him the right to submit to a jury the issue that he should not be punished because he was insane at the time he committed the act, in no way deprives him of his constitutional right to a jury trial.

[5, 6] The present statute was passed by the Legislature on the recommendation of the commission for the reform of criminal procedure, created by the Legislature in 1925 to make a study of the methods of criminal procedure, and to recommend such new system, or such amendments to the then existing system, as would in its opinion tend to provide for this state the most efficient system for the swift and certain administration of criminal justice. The purpose of the statute is to overcome some of the abuses which have crept into the administration of justice by reason of the frequent interposition of the defense of insanity in criminal prosecutions. Its provisions are plain, and we deem it unnecessary to enter into a critical analysis or restatement of its various features to show that every essential right of one charged with crime by indictment or information has been safeguarded, and that a defendant, by availing himself of its various provisions, and entering the proper plea or pleas, may interpose and submit to the consideration of the jury every issue and every defense that has heretofore been open to him. Under proper pleas he may still submit all the evidence he could submit before the effective date of the amended statute. It has always been the law in this jurisdiction, for instance, that upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed amounts only to manslaughter, or that the defendant was justified or excused. Crim. Prac. Act 1850; Stats. 1850, p. 232, par. 37; Pen. Code, § 1105. A person charged with crime is presumed to be sane until the contrary is established by a preponderance of evidence. People v. Williams, 184 Cal. 590, 593, 194 P. 1019.) The rule requiring the defendant, where insanity is interposed as a defense, to prove it by a preponderance of the evidence, does not affect the other rule that the burden of proving sanity is on the prosecution. That burden has always been on it and is met in the first instance by the presumption of sanity which the law raises and which must prevail until it is overcome. The rule relating to the defense of insanity does not shift the burden of proof from the people to the defendant, but only shifts the burden of introducing evidence and declares the amount or quantum of evidence which he must produce to overcome the presumption and show his insanity. People v. Harris, 169 Cal. 53, 68, 145 P. 520. The present statute does not take away the defense of insanity, and the procedure followed in no way changed or affected the rule respecting the burden which rested on the prosecution and on the defense in this case.

We are firmly convinced that no right of the defendant guaranteed by the state Constitution was injuriously or at all affected by his being compelled to proceed to trial under the sections of the Code as recently amended. The statute gives, and he was accorded, a jury trial on the sole issue he desired to tender—in fact, the only issue, under the evidence including his confession, which he could tender to the counts of the indictment. In concluding this phase of the discussion, it may be said that the appellant thoroughly understood that in electing to stand upon the one plea of "not guilty by reason of insanity" he admitted the commission of the offenses charged against him. He was at the time of the arraignment, and at all times, represented by able counsel. Before permitting the pleas to be entered, the trial court assured itself that the defendant himself was well aware of the nature and effect of his voluntary action.

[7, 8] Appellant further contends that the law under which he was tried violates the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States (the "due process" and "equal protection" clause), relating to the powers of the several states. No federal question is here involved. A state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the federal Constitution. It is not tied down by any provision of the federal Constitution to the practice and procedure which existed at common law. Subject to the limitations noted, it may avail itself of the wisdom gathered by experience to make such changes as may be necessary. Brown v. New Jersey, 175 U. S. 172, 175, 20 S. Ct. 77, 44 L. Ed. 119. There is nothing in the Fourteenth Amendment to prevent a state from adopting a reasonable regulation of procedure in relation to jury trials. Frank v. Mangum, supra. As used therein, the term "due process" refers to the law of the land which derives its authority from the inherent and reserved powers of the states, exercised within the limitations of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, the greatest security of which resides in the right of the people to make their own laws and alter them at pleasure. It does not follow that merely because something has been the actual law of the land from time out of mind, it is therefore "due process." Hurtado v. California, 110 U. S. 516, 529, 4 S. Ct. 111, 28 L. Ed. 232. The common law is only one of the forms of law and is no more sacred than any other. As a rule of conduct, it may be changed at the will of the Legislature, unless prevented by constitutional limitations. The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. Munn v. Illinois, 94 U. S. 113, 134, 24 L. Ed. 77. The power to legislate must not be exercised in an arbitrary or despotic manner, but any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in the furtherance of the general public good, which regards and preserves the principles of liberty and justice, must be held to be due process of law. Hurtado v. California, supra, page 537 (4 S. Ct. 121, 122). Accordingly, it has been held that a statutory provision of a state, such as that already referred to, conferring power on the court, under a plea of "guilty," to determine the degree of crime in an indictment for murder, is constitutional and valid and violates no provision of the United States Constitution. Hallinger v. Davis, 146 U. S. 314, 13 S. Ct. 105, 36 L. Ed. 986.

[9] The fact that the new law and procedure of the state of California may appear to mark a departure from the law and procedure relating to the same subject in other states has no place in this consideration. The "equal protection" provision of the federal Constitution does not secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in states separated only by imaginary lines. On one side of the line there may be a right to trial by jury, and on the other side, under like circumstances, there may be no such right. Missouri v. Lewis, 101 U. S. 22, 31, 25 L. Ed. 989. A state may make different procedure for trials of even the same class of offenses. The Fourteenth Amendment merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. Hayes v. Missouri, 120 U. S. 68, 7 S. Ct. 350, 30 L. Ed. 578; Brown v. New Jersey, supra, page 177 (20 S. Ct. 79).

Measured by these standards, we are satisfied that the statute under which the appellant was tried and convicted violates no provision of the federal Constitution.

[10] Another contention of the appellant is that the trial below was conducted by a judge of the superior court who had no jurisdiction in the premises. The contention is without merit. The superior court of Los Angeles county is composed of 38 regular and a number of extra sessions departments. It is therefore required by the Constitution to have a presiding judge who, subject to the regulations of the judicial council, "shall distribute the business of the court among the judges, and prescribe the order of business." Const. art. 6, § 7. When this cause came on for trial, objection was made to proceeding before the judge who had taken and entered the pleas, upon the ground that he was biased and prejudiced against the defendant. The judge filed a denial of bias or prejudice, but, upon the ground that he desired to avoid arresting the trial by a protracted hearing with reference to his qualifications, and in order that the cause might be heard and determined with the least possible delay, consented to retire from the case. The presiding judge thereupon made and caused to be entered an order that the trial proceed before another judge of the superior court, then sitting in the Los Angeles court under assignment by the chairman of the judicial council. The procedure followed was in strict accord with the terms of the constitutional provision, supra, and with section 170 of the Code of Civil Procedure.

[11, 12] It is next contended that the trial court erred in permitting the prosecution to exercise a peremptory challenge to a juror after the defendant had exhausted all of his peremptory challenges, and after challenge had been waived by him, and the prosecution was satisfied. It is also contended that further error was committed when the court refused to allow the defendant to exercise a peremptory challenge after permitting the state to do so, but after he had exhausted the number of peremptory challenges allowed by law. It does not appear that the prosecution was actually satisfied when 12 jurors had been passed before being sworn, or that it actually waived the right to exercise its peremptory challenges, even though the defendant might have been satisfied. The jurors had not been sworn, and the trial court was of the opinion—and the record supports its view—that the prosecution had not finally announced its satisfaction with the jurors, but had temporarily passed the challenge. Its allowance of the right of the prosecution to exercise a peremptory challenge under the circumstances was, therefore, at most but an irregularity not affecting, so far as we can ascertain from the record, any substantial right of the defendant. People v. Majors, 65 Cal. 138, 148, 3 P. 597, 52 Am. Rep. 295. As to the second contention, the defendant, having used all of his peremptory challenges, had no legal right to any more challenges of that nature. Further than asking to have the record show that it was not satisfied with the jury, the defense disclosed no reason to the trial court why it demanded the right to exercise a peremptory challenge after exhausting the statutory number, and has not made any showing here from which we can say that the defendant was prejudiced, or that the action of the court actually affected any of his substantial rights. The defense was not excluded nor prevented in any way from examining or reexamining, if that were deemed necessary, any or all of the jurors as to their qualifications, or from challenging the jurors for cause, if any existed. The record discloses that the defendant was tried by a fair and impartial jury, and the contention now made appears to be based on a technical ground, rather than on substance.

[13] Complaint is made of the giving and refusing of certain instructions. After the jury was sworn to try the cause, the trial court instructed the jurors that the sole issue for them to determine was the issue of whether the defendant was sane or insane at the time of the alleged commission of the acts charged in the indictment, and that further instructions would be given them later, after the testimony had been submitted, as to what is meant by the term "insanity" and as to the burden of proof in reference thereto. Under the present statute, the instruction was properly given. At the conclusion of the evidence, the defense submitted certain instructions which it requested the court to include in its final charge. They were refused. We have carefully considered the specifications of error (VI to XII, inclusive) dealing with that subject, and are convinced that the action of the court was proper. Certain of the rejected instructions relating to the insanity, or state of mind, of the defendant were sufficiently covered by the charge of the court to render their being given unnecessary. Other instructions as to what the defendant did or did not admit, in entering the plea "not guilty by reason of insanity," were contrary to the express provisions of the Code sections (Pen. Code, § 1016 et seq., supra). Others, applicable if a plea of "not guilty" had also been joined, were not pertinent to the issue submitted to the jury. In view of what we have said concerning the other contentions raised by appellant, we are of opinion that the trial court properly and sufficiently instructed the jury on the issue of insanity tendered by the defendant's plea.

[14] The contention that the trial court had no right to determine the degree of the murder committed by the defendant, or fix the penalty therefor, is without merit. Section 1157 of the Penal Code, which provides that whenever a crime is distinguishable into degrees the jury, if it convict the defendant, must find the degree of the crime of which he is guilty, has no application to the present situation. Section 190 of the same Code alone applies.

[15] We find no error or abuse of discretion in the action of the trial court in refusing the request of counsel for the defense that it should be permitted to open and close the argument to the jury because the burden of establishing the insanity of the defendant rested upon him. The Penal Code provides (section 1093) that, a jury having been impaneled and sworn, the trial must proceed in the order therein prescribed, unless otherwise directed by the court. One of the provisions of the section is that, unless the case is submitted to the jury on either side, or on both sides, without argument, the district attorney, or other counsel for the people, and counsel for the defendant, may argue the case; the district attorney, or other counsel for the people, opening the argument and having the right to close. Section 1369 of the Penal Code, which might imply a different view, relates only to the procedure to be followed in an inquiry into the insanity of a defendant, before trial or after conviction, and has no reference to the actual trial of the issues tendered by the plea or pleas entered by the accused.

[16] Lastly, it is contended that the two judgments of conviction and sentence are void for the reason that each recites that the defendant "duly pleaded guilty" of the crime charged in the respective counts of the

indictment. While, technically, the recitals are not in strict accord with the procedure followed, since the defendant did not actually enter the separate and distinct plea "guilty" as provided by the statute (Pen. Code, § 1016), the result of his action was an admission that he committed the offenses charged. In legal effect, therefore, the recitals state what actually took place. In any event, the objection goes to a mere irregularity which in no sense affects the substantial rights of the defendant. Each judgment refers to the crime with which the defendant was charged, and the appropriate count of the indictment under which he was arraigned, and convicted by his own plea and the verdict of the jury as to his sanity. The penalty or sentence in each judgment is clearly and concisely stated. The judgments are therefore not void, and the situation is not one calling for a reversal.

[17, 18] No good purpose will be served by stating the substance of the evidence interposed by the defense, and met by the prosecution, on the question of the sanity of the defendant at the time he committed the offenses charged. A number of witnesses testified, and much expert testimony was given on both sides of the question. The defendant did not offer himself as a witness, but the law which required his presence in court during his trial submitted him to the observation and scrutiny of the court and jury. People v. Cornell (Cal. Sup.) 134, 263 P. 216. The jurors, with whom rested the responsibility of determining the credibility of the various witnesses who testified in the case, and the weight to be given to the evidence, found that the defendant was sane at the time he committed the acts. The finding of the jury was approved by the trial court when he denied the motion for a new trial. The finding of court and jury is conclusive upon the subject and upon this court, for there is ample evidence to support it.

By agreement of counsel, subject to objections on constitutional grounds reserved by the defendant, the testimony received and taken on the trial of the issue of insanity was considered with other evidence for the purpose of ascertaining and determining the degree of the murder committed by the defendant. It sustains to the fullest extent the finding of the trial court that the crime was murder of the first degree without extenuating circumstances.

The judgments of the trial court, and its orders denying the motion for a new trial and the motion in arrest of judgment are, and each is, affirmed.

We concur: CURTIS, J.; SHENK, J.; PRESTON, J.; RICHARDS, J.; TYLER, Justice pro tem.

92 Cal. App. 683

PEOPLE v. FERELLO. (Cr. 1437.)

District Court of Appeal, First District, Division 1, California. June 22, 1928.

1. Infants 🔑20—Evidence of mother's instructions to daughter to sell liquor sustained conviction for contributing to minor's delinquency (Juvenile Court Law, § 21).

Evidence that defendant was bootlegger, and that she instructed 15 year old daughter to take care of customers in mother's absence, *held* sufficient to sustain conviction of mother for contributing to minor's delinquency, under Juvenile Court Law, § 21 (St. 1915, p. 1246).

2. Infants 🔑20—Witnesses 🔑378—Matters relating to motives of witness are exclusively for jury, and jury's determination as to testimony is conclusive on appeal, unless testimony is inherently improbable.

Matters relating to the motives of a witness are determined exclusively by the jury, and jury's determination will not be disturbed on appeal, unless testimony of witness is inherently improbable or impossible of belief.

3. Infants 🔑20—In prosecution for contributing to daughter's delinquency by requiring her to sell liquor, state was not required to prove daughter knew sale was wrongful and violated law, where daughter was put in danger of "immoral life" (Juvenile Court Law, § 1, subds. 11, 13, and § 21; Wright Act).

In prosecution under Juvenile Court Law, § 21 (St. 1915, p. 1246), for contributing to minor's delinquency by inducing and requiring daughter to sell liquor to defendant's customers in defendant's absence, state was not required to prove that the girl knew that the sale of liquor was wrongful, or that she actually violated the Wright Act (St. 1921, p. 79), where evidence was sufficient to sustain conviction on ground that defendant had persuaded and compelled her daughter to commit an act putting her in danger of leading an immoral life within meaning of Juvenile Court Law, § 1, subds. 11, 13 (St. 1915, p. 1225).

4. Infants 🔑20—Testimony that defendant, accused of contributing to daughter's delinquency by inducing her to sell liquor, was bootlegging held admissible (Juvenile Court Law, § 1, subds. 11, 13, and § 21).

In prosecution under Juvenile Court Law, §§ 1, 21 (St. 1915, pp. 1225, 1246), for contributing to daughter's delinquency by inducing her to sell liquor, admission of testimony that the defendant was bootlegging *held* not error, though involving different offense, since prosecution could show general surroundings in which liquor was sold for the purpose of determining whether the girl was in danger of becoming a delinquent, under section 1, subds. 11, 13.

5. Criminal law 🔑693—Where no objection was made to question or to testimony showing reasons for answer, defendant could not complain answer was inadmissible.

Where answer of which defendant complained was given in response to a question to which no objection was made, and witness was thereafter permitted without objection to relate facts on which answer was based, defendant could not on appeal complain that the witness' answer was inadmissible.

6. Criminal law ⚷1170(2)—Sustaining objection to question held not prejudicial, where fact sought to be established was subsequently shown.

Ruling of trial court in sustaining objection *held* not prejudicial, where fact sought to be established was shown by question and answer immediately following the question objected to.

7. Witnesses ⚷269(2)—Cross-examination as to witness' knowledge whether defendant induced daughter to sell liquor held improper, where witness merely testified daughter had delivered bottle.

In prosecution for contributing to minor's delinquency, under Juvenile Court Law, § 21 (St. 1915, p. 1246), cross-examination of witness as to whether she knew about defendant's having induced daughter to sell liquor *held* improper, where witness merely testified on direct examination as to having seen the daughter deliver the bottle to a man, and there was no claim that the witness had any knowledge of the mother's influence over the daughter.

8. Criminal law ⚷1170(2)—Exclusion of testimony relative to witness' desire for revenge held not prejudicial, where witness' motives were fully developed.

Exclusion of evidence concerning daughter's motives of revenge in prosecution of mother under Juvenile Court Law, § 21 (St. 1915, p. 1246), for contributing to daughter's delinquency, *held* not prejudicial, where matter of the motives of the girl who testified as witness was fully developed.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Delphina Ferello was convicted of contributing to the delinquency of a minor, and she appeals. Affirmed.

Harris & Sullivan, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Lionel B. Browne, Deputy Atty. Gen., for the People.

KNIGHT, J. Defendant was charged by information containing two counts with having contributed to the delinquency of her minor daughter, Nellie Ferello, in violation of section 21 of the Juvenile Court Law (St. 1915, p. 1246); the specific accusations against her being that on or about June 11, 1927, she persuaded, induced, and compelled her daughter, who was 15 years of age, to serve and sell intoxicating liquor to various persons, and that on or about June 1, 1927, she served, sold, and gave wine to her daughter, which caused and manifestly tended to cause and encourage the girl to become delinquent. Upon trial the jury found defendant guilty on the first count and acquitted her on the second, and from the judgment of conviction she has appealed, urging as grounds for reversal insufficiency of the evidence to sustain the verdict and that the court erred in ruling upon the admissibility of evidence and in giving to the jury certain instructions.

[1, 2] The evidence, briefly stated, was as follows: Some time prior to the commission of the offenses charged in the information appellant's husband died, and following his death appellant continued to occupy the family home with her son and daughter. She kept considerable liquor on the premises mostly wine, and while testifying as a witness in her own behalf admitted that prior to her husband's death she had been "bootlegging" and as a consequence thereof had been arrested two or three times, but claimed that since her husband's death she had been obeying the law. On June 11, 1927, she went to town, leaving her daughter in the house alone, and during her absence several men called at the house and the girl served them with wine from her mother's stock, and collected the money therefor. Appellant testified that the actions of the girl in selling the wine were unauthorized by her; but the girl testified to the contrary, claiming that her mother upon leaving that morning instructed her "to clean up the house and take care of the customers," and that, accordingly, when the men called to purchase liquor, she served them with wine, and accepted the money therefor, which she turned over to her mother upon the latter's return home. The girl further testified that during the first two weeks in June, which was subsequent to her father's death, her mother served and sold both wine and whisky to various persons calling at the house; and in this connection the evidence further shows that on one occasion appellant's daughter and a girl friend were present while two men were there drinking, and that the men requested appellant to pour a drink for each of the girls, which appellant did, but that the girls declined to drink. Testimony was also given by a third girl to the effect that between June 1 and 11 she had seen appellant and her daughter serve men with liquor at their home.

The foregoing testimony is legally sufficient in our opinion to sustain the verdict of the jury finding appellant guilty on the first count. True it was shown on the part of appellant that, when the girl first made the disclosures against her mother as to liquor violations, the girl was an inmate of the detention home, having been placed there at the instance of her mother on account of the girl's conduct with a young man with whom her mother had forbidden her to associate, and it may be reasonably inferred from such circumstances that the girl first made the accusations against her mother in a spirit of revenge; but as has been repeatedly held, matters relating to the motives of a witness are to be dealt with and determined exclusively by the jury, and on appeal, unless it be shown that the testimony of the witness is inherently improbable or impossible of belief, the jury's determination will not be disturbed. People v. Fleming, 166 Cal. 357, 136 P. 291, Ann. Cas. 1915B, 881; People v. Tom Woo, 181 Cal. 315, 184 P. 389. In the present case, by finding appellant guilty, the jury evidently accepted the girl's testimony as being true, despite her motives, and there is nothing in the record upon which we can fairly base the conclusion that her testimony is inherently false; consequently the facts established thereby must be taken in support of the verdict.

[3] One point stressed by appellant regarding the asserted insufficiency of the evidence is based upon an instruction given to the jury to the effect that "it is a violation of the law of this state commonly known as the Wright Act [St. 1921, p. 79] for a girl of 15 years, *if she knows it to be wrongful*, to sell wine as a beverage" (italics ours), and that therefore, if the jury found that as a result of appellant's persuasion and inducement the girl sold the wine as charged, "knowing it to be wrongful at the time," appellant should be found guilty on the first count. Appellant contends that there is no proof whatever of such knowledge on the part of the girl.

In order to establish appellant's guilt under the charge involving the girl's alleged violation of the Wright Act, we do not agree, as the foregoing instruction implies, that it was essential for the prosecution to prove the element embodied in those portions of the instruction above italicized and quoted; but even though it were, the question of whether or not the Wright Act has been violated is not material to a determination of this appeal for the following reasons: One of the main purposes sought to be accomplished by the Juvenile Court Law is to prevent children from becoming delinquent as a result of inducement, persuasion, encouragement, or compulsion exercised on the part of others seeking to impose upon their immature minds; and to this end section 21 of the Juvenile Court Law was enacted, denouncing as a crime the commission of any act or omission to perform any duty on the part of another which shall cause or tend to cause or encourage a juvenile "to come within the provisions of any subdivisions 1 to 13, inclusive, of section 1" [St. 1915, p. 1225] of said law; and subdivisions 11 and 13 of said section respectively provide that a juvenile shall be deemed subject to the provisions of said act "who is leading, or from any cause is in danger of leading an idle, dissolute, lewd or immoral life," or "who violates any law of this state or any ordinance of any town, city, county, or city and county of this state defining crime." Count 1 of the information upon which appellant was convicted was drawn in such form as to cover each of the foregoing subdivisions, the two elements of the charge being that appellant's act in persuading and compelling her daughter to sell wine caused and manifestly tended to cause the girl to lead, and that she was in danger of leading, an immoral life, and that in thus persuading and compelling her daughter to sell wine appellant caused the former to violate the Wright Act.

The instruction in question, as will be observed from its terms, pertains exclusively to the element of the charge involving the alleged violation of the Wright Act; but, as indicated, that phase of the case need not be inquired into on this appeal, because, irrespective of whether or not the girl did commit a violation of said act, the evidence is legally sufficient to sustain the verdict of the jury finding appellant guilty on the other element involved in the charge, to wit, that appellant had persuaded and compelled her daughter to commit an act which in itself may not have amounted to the commission of a crime, but which had caused her to lead, and that by reason thereof she was in danger of leading, an immoral life, and, clearly, under this latter charge it is immaterial, so far as the question of appellant's guilt is concerned, whether or not the evidence is sufficient to show that the girl knew that the act she was committing was wrongful.

[4] The first assignment of error relating to the trial court's rulings on the admissibility of evidence is based upon certain preliminary questions asked of Nellie Ferello on direct examination, which were as follows:

> "Q. (by Mr. St. Sure, deputy district attorney): What did she (appellant) do for a living?
>
> "Mr. Maurice (counsel for appellant): I object to that as incompetent, irrelevant, and immaterial.
>
> "The Court: What particular time are you asking about?
>
> "Mr. St. Sure: At the time between the 1st of June and the 15th of June of this year.
>
> "Mr. Maurice: Objected to as incompetent, irrelevant, and immaterial, and has no bearing on the case.
>
> "The Court: Objection overruled.
>
> "Mr. St. Sure: Q. What did your mother do at that particular time and place? A. She was bootlegging.
>
> "Q. During the time particularly referred to, the first two weeks in June of this year, and while living at the address you have given of your mother and brother, did you ever see your mother selling or giving away intoxicating liquors to persons who came to the house? A. Yes.
>
> "Q. On more than one occasion? A. Yes."

Appellant contends that the admission of the answer, "She was bootlegging," was in effect allowing the prosecution to prove an offense for which appellant was not on trial, and was therefore in violation of the rules adhered to in the cases of People v. Dial, 28 Cal. App. 704, 153 P. 970, and People v. Morales, 45 Cal. App. 553, 188 P. 58.

The cases cited are not in point, however, for the charges there were that the defendants themselves unlawfully sold alcoholic liquors on specified dates, in certain designated territory, to particular persons, and testimony was admitted to show that they had disposed of the liquor at times, in places, and to persons other than as charged in the information; consequently the admission of such testimony was held to be error. Here appellant was not charged with having illegally sold liquor, but with having contributed to the delinquency of her daughter, on or about the 11th day of June, by inducing and compelling her "to sell and serve to various persons whose names are * * * unknown certain intoxicating liquors, * * *" which tended to cause the girl to become a delinquent within the meaning of the Juvenile Court Law. It was therefore permissible, we think, for the prosecution to show the general surroundings under which the liquor was sold for the purpose of allowing the jury to determine whether under such circumstances the girl was in danger of becoming a delinquent within the meaning of the Juvenile Court Law.

[5] Furthermore the record shows that the particular question to which appellant objected was not answered, and that the answer, "She was bootlegging," of which she now complains, was given in response to a question to which appellant did not object at all, and that, following the giving of said answer, appellant, without objection, allowed the witness to continue on and relate the facts upon which the answer was based. It would appear, therefore, that appellant is not in a position now for the first time to complain of the effect of the answer given.

[6] Appellant next assigns as error the ruling of the court sustaining an objection to the following question propounded to Nellie Ferello on cross-examination: "These three men who came there, she (appellant) knew nothing about that?" The evident purpose of the question was to show that appellant, being absent at the time, knew nothing about the sale of the liquor on the day in question; but since the record shows that this fact was established by the question and answer immediately following the question objected to, we think appellant was not harmed by the ruling.

[7] A witness for the prosecution named Lillian Aikens was asked the following question on cross-examination: "You do not know about the mother of Nellie inducing or allowing her to sell any liquor, do you?"—and an objection thereto by the district attorney was sustained. The ruling was proper for the reason that on direct examination the witness had testified only as to having seen Nellie Ferello deliver a bottle to a man, and there was no claim made by the witness or by the prosecution that the witness had any knowledge of any influence being exercised over the girl by her mother.

[8] For the purpose of showing that her daughter was actuated by a feeling of revenge in making the accusations against her, appellant sought to prove the circumstances under which her daughter was sent to the detention home, and during the course of the examination of various witnesses on this subject a number of objections made by the prosecution were sustained. It appears, however, from an inspection of the entire evidence, that before the testimony on this subject was finished the matter of the motives of the girl was fully developed, and therefore it would seem that none of the rulings complained of could have operated to appellant's prejudice.

Appellant also complains of an instruction embodying the substance of subdivision 3 of section 2061 of the Code of Civil Procedure, which prescribes one of the rules to be used by the jury in weighing the testimony of witnesses, it being claimed that the word "falsely" was omitted from the instruction and that thereby the meaning of the instruction was destroyed. The original record before us shows, however, that the word was not omitted. It is our conclusion that the record discloses no error justifying a reversal.

The judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

CHADWICK v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY. ★

(Civ. 6049.)

District Court of Appeal, Second District, Division 2, California. June 21, 1928.

Hearing Granted by Supreme Court Aug. 20, 1928.

1. Mandamus ⚷48, 52—Lower court will not be required to amend findings, conclusions, and judgment when motion for same relief was properly denied on showing made.

Appellate court will not by mandamus compel superior court to amend findings, conclusions, and judgment where, on the showing made, it was justified in refusing such relief on motion.

2. Judgment ⚷324—Motion to amend findings, conclusions, and judgment on ground of clerical error held properly denied on showing made.

Motion to amend findings, conclusions, and judgment in condemnation suit for clerical error as to value of property was properly denied, where evidence consisted only of affidavit asserting that such error was made and judgment roll showing judgment consistent with findings.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Superseded by opinion of Supreme Court, 270 P. 192.

Application by Elizabeth K. Chadwick for a peremptory writ of mandamus directed to the Superior Court in and for the County of Los Angeles, directing it to amend its findings of fact, conclusions of law, and interlocutory judgment in a certain condemnation suit. Writ denied.

J. Allan Frankel, Sidney A. Wilson, and A. V. Kaufman, all of Los Angeles, for petitioner.

Jess E. Stephens, City Atty., and Herman Mohr and E. H. Delorey, Deputy City Atty., all of Los Angeles, for respondent.

CRAIG, J. This proceeding is one seeking the issuance of a peremptory writ of mandamus directing that the above-entitled superior court amend the findings of fact, conclusions of law, and interlocutory judgment entered in a certain condemnation suit. The action in question was entitled City of Los Angeles v. George T. Gower et al. Elizabeth K. Chadwick was one of the defendants. Upon the oral presentation of the matter before this court, the averments contained in the affidavit of J. Allan Frankel were stipulated to be true. This affidavit states that the referees in their report filed in said action awarded Elizabeth K. Chadwick $1,190 for the value of land taken and $1,746 for the value of the improvements; that at the hearing before the superior court upon the referee's report the court approved "the said award of $2,936 to the defendant Elizabeth K. Chadwick as set forth on pages 25 and 26 of the referee's report," etc. It further appears from said affidavit that in the formal findings the value of the property of the petitioner and the improvements thereon was placed at $1,190, instead of $2,936, as set forth in the referee's report; that this seems to have been due to an error in computation "on the part of the clerk or stenographer who transcribed such findings of fact and conclusions of law; and that the judgment of this court, based upon such referee's report, was actually for the sum of $2,936."

Thereafter the defendant in the condemnation action, Elizabeth K. Chadwick, moved the respondent court to amend the findings of fact, conclusions of law, and interlocutory judgment in the same particulars as those whose correction is sought in this proceeding. The motion was denied.

It is the theory of petitioner that a clerical mistake only was made, and that where this is the case a party aggrieved has a right to have the judgment erroneously made so corrected as to conform to the judgment actually ordered. It may be conceded that if, upon the hearing of petitioner's motion to amend, facts had clearly appeared, as contended by her in this proceeding, the relief prayed for then and now would not only have been justified, but have been hers as a matter of right. Boust v. Superior Court, 162 Cal. 343, 122 P. 956.

Respondent, in resisting the petition, contends that there was no evidence before the superior court to show that a clerical error or any error had been committed, or to indicate that the difference between the referee's report and the findings and interlocutory judgment in the particulars in question did not result from a deliberate judicial determination, as declared in such findings and judgment. To this the principal reply of the petitioner is that the stipulation as to correctness of the facts set forth in the affidavit of J. Allan Frankel precludes the respondent from disputing such facts and, therefore, of advancing the argument just stated; but it has been shown above that the affidavit merely shows that there appears to have been a clerical error.

[1, 2] The outcome of this proceeding does not hinge upon a determination of what the facts were as to whether or not an error was actually committed, as contended by petitioner, and, if so, whether its nature was clerical or judicial. The deciding factor here is found in the facts before the trial court upon the hearing of the motion for amendment and correction of the findings, conclusions of law and interlocutory judgment. The proceeding in this court cannot be converted into a hearing de novo upon the application just mentioned. A reviewing court will not compel an inferior tribunal to do that which the latter upon the hearing before it was justified in refusing to do. To do so would violate every principle bearing upon the determination of justice involved in the proceeding in question. It would be unfair to the trial court and inequitable to respondent, and it would ignore all rules requiring diligence in the presentation of his case by one who would secure remedial relief through a court's decree. The affidavit in question does not represent that any proof was produced upon the hearing of the motion of Elizabeth K. Chadwick before the superior court except the affidavit of petitioner's attorney and the judgment roll. The gist of that affidavit was to assert that a clerical error had been made and that the judgment of the court was for $2,936, but the judgment roll showed that the judgment was for only $1,190, and that the findings of fact, actually signed by the court, were consistent with the rendition of that judgment and none other. The judge who presided upon the hearing of the referee's report was not made a witness; the stenographer and the clerk were not sworn nor questioned. The proceeding involved the determination of a question of fact, and, as we have said, in so far as the record before us shows, nothing was presented to the trial court except the judgment roll and the affidavit above mentioned. Without some further proof it is doubtful if an order amending the judgment

would have been justified. It is certain that an order denying the application cannot be disturbed. The showing certainly warranted the conclusion that if any error had been committed it was judicial and not clerical. Under such circumstances, the only remedy of the aggrieved party is by appeal, and no summary proceeding can be maintained. The authorities to this effect are numerous. Two of those in which the subject is given full consideration are McKannay v. McKannay, 68 Cal. App. 709, 230 P. 218, and County of Los Angeles v. Rindge Co., 69 Cal. App. 72, 230 P. 468.

The writ is denied.

We concur: WORKS, P. J.; THOMPSON, J.

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92 Cal. App. 585

CONTINENTAL INS. CO. et al. v. CITY OF LOS ANGELES. (Civ. 4893.)

District Court of Appeal, Second District, Division 2. California. June 16, 1928.

1. Municipal corporations 🔑1021, 1022—Provision of city charter that action for money or damages should not be brought against city until demand therefor had been rejected held valid.

Provision of charter of Los Angeles providing that no suit shall be brought upon any claim for money or damages against city until demand for it has been presented and rejected in whole or in part *held* reasonable and valid.

2. Municipal corporations 🔑1021, 1022—Action held not maintainable against city for negligent maintenance of electric wires without presentation of claim to board of public service commissioners (Los Angeles Charter, § 222, as amended by St. 1903, p. 568).

Action cannot be maintained against city of Los Angeles for loss due to negligent construction and maintenance of electric wires until demand has been presented to board of public service commissioners and rejected by them, presentation of demand to city council being insufficient under Los Angeles Charter (St. 1889, p. 510) § 222, as amended by St. 1903, p. 568, art. 18, § 192, as amended by St. 1911, p. 2135, art. 18, § 209, as amended by St. 1903, p. 567, art. 21, §§ 216, 222g, as amended by St. 1911, p. 2152, in view of Los Angeles Charter, §§ 208–216, art. 18, § 192, as amended by St. 1903, p. 563, and § 213¾ added by St. 1907, p. 1167.

3. Municipal corporations 🔑1021, 1022—Charter provision providing for presentation of claim as prerequisite to action against city includes claims not based on contract (Los Angeles Charter, § 217, as amended by St. 1911, p. 2152).

Los Angeles Charter (St. 1889, p. 510) § 217, as amended by St. 1911, p. 2152, relative to presentation of claim as prerequisite to action against city for money or damages, includes other claims than those based on contract, in view of use of word "expenditures" rather than "indebtedness."

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by the Continental Insurance Company and others against the City of Los Angeles to recover money on a policy of insurance to cover loss by fire alleged to have been caused by negligent construction and maintenance of electric wires. Judgment for defendant, and plaintiffs appeal. Affirmed.

John Everson, of Glendale, for appellants.

Jess E. Stephens, City Atty., W. B. Mathews, Sp. Counsel, and James G. Leovy, all of Los Angeles, for respondent.

VALENTINE, Justice pro tem. This is an appeal upon the judgment roll from a judgment of the superior court rendered upon plaintiffs' refusal to amend their third amended complaint in an action to recover the amount of insurance paid by them for a loss by fire alleged to have been caused by the negligent construction and maintenance of electric wires in the city of Los Angeles.

A general demurrer to the third amended complaint was sustained on the ground that plaintiffs' claim should have been presented to the board of public service commissioners of the city of Los Angeles before suit was begun, and upon the ground that suit should have been brought against the said board. Appellants contend that under the provisions of the charter of the city of Los Angeles the board of public service commissioners is a special agency, only, of the city. Respondent contends that the board has complete authority over the city's electric system and is made solely responsible for the management of the same, and that the department of public service, under the provisions of the charter, a municipal organization of independent functions; that it is a legal entity and is to be conducted as a distinct and separate business enterprise of the city, under the management and control of the board of public service commissioners; and that suit must be brought against it and not against the city.

[1] Under the view we entertain it is unnecessary for us to determine whether the city may be sued for the acts or omissions of the board, for the reason that the other point raised by respondent on this appeal is that under the provisions of the charter no suit may be brought for money or damages on account of a wrongful act or omission in the department of public service unless and until a demand therefor has been made on the board of public service commissioners, and has been rejected in whole or in part as provided in the charter, and that such a demand is a

prerequisite to the bringing of such a suit against either the city or such board.

> "A presentation of a demand as a condition precedent to the beginning of an action against a municipal corporation, and a special provision limiting the time thereafter in which such action may be brought, are measures which, without doubt, the Legislature may ordain. Thus the provision of the Los Angeles charter, which, in slightly varying form, is common to most charters, is a reasonable and valid provision as a condition precedent. That charter provides (section 222): 'No suit shall be brought upon any claim for money or damages against the city of Los Angeles * * * until a demand for the same has been presented as herein provided and rejected in whole or in part.' Bank v. Los Angeles, 151 Cal. 655, 91 P. 795." Geimann v. Board of Police Commissioners, 158 Cal. 748, 112 P. 553.

It seems well settled, and for sound reasons, and is not denied by appellants, that the presentation of a demand in the manner prescribed by law is a necessary prerequisite to the beginning of such actions as the present one, and it follows that if the complaint failed to allege that this was done it failed to state a cause of action and the demurrer was properly sustained on this ground alone. The complaint contains an allegation that the demand in this case was presented to the city council and by them rejected before this action was begun. This squarely presents the question of whether the presentation of the demand to the city council was a compliance with the law and the provisions of the charter, as contended by appellants, or whether the demand under those provisions should have been presented to the board of public service commissioners, as contended by respondent.

The department of public service under the management and control of the board of public service commissioners was created by an amendment to article 18 of the Charter in 1911. Stats. 1911, p. 2135. A careful examination of the Charter of 1889 and the subsequent amendments discloses a consistent evolution or development of the ideas and intentions of the people and the Legislature as to this question of preliminary demand before suit brought. It is to be regretted that limitations of space prevent more than brief quotations from the provisions, for some of them, apparently unrelated to the subject of claim and demand, are collaterally significant as to the development of the general plan.

Section 222 of article 21 of the 1889 charter (Laws of 1889, p. 510) provides as follows:

> "No suit shall be brought upon any claim for money or damages against the city of Los Angeles, its board of education, or the board of directors of the Los Angeles public library, until a demand for the same has been presented as herein provided, and rejected in whole or in part. If rejected in part, suit may be brought to recover the whole. Nor shall suit be brought against said city upon any such claim or demand, if the same shall be in whole approved and audited as provided herein; provided, that nothing herein contained shall be construed so as to deprive the holder of any demand of his right to resort to a writ of mandate, or other proceeding, against the said council or any board or officer of said city, to compel it or him to act upon such claim or demand, or to pay the same when so audited."

The provision, "until a demand for the same has been presented as herein provided," relates to preceding section of article 21. Section 208 provides:

> "All claims and demands whatever against the city of Los Angeles, except interest coupons on bonds and bonds of the funded debt, shall be paid only on demands as herein provided for."

Section 209 provides:

> "Said demands except demands payable out of the school fund and library funds shall be presented to the council," etc.

The balance of section 209 and sections 210 and 211 relate to approval by the mayor, and procedural matters. But section 212 provides:

> "All demands payable out of the school fund must, before they can be approved by the city auditor or paid, be previously approved by the board of education."

And section 213 provides:

> "All demands payable out of the library fund must, before they can be approved by the city auditor or paid must be previously approved by the board of directors of the Los Angeles public library."

The balance of sections 212 and 213 and sections 214 and 215 relate to details of procedure. Section 216 provides, among other things:

> "No payment can be made from the city treasury, or out of the public funds of said city, unless the same be specially authorized by law or this charter, nor unless the demand which is paid be duly audited as in this chapter provided."

The term "audited as used in this charter with reference to demands upon the treasury, is to be understood to mean that said demands have been presented to, passed upon and approved by every officer and board of officers as required by this charter." At the December, 1902, election, various amendments to the charter were adopted by the voters and approved by the Legislature in January, 1903. Article 18 of the charter had provided for the rights and duties of the city as to "water and water rights," and section 192 prescribed certain rights and powers of the corporation (the city) as to construction, maintenance and operation of waterworks, etc., but section 192 of article 18 as amended in 1903 (Stats. 1903, p. 563) created the water board, in the following language:

> "Section 192. There is hereby created, for the purpose of managing and controlling all wa-

> ters and water rights that are now, or may be hereafter, owned by the city of Los Angeles, a department of said city to be known as the 'water department,' which shall be under the management and control of a board of water commissioners."

The section then prescribes the details of the organization of the board and its powers, among them to sue and be sued, and providing for the conveyance to the board "as special trustee for the city" all real and personal property belonging to the city and providing for the creation of the water revenue fund, from which moneys shall only be withdrawn "upon demands authenticated by the signatures of the president and secretary of the board, or in the absence of the president, by the signatures of two members and the secretary."

Section 209 of the charter is amended to read as follows (Laws of 1903, p. 567): "Said demands, *except demands payable out of the school fund, the library fund, or water revenue fund*, shall be presented to the" city "council," and adds a new section to the charter to be known as section 213½ as follows: "All demands payable out of the water revenue fund must be presented to the board of water commissioners, and, before they can be approved by the city auditor or paid, must be previously approved by the board of water commissioners," and prescribes the procedure and, further, "provided, that in case that the city auditor shall reject any such demand, or if, in his opinion, said demand should be paid only in part, he shall return the same to the board of water commissioners, instead of to the council"—and if such demand be again considered and approved by the board the objections of the auditor shall be thereby overruled.

Section 222 is also amended (Laws of 1903, p. 568), and the changes are significant as showing the consistent development of the plan and intention as new boards were created to impose upon them the original duty of approving or rejecting demands, and reads as follows:

> "No suit shall be brought on any claim for money or damages against the city of Los Angeles, its board of education, board of directors of the Los Angeles public library, or the board of water commissioners, until a demand for the same has been presented as herein provided, and rejected in whole or in part. If rejected in part, suit may be brought to recover the whole. Nor shall suit be brought against said city, or said board of education, board of directors of the Los Angeles public library, or board of water commissioners, upon any claim or demand that has been in whole approved and audited as provided herein; provided, that nothing herein contained shall be construed so as to deprive the holder of any demand of his right to resort to a writ of mandamus or other proceeding against the city council, or any board or officer of said city, to compel it or him to act upon such claim or demand, or to pay the same when so audited."

In 1907 the charter was again amended by adding another new section to be known as section 213¾ (Stats. 1907, p. 1167), providing that certain demands must be presented to the board of public works and providing as in the case of the water board, under section 213½, that if the city auditor rejects the demand, he shall return the same to the board of public works "instead of to the city council." And section 209 was amended (Stats. 1907, p. 1166) by adding another class of demands (i. e., those payable out of funds derived from bonds of the city and referred to in the new section 213¾ above), which shall not be presented to the council in the first instance, but to the board of public works. And sections 214 and 222 were amended so as to be consistent with the above new provisions.

In 1911 article 21 was amended so as to include certain sections not previously included. The sections relating to claims and demands were included in sections 216 and 222g, inclusive (Stats. 1911, p. 2152). We find that section 217 is the same as section 208 in the original charter, and provides as follows:

> "Every claim and demand against the city of Los Angeles, except as provided in the preceding section, shall be first presented to and approved by the board, commission or officer authorized by this charter to incur the expenditure or liability represented thereby; if such approval be made by a board or commission the same shall be evidenced by a vote of two-thirds of the members thereof, taken with the ayes and noes and spread upon the minutes, and the action of such board or commission, and the date thereof, must be endorsed on such demand, and signed in writing by the president or by two members thereof, and the secretary or clerk thereof; and if such approval be made by an officer he, or his chief deputy, shall endorse the same by his signature in writing. In all cases the date of such approval shall be given."

Section 218 provides, among other things, that at the end of each month the "board, commission or officer having the management or control of any department or office" shall cause a pay roll of employees to be made out, which pay roll shall be certified "as herein provided in the case of demands against the city."

Section 219 provides for approval by the city auditor of all demands approved by any board or commission, but only "*provided*, that such approval by the city auditor shall be valid only for such amount as shall have been approved by the board [or] commission." There is a change in the procedure here from that provided in the new section 213½ added in 1903 referred to above, where the city auditor was directed to return the claim to the board if he rejected it in whole or in part. By section 219 (Stats. 1911, p. 2153) the auditor is directed to transmit the claim to the finance committee of the council, and section 220 provides the procedure by the finance committee. This would seem to be a change in the manner of "checking" rather than indicating any change in policy or principle. Sections 221 and 222 regulate procedure and are not material to the question of demand. The next material section is section 222g. This is the original 222 as amended in 1903 and 1907, but the change in the amendment of 1911 (sec. 222g) is significant in view of the creation of the new boards and commissions since the adoption of the charter in 1889. This section 222g was again amended in 1921 and as it was in force as so amended when the instant case was begun by the filing of the complaint, November 22, 1923, the section as so amended is here quoted in full (Stats. 1921, p. 1817):

> "Sec. 222g. No suit shall be brought on any claim for money or damages against the city of Los Angeles, its board of education, board of directors of the Los Angeles public library, board of public works, or the board of public service commissioners, or any officer or board or commission of the city until a demand for the same has been presented as herein provided, and rejected in whole or in part. If rejected in part, suit may be brought to recover the whole, Except in those cases where a shorter period of time is otherwise provided by law, all claims for damages against the city must be presented within six (6) months after the occurrence from which the damages arose, and all other claims or demands shall be presented within six (6) months after the last item of the account or claim accrued. Nor shall suit be brought against said city, or any board, officer or commission thereof, upon any claim or demand that has been in whole approved and audited as provided herein; provided that nothing herein contained shall be construed so as to deprive the holder of any demand of his right to resort to writ of mandamus or other proceeding against the City Council, or any board, commission or officer of said city, to compel it or him to act upon such claim or demand, or to pay the same when so audited."

[2, 3] So that it is apparent that the general plan or scheme and intention of the framers of the charter and of the Legislature was first to provide for the presentation of a demand as a necessary prerequisite to the maintenance of a suit to the end that the city should always be given an opportunity to pay before being subjected to litigation, and second, as its business and administrative responsibility increased to create new boards and commissions with the object and to the end of relieving the council of many of its responsibilities and enabling it to function, more especially as a distinctive legislative body. After the adoption of the charter as new boards and commissions were created, and broad powers and duties and independent functions were given to them, so, consistently, was the charter amended from time to time to make its provisions harmonize with this main purpose, and in this connection to provide that before paying any demand it must first be presented to and approved by the board or commission authorized by the charter to incur the expenditure or liability represented. The entire plan and scheme of approving and auditing every demand disclosed by the provisions of the charter quoted and referred to above makes it apparent that the prerequisite presentation of a demand in accordance with the provisions of the charter requires that that demand be first presented to the board or commission without whose approval the council may not order it paid, and this without reference to whether a suit is subsequently brought against the city or against the board. Appellants in quoting the language of the charter (section 217, above) substituted the word "indebtedness" for "expenditure," and argue that the section indicates that claims based upon contract only are intended. If the word were "indebtedness" the point might merit consideration, but the word is "expenditure." The demand should first be presented to the board, so that if it approved the demand it could recommend the "expenditure." Geimann v. Board of Police Comm., supra.

In the instant case the demand should have first been presented to the board of public service commissioners before action was brought. This was not done, and no allegation that it had been done was contained in the complaint, and the demurrer was properly sustained.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

92 Cal. App. 628

PEOPLE v. STAIGERS. (Cr. 1627.)

District Court of Appeal, Second District, Division 2, California. June 20, 1928.

1. Forgery 🔑26—Information alleging that defendant counterfeited written instrument and passed it as true by suing thereon charged forgery (Pen. Code, §§ 134, 470).

Information alleging that defendant made, forged, and counterfeited certain written instrument, and fraudulently uttered, published, and passed as true such instrument by filing action to enforce it, charged forgery, as defined by common law and Pen. Code, § 470, not preparation of false instrument with intent to produce it as genuine or true in legal proceeding, contrary to section 134.

2. Criminal law 🔑1159(3)—Appellate court will not determine issue, on which evidence was directly conflicting.

Where there was direct conflict of evidence in forgery trial as to whether purported employment contract, on which defendant based civil action, was executed before date alleged, appellate court will not pass on such issue.

3. Criminal law 🔑553—Judge need not believe every uncontradicted assertion of witness or affiant.

Trial judge is not compelled to accept as true every assertion of a witness or affiant, merely because it is not directly contradicted.

4. Criminal law 🔑938(1)—New trial will be granted only on strictest showing of diligence and tender of new evidence not merely cumulative or unlikely to change result.

The claim of newly discovered evidence is viewed with distrust and disfavor, and new trial therefor will be denied, in absence of strictest showing of diligence or on tender of merely cumulative evidence or evidence which would not strongly tend to produce different result.

5. Criminal law 🔑938(1), 1156(3)—Diligence to procure cumulative effect of, and likelihood of different result on, new evidence tendered, are questions for trial court, whose action will not be disturbed, unless discretion was manifestly abused.

Questions whether sufficient diligence to procure alleged newly discovered evidence was shown, and whether such evidence is merely cumulative or would not strongly tend to produce different result, are addressed to sound legal discretion of trial court, whose action in denying new trial will not be disturbed on appeal, except on showing of manifest abuse of such discretion.

6. Criminal law 🔑945(1)—Denial of new trial for new evidence of seeing contract, alleged to have been forged, before alleged date of signature, held not abuse of discretion.

Denial of new trial for newly discovered evidence that typewritten employment contract, alleged to have been forged, was seen by affiants before date on which defendant was alleged to have obtained employers' signatures to pencil written letter, for which contract was alleged to have been substituted, *held* not abuse of discretion, in view of defendant's testimony as to same fact, contradictory testimony of state's witnesses, and defendant's asserted loss of memory as to such affiants.

7. Forgery 🔑12(½)—Employment contract, alleged to have been forged, held not nudum pactum, though not mentioning corporation officers signing it individually and authorizing cancellation by employee at any time (Pen. Code, § 470).

Purported contract of employment at stated salary and commissions *held* not a nudum pactum, not subject of forgery, in violation of Pen. Code, § 470, by substitution thereof for letter, signed by corporation officers, without signing corporation name, though signers were not mentioned in body of instrument and it provided for cancellation by employee at any time on forfeiture of commissions due him.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

J. D. Staigers was convicted of forgery, and he appeals. Affirmed.

Geo. B. Ross, of Los Angeles, for appellant.
U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant was charged and convicted of the crime of forgery, thereafter moved for a new trial, which was denied, and appeals from the judgment and from the order denying such motion. The specific acts upon which appellant was charged with having committed the offense mentioned, consisted of the alleged preparation in pencil of a letter, to which he obtained the signatures of his employers on April 23, 1927, which writing he later erased, writing in lieu thereof with typewriter, upon the same paper and over said signatures, a contract of employment at a stated salary and commission, and which such contract Staigers subsequently attempted to enforce by an action in the superior court.

[1] It is first contended upon this appeal, and was urged as a ground of motion for arrest of judgment, that appellant was erroneously prosecuted for forgery under the provisions of section 470 of the Penal Code, and that the offense, if any, should have been charged under section 134 thereof. It is provided by section 470 that:

> "Every person who, with intent to defraud, signs the name of another person, * * * or falsely makes, alters, forges, or counterfeits, any * * * writing obligatory, * * * contract, * * * or counterfeits or forges the seal or handwriting of another; or utters, publishes, passes, or attempts to pass, as true and genuine, any of the above-named false, altered, forged, or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person, * * * is guilty of forgery."

Section 134 of the Penal Code reads as follows:

> "Every person guilty of preparing any false or antedated book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced for any fraudulent or deceitful purpose, as genuine or true, upon any trial, proceeding, or inquiry whatever, authorized by law, is guilty of felony."

It is to be observed at a glance that appellant was not charged with having prepared a false paper or instrument in writing with intent to produce it as genuine or true, upon any trial, proceeding or inquiry authorized by law. The information alleged that J. D. Staigers did "make, forge and counterfeit a certain instrument in writing (setting forth the contract in full) * * * well knowing that the said instrument in writing was false, *altered, forged, and counterfeited,* as aforesaid, and *with intent* then and there to *defraud* * * * did * * * wilfully, unlawfully, falsely, fraudulently and feloniously utter, publish, and pass as true and genuine the instrument aforesaid, *by filing an action* in the superior court * * * to enforce the said false and forged instrument in writing." It was not the theory or contention of the prosecution that appellant at any time intended to produce upon a trial, proceeding, or inquiry the original letter which he prepared and caused to be signed, or to make any use of it whatever. If he erased the writing to which his employers appended their signatures and in its place and stead wrote something different, or so altered the existing instrument as to give it a different effect, such act constituted forgery under section 470 of the Penal Code. People v. Brotherton, 47 Cal. 388, 401. The instrument which appellant did in fact produce and seek to enforce was therefore a counterfeit in its entirety, and fell within all three of the definitions embraced in the information; and, being "altered, forged and counterfeited," with intent to defraud, such offense, if committed, was within neither the terms nor the spirit of section 134 of the Penal Code, but it embodied all of the elements of forgery as defined both by the common law and by the statutes of this state, and was properly so designated by the information. People v. Bendit, 111 Cal. 274, 43 P. 901, 31 L. R. A. 831, 52 Am. St. Rep. 186; People v. McPherson, 6 Cal. App. 266, 91 P. 1098.

[2-6] The defendant swore, and insisted throughout the trial, that he did not write said letter, in lead pencil or otherwise, but that the contract of employment upon which he based his civil action, and which was introduced in evidence in this case, was made and executed by all parties long prior to April 23, 1927. There is a direct conflict of evidence upon this issue, and so this court will not pass upon it. The principal ground upon which appellant seeks a reversal of the judgment consists of asserted errors of the trial court in denying his motion in arrest of judgment and for a new trial, which were founded upon certain affidavits setting forth alleged newly discovered evidence. It is strongly urged that if said contract was in fact executed as asserted by appellant and was in existence for some months prior to the date of the alleged forgery thereof, he was not guilty of the offense charged in the information. It is claimed that after his conviction and while confined in the county jail awaiting sentence, appellant's counsel interviewed J. A. Marshall, a deputy labor commissioner, and then for the first time was informed by the latter that Staigers had exhibited to him the contract in question early in March, 1927; that Marshall positively identified the contract marked People's Exhibit No. 1 in this case as the document which he had seen on the date last mentioned. The deputy commissioner's affidavit to the foregoing facts, and, further, that he was not acquainted with nor interested in the defendant, was presented to the trial court upon said motions, and is a part of the record herein. L. S. Driggs also made an affidavit that he had known the defendant about three years, but had not known of the criminal action until January, 1928; that upon inspection of People's Exhibit No. 1 he identified the same, and distinctly remembered having seen it prior to April 23, 1927, and "perhaps as early as 1926"; that he "distinctly recalled that the contract was peculiar in form in that certain of the signatures subscribed thereto overlapped the typewritten portion of the contract." Affidavits of the defendant and his counsel averred that during the preparation for trial of this case one of his attorneys persistently urged him to try and remember as to whether or not some one or more persons had been shown the contract before April, 1927, but that he had entirely forgotten these incidents and did not in fact know at the time of trial that such evidence could be obtained or that it existed. While, as we have observed, the defendant positively testified that said contract was genuine, that he did not write any letter and cause it to be signed, nor erase or alter any such document, the people's witnesses Palmer, Colmeraues, and Grau just as positively testified upon the trial that appellant did write said letter with a "soft lead pencil," and that when questioned he gave various reasons for so doing. A statement in writing, signed by Staigers and the three persons last mentioned, dated April 25, 1927, also appears in the record as People's Exhibit No. 2 wherein the defendant admitted having so written said letter, and that:

> "The entire letter was written in soft lead pencil except the signature of Grau, Colmeraues and Palmer which were in ink and on the lower left hand corner of the sheet. Their signatures appeared as below. This statement is made and notorized as a guarantee against the above mentioned sheet again turning up with any written matter other than the above appearing over said signatures."

A handwriting expert testified that a minute examination of the contract before the jury disclosed beyond question that certain typewritten words had been written on top of portions of the signatures; that he found parts of small pencil markings, and evidences of erasures in various places on the exhibit. Another expert testifying for the defendant admitted that he discovered marks or specks which might have been pigments of a pencil. All that either affidavit presented on behalf of the defendant in support of his motion for a new trial tended to show was that the contract in controversy existed previously to the date of the alleged forgery by alteration. To this fact the defendant himself had testified, and hence the offered new testimony was but cumulative in this respect, and tending to contradict four witnesses produced by the prosecution. Appellant's memory and some of his testimony from the witness stand were not entirely consistent nor at all in accord with that of other witnesses which the jury apparently accepted as true, which may properly have been considered by the trial court in passing upon the motion for new trial. Among other inconsistencies, he could not remember when he wrote People's Exhibit No. 1, and although he testified as to where it was written, he admitted that in giving a deposition some time previously in the civil action he then claimed that he did not know where it was written. He swore that no one was present when he wrote it, but almost in the same breath he accounts for the discovery of the place by saying that shortly after being called to the district attorney's office in June or July, 1927, he "began to dig out all the facts"; that he visited various offices where he had called when he prepared the contract, and "by having the weight of a forgery charge hanging over my head, I went to all of my friends," and finally says he found he had written it in the offices of the California Petroleum Company; that he then took the document to a bank some three miles distant, and signed it there, when no one was present. A trial judge is not compelled to accept as true every assertion of a witness or of an affiant merely because it is not directly contradicted. It may well have been the conclusion of the trial court that appellant's asserted loss of memory as to the witnesses Marshall and Driggs until after the trial, weighed in the light of his other testimony during the trial, did not indicate the exercise of that degree of good faith or diligence which the statute requires, and also that in any event the new evidence was not such as would, when traversed by strong contradictory testimony, render a different result probable in the minds of another jury. The claim of newly discovered evidence is viewed with distrust and disfavor, and in the absence of the strictest showing of diligence, or upon the tender of merely cumulative evidence, or evidence which would not strongly tend to produce a different result, a new trial will be denied. People v. Freeman, 92 Cal. 359, 28 P. 261; People v. Gonzales, 143 Cal. 605, 77 P. 448; People v. Lapique, 136 Cal. 503, 69 P. 226. These questions are addressed to the sound legal discretion of the trial court, and except upon a showing of manifest abuse of such discretion, its action will not be disturbed on appeal. People v. Weber, 149 Cal. 325, 86 P. 671; People v. Byrne, 160 Cal. 217, 116 P. 521; People v. Canfield, 173 Cal. 309, 159 P. 1046; People v. Kilfoil, 27 Cal. App. 29, 148 P. 812. We cannot say that such an abuse of discretion is shown here.

[7] Finally, it is argued that while the purported contract was apparently an agreement in writing between the Watson Perforating Company, Inc., a corporation, and J. D. Staigers, it was not signed by the corporation, but was in fact signed by Grau, Colmeraues, and Palmer, who were not mentioned in the body of the instrument; and, further, that the contract provided for cancellation by Staigers at any time upon a forfeiture of any commissions which might be due him, and that since he was at liberty to repudiate it, it had no legal binding force upon the parties. Hence, it is urged that the instrument was a mere nudum pactum, and that since such documents are not subjects of forgery, no offense could be or was committed. The contract is set forth in full in the information, and by its provisions the corporation agrees to pay Staigers $150 per month to start, said salary to be increased to $175 per month "when both parties concerned have agreed"; and it further provides for a commission of 15 per cent. upon all business done by the corporation. True, the corporate name is not signed thereto, but the three signers appear from the record before us to have been the president, secretary and treasurer, respectively, of said institution. It is dated January 20, 1926, at Torrance, Cal., and recites, in part, "This contract entered into * * * between the Watson Perforating Company, Inc., * * * and J. D. Staigers; * * * J. D. Staigers shall receive the following named salary and commission," and is signed, as we have seen, by the officers of the contracting corporation. It has been held that a letter signed by the president of a corporation, individually, without adding his title of office, will bind the corporation if the other party understood that he was dealing with the corporation. Richardson Press v. Vandergrift, 165 App. Div. 180, 150 N. Y. S. 238. Other cases to the same effect are St. Clair v. Rutledge, 115 Wis. 583, 594, 92 N. W. 234, 95 Am. St. Rep. 964; Lewis v. Pulitzer Pub. Co., 77 Mo. App. 434, and Fletcher, Ency. Corp., vol. 3, p. 2460, § 1470. It is conceded that appellant instituted suit upon this identical paper for the collection of moneys which he claimed to have earned thereunder. It was an agreement signed by the three principal officers of the corporation that the latter would compensate appellant for services rendered, and had it been intentionally so executed by the corporate officials and relied upon by all parties, little could have been added to its legal import by the signing of the name under which they were doing business as a corporation. The contract was therefore not a nudum pactum, and the evidence strongly tends to show that by the alterations heretofore mentioned appellant intended to forge an enforceable contract.

The judgment and orders appealed from are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

92 Cal. App. 729

PEOPLE v. MURPHY. (Cr. 1038.)

District Court of Appeal, Third District, California. June 25, 1928.

1. Robbery ⇨26—Defendant's guilt of robbery held for jury, as against contention there was not sufficient evidence to connect him with crime.

Defendant's guilt of robbery *held* for jury, against contention that there was not sufficient evidence to connect him with commission of offense.

2. Criminal law ⇨925(1)—Denying accused new trial held not error, where during recess juror and prosecuting witness engaged in conversation, although conduct was improper.

Denying new trial *held* not error, where during recess one of jurors took seat in courtroom in space reserved for spectators and prosecuting witness seated himself beside juror and engaged in earnest conversation for period of four or five minutes, although such conduct was improper.

3. Criminal law ⇨925(1)—Denial of new trial on ground of jurors' misconduct in telephoning to inform relatives they were delayed held not error.

Court properly denied motion for new trial, for assault with intent to commit robbery, based on ground of misconduct of jurors in using telephone, where explanation by people was that officer in charge permitted jurors to telephone their relatives that they were delayed.

4. Criminal law ⇨829(1)—Refusing instructions covered by instructions given held not error.

Refusing instructions containing statements of law which were included in instructions given *held* not error.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Joseph Murphy was convicted of assault with intent to commit robbery, and he appeals. Affirmed.

J. R. McHenry and Frank C. Hale, both of Merced, and Howe, Hibbitt & Johnston and O. F. Meldon, all of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of assault with intent to commit robbery, and his motion for a new trial was denied. This appeal is from the judgment and the order denying a new trial.

[1] Appellant contends that there is not sufficient evidence to connect him with the commission of the offense. The prosecuting witness positively identified the defendant as one of the men who attacked and attempted to rob him. His testimony was corroborated as to the commission of the offense but not as to the identity of the persons who committed it. The defendant testified that he was not at the scene of the crime at the time of its commission. This testimony is corroborated to some extent by that of other witnesses. Clearly, the determination of this conflict in the testimony was a question for the jury and the trial court.

[2] It is urged that some of the jurors were guilty of prejudicial misconduct. At a recess during the trial one of the jurors "took a seat in the courtroom in the space reserved for spectators. * * * Thereupon the prosecuting witness * * * seated himself beside the said juror and engaged in earnest conversation for a period of at least four or five minutes." It does not appear what the subject of the conversation was, and the people offered no explanation of the alleged misconduct. Relative to a similar state of facts it was said:

> "It was a grave impropriety, exposing the juror to suspicion and reflecting upon the administration of the law. It is not going too far to say that his conduct called for explanation. But this was a matter resting in the discretion of the trial court, and, since it does not appear that the conversation related to the case on trial, we cannot hold that there was abuse of discretion." People v. Phelan, 123 Cal. 551, 567, 56 P. 424, 430.

[3] After the case had been submitted to the jury, three jurors were permitted, by the officer having them in custody, to use the telephone. Respondent does not contend that this was not misconduct. The officer in charge of the jury made affidavit that he permitted such jurors "to use the telephone and tell their folks that they would not be home; that at the time said jurors used said telephone affiant was present in the office of the county clerk where said telephone is situated, and the rest of the jurors were also present in said room, or in the doorway of said room which adjoins the hallway; that affiant heard said jurors telephone and in no instance did they refer in any manner whatsoever to the above-entitled case, but were apparently informing relatives that they were delayed and could not return to dinner, or else were seeking some one to come for them later in the evening." The three jurors in question made similar statements in their affidavits, and, in addition thereto, two of them stated that there was no response to their telephone calls, and the third one stated that her conversation was with her 13 year old daughter and related solely to the inability of the juror to go home at that time, and to the feeding of the juror's chickens. The foregoing explanation by the people of the conduct of the jurors was sufficient to warrant the court in denying the motion for a new trial based on the ground of such misconduct. People v. Cord, 157 Cal. 562, 571, 108 P. 511; People v. Page (Cal. App.) 260 P. 591.

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[4] Complaint is made of the court's refusal to give certain instructions requested by the defendant. The statements of law contained in the proposed instructions were all included in instructions which the court gave, and it was unnecessary to repeat them.

The judgment and the order are affirmed.

We concur: PLUMMER, J.; HART, J.

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92 Cal. App. 691

LOPES v. BRUNS et al. (Civ. 6297.)

District Court of Appeal, First District, Division 2, California. June 22, 1928.

1. Appeal and error 🔑193(9)—Objection to sufficiency of cross-complaint to state cause of action is of little force, where raised for first time on appeal.

Objection that cross-complaint does not plead facts sufficient to constitute cause of action is of little force, where raised for first time on appeal; parties having gone to trial of issues on assumption that they were properly raised in pleading.

2. Divorce 🔑156—Interlocutory decree in divorce action, providing for division of property became contract between parties.

Interlocutory decree of divorce, providing for division of property, became contract between parties in divorce action.

3. Divorce 🔑254—Husband's deed, executed after interlocutory divorce decree dividing property, from which decree no appeal was taken, held ineffectual to convey interest awarded wife.

Deed of husband, executed ten days after entry of interlocutory decree of divorce providing for division of property, from which decree no appeal was taken, *held* ineffectual to convey any title in interest awarded to wife under such decree, since decree was final judgment, subject to attack only by appeal or other method authorized by statute, in so far as it determined rights of parties to community property.

4. Fraudulent conveyances 🔑299(11)—Evidence held to support finding that transfer to plaintiff from half-brother was for purpose of defrauding latter's wife and rendering property not subject to execution.

In action to quiet title, evidence *held* sufficient to support finding that transfer to plaintiff by his half-brother was for purpose of defrauding latter's wife and of placing property where it would not be subject to execution, where plaintiff was familiar with marital troubles of grantor and purported consideration for transfer was much less than value of property.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Manuel S. Lopes against Hatti E. Bruns and others. Judgment for defendants, and plaintiff appeals. Affirmed.

E. H. Christian and Ernest S. Leslie, both of Oakland, for appellant.

Rodolph Hatfield and Silverstein, Collier & Silverstein, all of Oakland, for respondents.

NOURSE, J. Plaintiff sued to quiet title to real property situated in Alameda county. Defendant Bruns filed an answer and cross-complaint, charging that defendant Frank Lopes conveyed the property to plaintiff for the purpose of defrauding defendant Bruns, who was a creditor of the two defendants, Frank and Marie Lopes. The last-named defendant filed an answer alleging that she was granted an interlocutory decree of divorce from her codefendant, Frank Lopes, prior to this transfer to plaintiff, and that by the terms of this decree she was awarded an undivided two-thirds interest in the property in suit, and that the husband was awarded an undivided one-third interest therein. Trial was had before the court sitting without a jury, and resulted in findings and a decree awarding plaintiff an undivided one-third of the real property in suit, awarding defendant Marie Lopes an undivided two-thirds thereof, and adjudging that the respective interests of both of these parties were subject to a judgment lien of the defendant Bruns in the sum of $976.15. From this judgment the plaintiff has appealed on a typewritten transcript.

[1] The appellant advances three grounds for a reversal of the judgment which we will consider in order. It is argued that the cross-complaint of respondent Bruns does not plead facts sufficient to constitute a cause of action. It does not appear that the point was raised in the trial court. No demurrer to the cross-complaint was interposed, and we are not directed to any portion of the typewritten record showing that any objection to the pleading was made during the course of the trial. If it is true (and nothing is said to the contrary) that the parties went to trial of the issues on the assumption that they were properly raised in the pleadings, the objection is of little force when raised for the first time on appeal. Etienne v. Kendal (Cal. Sup.) 259 P. 752.

[2, 3] It is argued that no title vested in respondent Marie Lopes by virtue of the interlocutory decree of divorce. It is of no importance whether title vested or not. The interlocutory decree became a contract between the parties in the divorce action. London Guarantee & Accident Co., Ltd., v. Industrial Accident Commission, 181 Cal. 460, 466, 184 P. 864; Gould v. Superior Court, 47 Cal. App. 197, 200, 191 P. 56. It was the final determination of the rights of

the parties as to the property involved, subject only to the entry of the final decree of divorce. Newell v. Superior Court of Los Angeles County, 27 Cal. App. 343, 344, 149 P. 998. In so far as the decree determined the respective rights of the parties to the community property, it was a final judgment subject to attack only by appeal or other method authorized by statute. Suttman v. Superior Court, 174 Cal. 243, 244, 162 P. 1032.

As this decree was not attacked, but was followed at the end of the year with a final decree of divorce containing the same provisions as to the award of property rights, the interlocutory decree became the final adjudication of these property rights, and the interest of the wife would date back to the time of the entry of the interlocutory decree. Thus, whether we treat the interlocutory decree as creating the statutory lien of an ordinary judgment, or as a temporary restraining order preventing the husband from alienating the property pending the entry of the final decree, or as a contract between the parties, the effect is the same as applied to the facts of this case. Abbott v. Superior Court, 69 Cal. App. 660, 666, 667, 232 P. 154. The deed of the husband to the appellant was executed just ten days after the entry of the interlocutory decree of divorce, and was ineffectual to convey any title to the interest in the property which had been awarded to the wife.

[4] It is argued that the evidence is insufficient to support the finding that the transfer to appellant was made for the purpose of defrauding the respondent Marie Lopes and of placing the property where it would not be subject to execution. As with the other points raised, the appellant has failed to comply with the terms of section 953c of the Code of Civil Procedure, which require the printing of such portions of the record and evidence as are under attack. We have, however, examined enough of the record to satisfy us that there has been no miscarriage of justice in the judgment rendered. The appellant is a half-brother of the defendant Frank Lopes; the appellant was familiar with the marital troubles of this defendant and his wife, and appeared in court as a witness in the divorce proceedings; the purported consideration for the transfer was the sum of $800, of which sum $400 was in liquidation of an antecedent debt; the value of the property at the time of the trial was $3,500, but, as the appellant testified, the property had depreciated in value since he took the deed; the conveyance was prepared by counsel for the husband in the divorce proceedings. The transaction was conceived in fraud, and, when the trial court quieted the title of appellant to the one-third interest owned by the husband, it gave him all that he could ask from a court in equity.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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92 Cal. App. 747

LORD v. SMITH et al. (Civ. 5163.)

District Court of Appeal, Second District, Division 1, California. June 26, 1928.

Sales ⚷479(11)—Conditional seller's repossessing of register on notice from purchasers of buyer's business to remove it held not election preventing recovery of price.

Action of conditional seller of cash register in taking possession thereof on notice by purchasers of buyer's business to remove it *held* not to constitute election of remedies, depriving seller of right to sue on contract for purchase price.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by W. R. Lord against Charles Smith, Jr., and E. Ranard, doing business under the fictitious name and style of the Windsor Square Grocery. Judgment for plaintiff, and defendants appeal. Affirmed.

Ben S. Beery, of Los Angeles, for appellants.

Brown & Mahon, of Los Angeles, for respondent.

YORK, J. This action was commenced for the recovery of $330 alleged to be due from the defendants to plaintiff (assignee of Remington Cash Register Company) under a contract of conditional sale of a Remington cash register. The original price was $375, $45 was paid, and the balance was payable at the rate of $20 per month. The contract provided that, in case of default "the purchase price of said register, less any actual payments thereon, shall at once become due and payable. * * *" The contract further provided that the Remington Cash Register Company, or its agent, may, if it so elect, "take possession of and remove said register without legal process and retain as rental for the use of said register while in the possession of the undersigned all payments theretofore made." Said contract also provided that "the register shall remain your property until the price, or any judgment for the same is paid in full."

It appears from the record that the cash register in question was delivered to the defendants, who were doing business under the firm name and style of Windsor Square Grocery Company, and that thereafter, upon a sale of the business of the Windsor Square Grocery Company from the defendants to

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

other parties, the Remington Cash Register Company was notified to remove the machine by the purchasers of the business, and they were also notified that, if they did not remove the cash register from the premises, the same would be placed in the alley. Thereupon the Remington Cash Register Company took possession of the cash register, and this action was brought in the name of W. R. Lord, to whom the Remington Cash Register Company had sold and assigned its interest in and to the contract and the payments due thereunder.

Said contract provided that, in case suit should be brought for the collection of the purchase price or the amount due thereon, the defendants would pay a reasonable attorney's fee to be fixed by the court. The only thing that the Remington Cash Register Company could do on such notification that the cash register would be moved into the alley was either to come and take possession of the same to protect it, or to sue on the contract for the money to be paid thereunder and abandon any security that they might obtain by reason of holding possession of the cash register. This latter method they did not have to adopt. The taking under such circumstances is not a rescission of the sale, and cannot act as a bar to the recovery of the purchase price.

As to the objection of appellants to the introduction of the letters in evidence that passed between the Remington Cash Register Company, Inc., and the successors in interest of the defendants herein in the business which they had been conducting, it appears from the entire record that such letters were merely the notification of the Cash Register Company to the successor in the business as to their position and the grounds of taking possession, and were in response to the notification of such successors in interest to remove the cash register, which letter was also properly admissible in evidence to show the necessity for the protection of the cash register.

The findings of the court are sufficient to support the judgment, and there is in the record sufficient evidence to support the findings of the trial court.

The judgment is therefore affirmed.

CONREY, P. J. I concur in the judgment. Appellants' principal contention is that the Remington Company, by resuming possession of the cash register, elected to terminate the contract, and thereby lost its right to maintain an action on the contract, to recover the unpaid balance of the purchase price. Even in the event of a completed sale of personal property, where a vendee, to whom title had passed, abandoned the property and exposed it to dangers arising from the absence of protection, it was held that, although the vendor might have left to its fate the property so abandoned, yet he was not required to follow any such hazardous and unreasonable course. Under the stated circumstances, although the vendor took the property into possession, this act did not amount to an election of remedies, and did not deprive the vendor of his right to an action on the contract. Phillips v. Stark, 186 Cal. 369, 374, 199 P. 509. Notwithstanding that the present action arises out of a conditional sale contract, I think that the same rule applies here.

HOUSER, J. I concur in the opinion herein as expressed by Mr. Presiding Justice CONREY.

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92 Cal. App. 670

LEWIS v. SOUTHERN CALIFORNIA GAS CO. (Civ. 3542.)

District Court of Appeal, Third District, California. June 21, 1928.

1. Gas ⚷18—That gas company turning on gas could have discovered defect in stove by inspection did not make it liable, where it was not its duty to inspect.

That gas company, turning on gas at meter in apartment house, could have discovered defect in adjustment of gas mixture admitting air to burner in oven of gas stove, did not carry with it any liability for damages from explosion, where it was not gas company's duty to make such inspection and discovery.

2. Gas ⚷18—Gas company not having notice of defects, was not liable for injuries from explosion caused by defective stove.

Gas company, turning on gas at meter in apartment house at plaintiff's request, was not liable for injury resulting from explosion caused by defective cooking range over which gas company had no control, where gas company did not have actual notice of defects.

3. Gas ⚷16—That proprietress of apartment house might have been liable where gas from stove exploded did not fix liability on gas company.

That proprietress of apartment house might have been liable, where gas exploded while plaintiff was using gas stove in apartment, did not fix any liability on gas company turning on gas at plaintiff's request but having no control over gas stove.

4. Gas ⚷20(2)—Where gas from stove exploded, rule of res ipsa loquitur did not apply in action against gas company not owning stove.

Where gas exploded while plaintiff was using oven of gas stove in apartment and plaintiff was injured, rule of res ipsa loquitur did not apply in action against gas company, where gas company did not own gas stove.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action for damages for personal injuries by Iva B. Lewis against the Southern California Gas Company. From a judgment for plaintiff, defendant appeals. Reversed.

Thos. J. Reynolds, of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondent.

PLUMMER, J. Plaintiff had judgment in the sum of $1,500, damages alleged to have resulted from an explosion of gas occurring while the plaintiff was using the oven of a gas stove in an apartment occupied by her. From this judgment the defendant appeals.

The transcript shows that on or about the 10th day of September, 1924, the plaintiff called at the office of the defendant and made application for gas service in apartment No. 5 at No. 417 West Twenty-Eighth street, in the city of Los Angeles. In response to said request, an employee of the defendant, on the afternoon of said day, went to the apartment house referred to and turned on the gas at the meter belonging to the defendant, and also went in the apartment and tested one or two of the top burners of the stove to see that the gas was coming through the pipes. Thereafter, and prior to the 27th day of October, 1924, the plaintiff twice used the oven of the stove referred to. The stove was an "Occidental" cooking range, installed in apartment No. 5 by persons other than the defendant. The defendant had nothing to do with installing the service pipes leading from the meter to the gas range in apartment No. 5, and, as just stated, had nothing to do with the sale or installation of the cooking range. On the morning of the 27th of October, 1924, the plaintiff lighted the gas in the oven of the cooking range, left the door of the oven open for a few minutes, and proceeded with other duties in which she was engaged. After the gas had been lighted for a few minutes, the plaintiff closed the door and resumed the performance of other duties in and about the apartment. In a short time the plaintiff returned to the gas range, opened the oven door, and the burning gas flashed out and caused the injuries upon which the action against the defendant was based.

The testimony is uncontradicted that neither the plaintiff, nor the owner of the apartment house in which the plaintiff was occupying an apartment, ever requested the defendant to make any adjustment or test of the gas range in question, or of any of its appliances. After the explosion, a representative of the defendant named Andrews went to the apartment house, made an investigation of the cause of the flaring up or explosion of the gas, and came to the conclusion that, when the door of the oven was closed, sufficient air could not be admitted to the burner to enable the gas to burn properly; this defect being due, in the opinion of the witness, to the fact that the air mixer was not sufficiently adjusted to admit of sufficient air to cause the flame to burn properly. This witness was further of the opinion that the adjustment had become defective by reason of the accumulation of rust, corrosion, and dust or dirt which impeded the flow of air through the air mixer. The testimony of this witness was further to the effect that whenever an employée of the defendant goes out to turn on the gas in any apartment, or to install a meter, the employee usually enters the apartment and turns on one or two of the top burners to see that the gas is coming through, and that the company never makes any attempt to adjust or inspect ranges, but merely turns on one or two of the convenient burners for the purpose of seeing that the air is all out of the pipes. There was also testimony to the effect that the vent pipe, which is used for carrying away fumes from the oven, was disconnected, and the testimony is also to the effect that this had nothing to do with the cause of the explosion, and that the vent pipes were not attached or used in connection with "Occidental" gas ranges in the apartment house in which the particular one in question was installed. The theory upon which the trial court rendered judgment for the plaintiff appears to have been that it was the duty of the defendant to inspect the gas range and adjust the air mixers or appliances thereon. This appears from the remarks of the court taken during the introduction of testimony, to wit:

> "Q. Did you, at any time, ask the Southern California Gas Company to adjust this particular 'Occidental' range for you prior to October 27, 1924? A. I did not.
>
> "The Court: Having paid for the gas, was it up to her to notify them to adjust it? * * * I am asking you, having paid for the gas, was it up to her to notify them to adjust it?
>
> "Mr. Reynolds: To adjust the stove?
>
> "The Court: Yes.
>
> "Mr. Reynolds: If she knew that it was out of order, I think it was up to her.
>
> "The Court: Well, the court is not agreeing with you."

The plaintiff had testified that the second time she lighted the oven, it burned only with a red flame, and not with a blue flame, which she did not think was right; that she had not seen it burn with a red flame before. The respondent's contention is further to the effect that the defendant had established a custom of inspecting gas stoves after turning on the gas or installing meters, and calls our attention to the following testimony introduced in support thereof:

> "Mrs. Ida Gray Scott, the proprietress of the apartment house, which contained many rooms, among other things testified:
>
> "Q. Do you know of your own knowledge whether or not the Southern California Gas

Company ever inspected this particular range in apartment five? A. They did when they turned the gas on.

"Q. Did you see them inspect it? A. I cannot remember that; I know they always did. Some one of us in the family did see it, but which one of us I cannot remember.

"Q. But you did not see it? A. I cannot remember; maybe I did; I know it is always done.

"Q. By Mr. Stone: You know you placed your order with them and the inspection was made, and you did not place your order with anyone else? A. No, I did not place it with any one else.

"Q. By Mr. Reynolds: Did you ever ask the Southern California Gas Company to inspect the various ranges in your house? A. I don't think I ever did.

"Q. By Mr. Stone: Mrs. Scott, when they turned the gas on there, you do know that some one from that company inspected it at the time they turned it on? A. They did at the time they turned it on; they inspected the stove.

"Q. By Mr. Reynolds: Did you know of your own knowledge or did you see any representative of the Southern California Gas Company inspect this particular 'Occidental' gas range in apartment 5 at the time the gas was turned on for Miss Lewis? A. I cannot remember which one of us went with the man to open the door and let him in and saw him do it. I cannot remember. There is three of us together.

"Q. You do not remember of seeing any man from the Southern California Gas Company adjust that stove? A. No, but they always do.

* * *

"Q. By. Mr. Stone: As owner of the apartment house, you had no dealings with anybody but the Southern California Gas Company concerning gas in that apartment? A. No.

"Q. By Mr. Reynolds: Did you ever request the Southern California Gas Company to inspect your ranges in your apartment house. A. I don't think I ever did. They always did it at the time they turned on the gas."

This testimony, however, does not support any such contention. It simply shows that the witness thought such was the case; that she never saw them inspecting the stove; never asked them to inspect the stove. The only reasonable explanation of the witness' testimony, and the only reasonable conclusion that can be drawn therefrom, is that the witness knew that after a meter was installed or gas turned on by the company, the employee of defendant who turned on the gas or installed the meter went into the apartment to which gas had been turned, and lighted a burner or two to see if the gas was coming through, or, as stated by one of the witnesses, to "bleed the air out of the pipes." There is nothing whatever in the record to the effect that any one ever saw any of the employees of the defendant making adjustments of the air mixers or air valves, or doing anything whatever to make certain that the proper quantity of air was being admitted to the burners in order to insure proper combustion. The only testimony in the record showing the acts performed by the employees of the company is to the effect, as we have stated, that after turning on the gas, a burner or two was lighted to make sure that gas was coming through the pipes. The testimony as to whether the improper condition of the air vents leading to the burner in the oven of the gas range could have been ascertained by proper inspection, is wholly irrelevant to any of the issues in this case. If the defendant had no duty to perform in relation thereto, the inquiry is ended.

The statement in the respondent's brief that the plaintiff did not discover anything wrong with the stove between September 10 and October 27, is not borne out by the testimony. As we have just stated, the plaintiff testified that the second time she lighted the oven, it burned with a red flame, which she did not think was right. The respondent then further states in her brief that the defect which caused the explosion could have been discovered if the person turning on the gas in the usual way had made the ordinary inspection. The testimony, however, is directly to the contrary. We here give the following excerpt from the testimony, in answer to respondent's counsel:

"Q. All of which would have been discovered by the man when he went to turn on the gas and did what was the custom of the company for years to do? A. No.

"Q. It would not have been discovered? A. No.

"Q. Are you positive of that? A. Absolutely.

"Q. Now, you have given perhaps two or three reasons why this explosion occurred. Will you please state whether or not, with the usual inspection that it has been the custom of the company to make when turning on gas, the trouble would not have been disclosed that existed then in such a way to cause the explosion? Wouldn't the man have found it out when he lit this stove? A. No."

This is followed by the further statement in respondent's brief, to wit:

"And the same employee further testified that if the usual and customary practice had been followed, this lack of the proper connection for the lighting of the stove would have been discovered by the employee."

The testimony upon which this statement is based relates to the vent by which the fumes are carried away, and not to the adjustment of the air mixer by which the flame is fed with oxygen. This appears when we quote the testimony which eliminates some apparent confusion, to wit:

"Q. Was there any ventilation for this oven? A. It was not connected. There was a place for ventilation to be connected to it.

"Q. But the ventilation had not been connected with the oven? A. No.

"Q. Now, if that were true on the 10th day of September, when your man went out there and turned on the gas, if he had turned it on and lit it, as he said it was the universal custom to do, he would have seen that, would he not? A. If he had lighted it, yes.

"Q. If he had followed the universal custom of turning on the gas and lighting this stove, he would have discovered that there was no vent connected with it? A. Yes.

"Q. You have testified that the flue where the odors from the oven pass off was not connected? A. It was not.

"Q. Is it customary for flues of that nature to be connected? A. It is not customary only in a very few places in Los Angeles.

"Q. In other words, by casual inspection it would show that this flue was not connected, and that is customary in Los Angeles? A. Yes, sir.

"Q. If this flue had been connected with the vent, would that have had anything to do, one way or the other, with this particular explosion? A. I don't think it would."

The testimony further shows that the particular stove in question had been in use for something like one year previous to the explosion. There is no testimony showing that the vent was ever connected, nor is there any testimony in the record showing that the gas company ever installed or connected vents with gas ranges. The testimony further is to the effect that mechanically the air mixture appeared to be all right, but that the fault was in the adjustment, and that the red flame which the plaintiff testified to, was the result of defective adjustment. It does not appear that either the plaintiff or the proprietress of the apartment house gave any directions to the defendant or to anybody else in relation to the adjustment of the gas range, or did anything further than to request that the gas be turned on. There is also testimony to the effect that the defendant did not adjust appliances for gas stoves unless they had an order for that purpose. We find nothing in the record indicating that it was the custom of the defendant either to make adjustments or inspection of adjustments of gas ranges, other than the intimations contained in the language used by respondent's counsel in propounding questions on cross-examination.

[1] As stated herein, the defendant owned the pipe lines and gas fixtures from the street up to and including the gas meter. From there on the defendant had no ownership whatever. The ownership and control of the defendant stopped with the meter. The ownership and control of pipe lines and fixtures, including stoves, vested in the proprietress of the apartment house and her tenants. Whether the defendant, by inspection, could have discovered a defect in the adjustment of the gas mixture admitting air to the burner in the oven of the gas range, does not carry with it any liability, unless it was the duty of the defendant to make such inspection and discovery.

[2-4] Under the circumstances disclosed by the record in this case, is there any liability on the part of the appellant? The general rule in cases like this is aptly stated in 28 C. J., p. 594, § 58d:

> "The general rule requiring the use of ordinary care and diligence on the part of a gas company applies to its delivery of gas into the residence or other building of the consumer. The rule has been laid down, however, that in the absence of any fact upon which to base an inference of duty, the failure of the gas company, on introducing gas into a dwelling, upon application, to inspect pipes or fixtures which were placed there by the owner, and over which the company has no control, is not negligence. The company is warranted in assuming that the interior system of pipes is sufficiently secure to permit the gas to be introduced with safety. To render the company liable in such cases, there must be facts alleged to show notice of defects, or facts from which an inference of duty to inspect arises, either from contract, custom or franchise."

Cases are then cited where gas companies have been held liable when given notice of a defect or leak in the gas system, in not immediately turning off the gas, etc., which cases are not pertinent here. In the case of Okmulgee Gas Co. v. Kelly, 105 Okl. 189, 232 P. 428, the Supreme Court of Oklahoma considers questions identical with those presented here as to liability, and sets forth the law in a carefully prepared opinion, and we can do no better than quote therefrom:

> "The gas company owes the duty to see that the pipe lines and fittings, when first laid in the ground, with reasonable care and skill, will not permit the escape of gas, and a system of inspection is required as will result in reasonable promptness in the discovery of leaks, which may occur from deterioration of the material, or from other causes within contemplation by the company. (Pine Bluff Water Co. v. Schneider, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366; Louisville Gas Co. v. Guelat, 150 Ky. 583, 150 S. W. 656, 42 L. R. A. [N. S.] 703; Barrickman v. Marion Oil Co., 45 W. Va. 634, 32 S. E. 327, 44 L. R. A. 92.) But in this case the duty rested with the defendant, only to maintain inspection and make repairs over its line, which ended at the property line of the consumer. The defendant owed no duty to inspect the pipe line and gas fittings of Agard. The defendant would not be liable for injury resulting from explosions, due to defects of pipe line, gas connections, and fittings on the property of Agard, unless it had actual notice of such defects. (See notes to 32 L. R. A. [N. S.] 813, L. R. A. 1915E, 1023; Ann. Cas. 1914C. at page 348.) If the gas pipes and fittings are the property of the consumer, and there is no contractual duty resting on the gas company to inspect, the consumer, by application for gas service, assumes the burden of inspecting and maintaining the pipe and fittings on his property in a manner reasonably suited to meet the required service, and the company has the right to assume that these duties have been performed by the applicant. (Smith v. Pawtucket Gas Co., 24 R. I. 292, 52 A. 1078, 96 Am. St. Rep. 713.) However, the company would be responsible for inspection and the condition of the meter and its

connections which it installed on the premises of the consumer."

To the same effect we may cite 12 R. C. L. 909, where it is said:

> "Generally speaking, a gas company which does not install the pipes in a customer's building, and which has no control over them, is in no way responsible for the condition in which they are maintained, and consequently, is not liable for injuries caused by a leak therein, of which it has no knowledge. One who applies for gas has the duty to see that his own pipes, through which the gas is to be used, are in good order, and no general obligation on the part of the company can be inferred to inspect such pipes."

See, also, Ann. Cas. 1914C, p. 348, holding that a gas company owes a duty only to inspect that portion of the gas line and fixtures which it owns and controls.

The authorities relied upon by the respondent refer only to cases where gas companies have been liable on account of negligence in not turning off gas after notification that the pipe lines were leaking. That a gas company is not liable for defects upon the owner's premises, see also note in 25 A. L. R. page 272. That the proprietress of the apartment house might have been liable under the law as laid down in Gobrecht v. Beckwith (N. H.) 135 A. 20, 52 A. L. R. 858, and the annotations appended to that case, does not fix any liability upon the defendant. Nor does the rule of res ipsa loquitur apply. That rule applies only when the appliances and fixtures involved all belong to the gas company. A good case showing when this rule applies is that of Chiles v. Ft. Smith Commission Co., 139 Ark. 489, 216 S. W. 11, 8 A. L. R. 493, and the annotations appended to that case. See, also, Triplett v. Alabama Power Co., 213 Ala. 190, 104 So. at page 248. That the defendant is not liable for defect in fixtures which it did not install is likewise held in Helm v. Manufacturers' Light & Heat Co., 86 W. Va. 628, 104 S. E. p. 59, 25 A. L. R. 240. There, as here, the trouble arose from a defect in appliances not installed by, and not under the control of, the defendant.

Other cases might be cited, but the holding of all of them is to the effect that liability does not extend beyond the property owned and controlled by the defendant unless some defect has been discovered of which the gas company has notice, requiring the company to discontinue its service until the defect is remedied, and it fails so to do. There is also inserted in the record the rule of the railroad commission setting forth that the owner of the premises into which the gas is conducted is liable for all defects from the point where the gas meter connects with the service pipes upon the premises in question. Whether this rule applies to the instant case need not be decided, and whether such a rule would excuse the defendant from negligence need not be determined, as we find nothing in the record upon which a conclusion could be predicated that the defendant has been guilty of the violation of any duty incumbent upon it.

The judgment of the trial court is reversed.

We concur: FINCH, P. J.; HART, J.

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92 Cal. App. 740

SULLIVAN v. PEOPLE'S ICE CORPORATION et al. (Civ. 6088.) ★

District Court of Appeal, First District, Division 2, California. June 26, 1928.

Hearing Denied by Supreme Court Aug. 23, 1928.

1. Master and servant ⚷329—Complaint against employer for assault by employee held sufficient to plead act within scope of authority.

In action against employer for assault by employee, complaint *held* sufficient to show that the employee was acting within the scope of his authority.

2. Master and servant ⚷332(2)—Whether defendant's employee in assaulting plaintiff acted within the scope of his authority held for jury.

In action against employer for assault by employee in which there was evidence, either direct or circumstantial, to support every allegation of complaint showing act of employee to have been within the scope of his authority, the question is for the jury.

3. Master and servant ⚷308—Employer's retention of employee with knowledge of assault of plaintiff was some evidence of ratification.

In action against employer for assault by employee, the fact that employer retained employee in his employment with knowledge of the facts was some evidence of ratification of employee's acts.

4. Trial ⚷244(1)—Instruction picking out isolated facts is improper.

It is not proper for the court to pick out isolated facts and either fortify them or belittle them by making them the subject of an instruction.

5. Master and servant ⚷308—Employer's retention of employee with knowledge of assault of plaintiff may be evidence of ratification, though assault constituted crime (Civ. Code, §§ 2338, 2339).

In action against employer for assault by employee, the mere fact that the assault constituted a crime did not, as a matter of law, prevent employer's retention of employee with knowledge of facts from being some evidence of ratification, under Civ. Code, §§ 2338, 2339.

6. Master and servant ⚷308—Employer who ratifies assault by employee is liable therefor.

Employer who ratifies assault by employee, constituting crime committed without knowledge of employer, is liable.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

Appeal from Superior Court, Fresno County; Chas. R. Barnard, Judge.

Action by Sherman Sullivan against the People's Ice Corporation and another. Judgment for plaintiff, and named defendant appeals. Affirmed.

Everts, Ewing, Wild & Everts, C. M. Ozias, and L. W. Young, all of Fresno, for appellant.

Cosgrave & Barstow, of Fresno, for respondent.

STURTEVANT, J. The plaintiff sued for damages suffered because of personal injuries inflicted on him. The defendants appeared and answered separately. The jury returned a verdict against both defendants. People's Ice Corporation made a motion for judgment notwithstanding the verdict. The motion was denied. From a judgment entered on the verdict, People's Ice Corporation has appealed under section 953a of the Code of Civil Procedure.

In his complaint the plaintiff alleged:

"Plaintiff complains and for cause of action alleges: That defendant, People's Ice Corporation, is now, and at all times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the state of California, and engaged in the business of manufacturing and selling at retail ice in the city of Fresno and elsewhere. That defendant Alfred M. Dupzyk is now, and at all times hereinafter mentioned was, the agent, employee, and servant of the defendant People's Ice Corporation. That said Alfred M. Dupzyk was, at all times herein mentioned, and at and during the time when the acts hereinafter set forth were performed, employed by said People's Ice Corporation to drive a wagon containing ice along a designated route in a designated district in the city of Fresno, to solicit the sale of the ice of the said defendant People's Ice Corporation, to deliver the said ice to purchasers thereof when sold, to observe vendors of ice in the said district so assigned to said defendant Alfred M. Dupzyk, who were in competition with the said defendant People's Ice Corporation, and to eliminate, discourage, and exclude from such district such competing vendors of ice, and to prevent such competing vendors from soliciting the sale of ice along the route or within the district so assigned to said defendant Alfred M. Dupzyk by the said People's Ice Corporation, and to prevent the securing of the trade of the customers of said People's Ice Corporation by competing vendors of ice, and to extend the custom and trade of said People's Ice Corporation, and to secure new customers for the same. That plaintiff is now, and at all times herein mentioned was, an agent of a vendor of ice in competition with the said People's Ice Corporation, in the business of selling ice along the route so assigned to the said defendant Alfred M. Dupzyk, and, at the time the acts herein complained of occurred, plaintiff was engaged in soliciting the sale of ice on behalf of his said employer along the route and in the district assigned to the said defendant Alfred M. Dupzyk by said People's Ice Corporation. That on or about the 28th day of May, 1920, on the southeasterly corner of G and Tulare streets in the city of Fresno, county of Fresno, state of California, said Alfred M. Dupzyk, while in pursuance of his employment, and in performance of his duties, as alleged in paragraph III hereof, did, without the fault of or provocation by plaintiff, wrongfully, unlawfully, and violently and with oppression and malice toward plaintiff assault plaintiff, and violently strike and beat him about the face and head, and, as a result of being so beaten and struck, plaintiff was knocked violently upon the ground. That, by reason of being so struck, beaten and knocked upon the ground, plaintiff has sustained broken facial bones, impaired vision in the right eye, and has been confined to his bed for a period of two weeks, and has been incapacitated from pursuing his ordinary employment for a period of three weeks. That, ever since said injury, plaintiff has suffered, and does still suffer, great pain and inconvenience by reason of said injuries so inflicted by defendants as aforesaid and said injuries are permanent in their nature. That, in the infliction of said injuries upon plaintiff by said defendants as aforesaid, said defendants have been guilty of oppression and malice upon and toward this plaintiff. That immediately upon and after the infliction of said injuries upon plaintiff, as aforesaid, defendant People's Ice Corporation had actual notice thereof and of all of the facts and circumstances under which the said injuries were inflicted, and thereafter and at all times since has retained, and does now retain, the said Dupzyk in its employ, and fully ratified the action of the said defendant Dupzyk in the infliction of said injuries as aforesaid. That, by reason of said injuries so inflicted by defendants upon plaintiff, plaintiff has been damaged in the sum of $10,000, no part of which has been paid. That, by reason of said injuries, plaintiff was compelled to, and did, go to a hospital for the treatment thereof, and in that behalf has expended the sum of $31.50. That plaintiff was compelled to, and did, hire a physician to treat his said injuries, and in that behalf has expended the sum of $31. That, by reason of his said injuries, plaintiff was unable to pursue his employment of ice salesman for a period of three weeks. That for said period the reasonable value of plaintiff's services is the sum of $105."

[1, 2] The defendant urges that the verdict and judgment are contrary to law, because there is no evidence to show that the defendant Dupzyk was acting within the scope of his authority, express or implied. In presenting the point, the defendant assumes that the case made by the plaintiff is merely a charge that the plaintiff was assaulted by Dupzyk during working hours, and that, after the assault, the defendant did not discharge Dupzyk. A most casual reading of the plaintiff's complaint shows that assumption fails to take into consideration many allegations contained in the complaint. There was evidence, direct or circumstantial, tending to support every allegation contained in the complaint. The weight of the evidence was for the jury.

The defendant called as a witness J. H. Wooden, who was the manager of the People's Ice Corporation at the time of the assault. He testified that he had expressly directed his men not to have any fights with any one on their routes. It cites the testimony and argues that it follows as a matter of law that Dupzyk was acting outside of the scope of his employment. If this were an action sounding in contract between employer and employee, the contention might be sound, but not in an action sounding in tort, and maintained by a third person. Johnson v. Monson, 183 Cal. 149, 150, 151, 190 P. 635.

During the introduction of evidence, the defendant maintained the same opinion as set forth above. Certain rulings were made against it. Those rulings are now assigned as error. However, as we have shown in this decision, the contention of the defendant as to the breadth of this case is too narrow, and fails to take into consideration all of the facts. We have not noted any ruling on the evidence that was prejudicial to the defendant.

Finally the defendant complains of the refusal of the trial court to give certain proposed instructions which defendant asked. They were as follows:

(1) "You are further instructed that evidence has been introduced in this case showing that the defendant herein, Dupzyk, is still in the employ of the defendant, People's Ice Corporation, and you are instructed that such evidence of itself does not amount to or constitute a ratification for the commission of a tort by defendant Dupzyk, and in this case, where the action complained of on the part of the defendant Dupzyk constitutes a crime, under no circumstances could this evidence constitute a ratification of the offense charged.

(2) "You are hereby instructed that it appears from the evidence in this case that the claim for damages against the People's Ice Corporation is founded upon a claim that the defendant Dupzyk herein committed a crime of assault and battery upon the plaintiff in the case, and you are instructed that the defendant People's Ice Corporation cannot by any acts ratify the commission of the criminal assault so as to make itself liable for damages. It is the law that acts committed by a servant which of themselves constitute a crime cannot by any acts of the master be ratified so as to make the master liable in damages. In cases where the acts are not criminal, they may be ratified by actions and course of conduct on part of the master, but even in this class of cases the failure on the part of the master to dispense with the services of a servant is not of itself sufficient to constitute a ratification of servant's act."

[3-5] The instructions were objectionable for many reasons. We will not attempt to state all of them. When defendant, with full knowledge of the facts, retained Dupzyk in his employ after obtaining such knowledge, such fact was some evidence of ratification. It may be conceded that the fact, standing alone, did not necessarily constitute a ratification. But, whether it did or did not, it is not proper for the court to pick out isolated facts, and either fortify them or belittle them by making them the subject of an instruction. Estate of Martin, 170 Cal. 657, 672, 151 P. 138. Again, even though the act of Dupzyk constituted a crime, it could not be said as a matter of law that in this action, as alleged by this plaintiff, there could not be evidence of ratification. Civ. Code, §§ 2338, 2339; Johnson v. Monson, supra.

[6] Defendant avers that the act of Dupzyk was a crime, and that a crime could not legally be authorized, and therefore it could not be "ratified." If this were an action sounding in contract between principal and employer, the argument would have much weight. 21 R. C. L. 925. But it is an action in tort brought by a third party. Our statute says it can be "ratified." Civ. Code, § 2339. In a note appended thereto the Code commissioners stated that the Code section was based on the following authorities:

In Story on Agency, § 456, it is said:

> "For the principal is not liable for the torts or negligence of his agent in any matters beyond the scope of the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use or benefit."

And in Eastern Counties Railway Co. v. Broom, 6 Ex. 314, at page 327, it is said:

> "With respect to the point, whether the company could ratify the act, if the act can be said to have been done for the use or benefit of the company, there can be no doubt that they could ratify it. The assault and imprisonment of a party liable to the company for not having paid his fare, was an act of a servant of the company, which manifestly might have been for the benefit of the company. Therefore, we are clearly of opinion that there might have been a ratification of that act. The law is well laid down in distinct terms in the passage from the 4 Inst. 317, 'he that receiveth a trespasser, and agreeth to a trespass after it be done, is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment.' The question of liability by ratification depends upon this, whether the act was originally intended to be done to the use or for the benefit of the party who is afterwards said to have ratified it. We are with the plaintiff in this case, that the action might lie, and the act, though not done with the knowledge of the company in the first instance, might have been ratified by them; but we are of opinion that there was no evidence of any such ratification, and that the direction of the Lord Chief Baron was wrong in this respect."

The defendant requested, and the trial court refused, an instruction to the effect that, if a servant steps aside from the master's business for however short a time, and commits a wrongful act, the master is not liable. In so doing the trial court did not err. The subject-matter was fully covered by other instructions which were given.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

92 Cal. App. 724

UNITED STATES BORAX CO. v. DEATH VALLEY BORAX CO. et al. (Civ. 5802.) ★

District Court of Appeal, Second District, Division 1, California. June 25, 1928.

Hearing Denied by Supreme Court Aug. 23, 1928.

Quieting title 🔑44(4)—Evidence held to sustain findings for defendants in action to quiet title to mineral lands.

In action to quiet title to property on which both plaintiff and defendants sought United States mineral patent, evidence *held* to sustain findings of trial court for defendants.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action to quiet title by the United States Borax Company against the Death Valley Borax Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

James F. Peck, of San Francisco, W. A. Lamar, of Independence, and Frank Wehe, of San Francisco, for appellant.

Lawler & Degnan, Frank C. Scherrer and W. B. Thomas, all of Los Angeles, for respondents.

YORK, J. The question involved in this action is, which party is entitled to possession of the land in question? The appellant is a corporation, and the respondents comprise a corporation and certain individuals who are stockholders and directors in the respondent corporation. The importance of the question of possession is caused by the fact that the party found to be entitled to the possession in this action will eventually obtain a United States mineral patent on the lode mining claims situated in Death Valley, known as Borax No. 1 and Borax No. 2 lode mining claims in the judgment herein.

Not only does the transcript disclose the fact that the evidence was very voluminous (561 pages of bill of exceptions alone), but the findings of the court comprise 49 pages of the transcript. However, the only question, as we view it, that we are called upon to decide, is whether or not there was evidence sufficient to support all of the material findings of the trial court, as the findings of the trial court are undoubtedly sufficient to support the judgment. It appears to us that the argument of the appellant only shows that there was evidence sufficient for the trial court to have made different and other findings; but an examination of the record discloses the fact that there was sufficient evidence to support each and every finding made by the trial court. None of the questions raised as to errors in rulings is sufficient to show any error of a prejudicial nature in any ruling of the court. In fact, the finding of the trial court in reference to abandonment by appellant is not only supported by the circumstances shown, but the letters of the attorney for appellant in its proceedings for patent before the Land Office, written to the United States Land Office, set forth in full hereinafter, were sufficient to justify the said Land Office in making the order which said Land Office did make canceling the application for patent of appellant, and were sufficient for the trial court to make the finding of abandonment.

Some of the evidence introduced as to the examination of the shafts and development work of appellant on the property in question was that there was no development of or discovery of any ore body by appellant or its predecessors, and that in fact the ore body nearest to the surface was found by respondents about ten feet deeper than the bottom of appellant's deepest shaft.

A complete statement of the facts shown by the record would be too voluminous for this opinion, and seems to us unnecessary. Let it suffice to state that the predecessor of plaintiff entered upon the land and started to do some work to attempt to develop mineral on or about April 30, 1900, and the deed of conveyance from said predecessor to plaintiff was dated February 28, 1901. The plaintiff's application for patent was made about December 14, 1905. About November 21, 1906, the Commissioner of the General Land Office issued an order to the register and receiver of the Independence Land Office, where the application had been received for patent, that under rule 1 of the circular of March 6, 1903 (32 L. D. 39), the state's right attached to said section, if at all, when the township survey was accepted, the letter showing that the township survey was accepted about March 19, 1858. The letter further instructed the register and receiver to notify the claimant company that 60 days would be allowed in which to show cause why the entry should not be canceled as to the portion of the land lying in section 36. Under date of August 20, 1907, the record disclosed that the attorney for appellant, in reply to such notice, wrote to the register of the United States Land Office as follows:

> "Dear Sir: I am in receipt of your letter of August 13th in reference to the Clara lode claim for which the United States Borax Company applied for patent. I do not think that we can make any showing to overcome the presumption in favor of the rights of the state, and will, therefore, not ask to have the matter kept open longer."

Thereafter, and under date of March 25, 1908, the Commissioner of the General Land Office, in a letter to the register and receiver at Independence, acknowledged receipt of the letter from the claimant company's attorney, and instructed the said register to notify the claimant company that it would be allowed 60 days from notice within which to show a

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

valid discovery on the portion not canceled and other and sufficient improvements made prior to the expiration of the period of publication, and in the letter stated that any default of such proof, or of an appeal, that the entry would be canceled without any further notice. A copy of the order in accordance with said letter was found by the court on sufficient evidence to have been received by the United States Borax Company, and on April 6, 1908, said company by its attorney in reply sent the following communication to the register of the United States Land Office at Independence, to wit:

> "Dear Sir: I am in receipt of your letter of March 31st, in reference to the Clara lode. No work has been done on the claim since the original application was filed, and it will, therefore, be unnecessary to keep the matter open for any further showing on the part of the applicant."

Thereafter, the Commissioner of the General Land Office canceled the entry of the plaintiff, and instructed the register and receiver at Independence to so notify the claimant. Such notice was thereupon given. No work was done on the land in question by plaintiff, or any one in its behalf, after the year 1904, and no proof of any annual labor thereupon or therefor was filed with the county recorder of Inyo county after the year 1904 by or on behalf of plaintiff. In the year 1919 the defendant W. S. Russell, on behalf of himself and associates, claimed to have made discovery upon the land claimed by the defendants herein, and filed a placer location thereon in the office of the county recorder of Inyo county, and ever since June 1, 1919, the defendants have been in the possession and occupancy of the lands during the portion of the year when it was possible to work the same in that portion of Death Valley. On June 25, 1921, the individual defendants named located the lands now claimed by them under lode claims, filing their copies of location for record with the county recorder of Inyo county about July 11, 1921. Thereafter the individual named defendants transferred to the Death Valley Borax Company, a corporation, their rights in the property, and said company applied for patent on all of the lands in question about April 26, 1922. Within due time thereafter, the plaintiff, United States Borax Company, filed its adverse claim against the issuance of such patent, and this suit to determine the right of possession was brought within the time allowed by law. From the record before us it is apparent that nothing was done by the appellant in connection with pressing its claim or doing anything whatever in connection with the development or patenting of the land from April 6, 1908, up to the date of its said protest against the patenting of the land to the defendants and respondents, except that on or about February 26, 1920, appellant filed in the United States Land Office an application for a reinstatement of its application for patent. The said application was decided against the appellant by the Commissioner of the General Land Office, from which both parties appealed to the Secretary of the Interior, by which office said application for reinstatement was denied by an order and opinion dated July 19, 1921, issued by the First Assistant Secretary of the Interior. Thereafter the United States Borax Company petitioned said Department of the Interior for the exercise of its supervisory powers and requested reversal of its prior ruling, which petition, on a hearing on the merits was denied. The opinion of the said department is set forth in the findings as follows:

> "The department is clearly of the opinion that the said mineral entry was made for land (as to section 36) then belonging prima facie to the state, and that the requirement made by the commissioner was proper. Furthermore, the claimant acquiesced in that ruling and admitted its inability to comply with the requirement. It dd not renew its claim after the state filed selection in lieu of the land involved but submitted without protest to the cancellation of the entry. It is estopped from now disputing the correctness of that action. If it has abandoned its claim so as to permit other bona fide rights to intervene and attach as alleged, it would be manifestly unjust and illegal to reinstate the old entry. The petition is accordingly denied."

It is apparently not necessary to pass upon the interesting questions which the parties herein have attempted to raise as to just when school sections are subject to mineral entry and as to just when the title to school sections containing mineral is transferred to the federal government, or as to whether or not any sections 16 or 36 that were mineral lands at the time of the grant of school sections to the state, or that were later proven to be mineral lands, ever became school lands of the state of California.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

92 Cal. App. 575

ADKINS v. MODEL LAUNDRY CO. et al.
(Civ. 6316.)

District Court of Appeal, First District, Division 2, California. June 16, 1928.

1. Pleading 🔑225(1)—In action for breach of contract for commissions for washing clothing, cause to which demurrer was sustained lapsed when plaintiff did not amend it.

In action for breach of contract for commissions for washing clothing, where demurrer was sustained to cause of action set forth in complaint, and plaintiff failed to amend cause, *held* that it lapsed.

2. Pleading 🔑192(2)—Demurrer to complaint, in action for breach of contract for commissions for washing clothing, should have been sustained, where complaint did not allege contract with certainty.

In action for breach of contract for commissions for washing clothing, where there were no definite allegations in complaint that company had ever agreed orally or in writing to wash clothing brought to it for any specified sum or at all, *held* that demurrer should have been sustained, since complaint failed to allege contract with sufficient certainty.

3. Action 🔑22—Action at law will not lie for damages for interference with customers of laundry route.

Where plaintiff who purchased laundry route from driver brought action against laundry, assuming that complaint charged laundry company with interference with customers of laundry route, *held* that plaintiff mistook remedy, since action at law would not lie.

4. Damages 🔑59—Damages for failure to wash clothing at agreed rate held not recoverable, where plaintiff immediately made contract at lower rate (Civ. Code, § 3301).

Where plaintiff who purchased laundry route brought action against laundry, after it had refused to wash clothing for him at agreed rate, although he immediately secured another contract at lower rate, *held*, under Civ. Code, § 3301, providing that no damages can be recovered for breach of contract which are not clearly ascertainable both in nature and origin, that damages for failure to wash clothing at agreed rate could not be recovered.

5. Contracts 🔑217—Contract to wash clothing held terminable at will of laundry or driver of laundry route, where time was not fixed.

In action for breach of contract for commissions for washing clothing, where neither pleadings nor evidence fixed time during which alleged contract was to continue, *held* that it could be terminated at will by either laundry or driver of laundry route.

6. Injunction 🔑55—Unlawful interference with benefits of patronage of specific list of customers in definite laundry route may be protected by injunction.

Unlawful interference with property rights in good will of business for benefits of trade or patronage of specific list of customers in definite laundry route may be protected by injunctive relief in court of equity.

7. Trover and conversion 🔑41—Right in patronage of specific list of customers in definite laundry route will not authorize damages in suit for conversion or trover.

There is no such property right in patronage of specific list of customers in definite laundry route which will authorize damages in suit at law for conversion or trover.

8. Appeal and error 🔑1039(13)—After demurrer had been sustained to cause based on loss of prospective sale of laundry route, admission of evidence showing interference with sale held prejudicial.

Despite fact that demurrer had been sustained to cause of action which was based on claim for damages for loss of prospective sale of laundry route through opposition of defendant laundry, evidence showing interference with sale *held* prejudicial.

9. Damages 🔑120(7)—In action for breach of contract for commissions for washing clothing, damages for appropriating customers are not recoverable.

In action for breach of contract for commissions for washing clothing, where, in instruction, trial court assumed that damages for tort in wrongfully divulging trade secrets and appropriating customers of plaintiff were proper measure of damages, *held* that remedy for such intangible property rights did not exist in mere suit at law for breach of contract.

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

Action by Roy V. Adkins against the Model Laundry Company and others for damages for breach of contract for commissions for washing clothing. From a judgment for the plaintiff, the defendant appeals. Reversed.

Roland Thompson, James L. Allen, and James L. Davis, all of Santa Ana, for appellant.

A. E. Koepsel and L. A. West, both of Santa Ana, for respondent.

THOMPSON, Justice pro tem. This is an appeal from the verdict of a jury and a judgment for damages for $2,000 for an alleged breach of contract with a laundry company for commissions for washing clothing.

The appellant Model Laundry Company, a corporation, was engaged in the laundry business at Santa Ana, Cal. The defendants C. C. Blanchard, Albert Blanchard, and E. W. Walker were directors of the corporation. The complaint alleged that Walker was the personal owner of Model Laundry route No. 1 in Santa Ana, having the exclusive right to collect laundry in that district for said company, with which he had an agreement to wash all laundry collected by him from said route for a commission of 27½ per cent. of their regular list price; that on January 15, 1920, Walker sold to respondent said laundry route, together with one Ford automobile for the sum of $1,000; that, prior to the consummation of this sale, the plaintiff told defendant Albert Blanchard, who was then the president of said corporation, of the proposed purchase, and that Blanchard "acquiesced, consented and approved of said sale"; that with Blanchard's consent the plaintiff purchased said route, and proceeded to "collect and deliver laundry from said route, * * * and took all of said laundry to the defendant Model Laundry Company and had it washed under the above agreement," until November 16, 1923; that the laundry company then placed another driver on said route, to whom it supplied the list of names and addresses of plaintiff's customers, and then attempted to dismiss plaintiff from their employment, addressing letters to his customers advising them of plaintiff's discharge, and requesting the delivery of all packages of washing to one George Clough, who would thenceforth represent the laundry company in said district; that the laundry company thereby enticed plaintiff's customers to desert him, impaired the value of his said laundry district, and decreased his income therefrom to his damage in the sum of $5,000.

[1] A second cause of action was set forth in the complaint to which a demurrer was sustained. The respondent failed to amend this cause, and it therefore lapsed. A general and special demurrer to the first cause of action was also filed, charging that it failed to state adequate facts; that it was uncertain as to how plaintiff became the owner of the laundry route, and that the terms of the alleged contracts between Walker and the laundry company and between plaintiff and the laundry company were uncertain. This demurrer was overruled, and the defendants filed their answer categorically denying each material allegation of the complaint. As a separate defense, the appellant alleged that it was the owner of the laundry route; that the respondent was its agent and employee hired for the purpose of collecting laundry in said district; and that he was discharged for unsatisfactory service on November 17, 1923. At the beginning of the trial, appellant objected to the introduction of evidence on the grounds enumerated in the demurrer. This objection was overruled.

The evidence is conflicting, but it satisfactorily appears that respondent paid Walker $1,000 for a Ford automobile and the exclusive right to gather and deliver laundry to the Model Laundry Company from said route. Before purchasing the route from Walker, the respondent had a conversation with Albert Blanchard, who was then the president of the laundry corporation. All that the evidence discloses respecting the alleged agreement with the laundry company appears in the testimony of respondent, as follows:

> "Q. What was said? * * * A. We asked him (Albert Blanchard) if it was perfectly all right for me * * * to buy the route, and if he was perfectly willing, and he said he was, or words to that effect. * * *
>
> "Q. In this conversation with Mr. Blanchard, what was said, if anything, in regard to who was to do the washing? A. I don't know as there was anything said as to that. Walker was getting the laundry done there, and that is what he was selling—the Model Laundry to do the washing at 72½ per cent. * * *
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> "Q. What did Mr. Blanchard say with reference to doing the washing, if anything? A. He said it was all right with him, to go ahead and make the deal, and he would take care of us the same as he had before."

For nearly three years after the purchase of the route respondent collected laundry from this district, and had it washed at the Model Laundry for 72½ per cent. of its regular rate of charges, collecting from his customers the full list price for such laundry. This left respondent 27½ per cent. of the list price for his own services, which averaged about $75 per week. Difficulties arose between the appellant and the respondent, and on November 16, 1923, the appellant refused to accept or wash any more laundry for respondent, and thereupon employed a driver by the name of Clough to take charge of said district, furnishing him with a list of respondent's customers, to whom letters were mailed notifying them that respondent no longer represented the laundry company, and advised the customers to patronize Clough, who immediately began to canvass the district, and succeeded in procuring patronage from some of respondent's former customers. The respondent continued to regularly solicit and collect laundry from this district, delivering it to the Sanitary Laundry, a competing organization, with which he procured an agreement to retain for his services 30 per cent. of their regular charges. The respondent, however, testified that, owing to the appellant's interference with his laundry route and customers, he lost business, which decreased his commissions on an average of $35 to $40 per week, which loss aggregated from $940 to $960 prior to the filing of the complaint. At the close of plaintiff's case, a motion for nonsuit was made and granted as to the individual defendants, but denied as to the laundry company. The jury rendered a verdict against appellant for $2,000 damages.

[2-4] This case seems to have been tried on the theory that the measure of damages was the loss of commissions sustained by virtue of appellant's wrongfully enticing respondent's customers from him. It is apparent that appellant's refusal to continue to wash respondent's laundry for 72½ per cent. of the regular list prices was not an element of damages, for respondent immediately

made a much better bargain with the Sanitary Laundry, which allowed him 30 per cent. of its regular schedule of prices. There are no definite allegations in the complaint that appellant ever agreed orally or in writing to wash respondent's laundry for any specified sum, or at all. Assuming, however, that such an agreement was made, there are neither pleadings nor evidence regarding the term during which this contract was presumed to continue. Evidently the trial court assumed that the damages in this case would be measured by the loss sustained by enticing respondent's customers away from him. But this was not an equitable action for injunctive relief to prohibit interference with the good will of a business, or confidential business relations affecting individual customers of a particular laundry route, under which circumstances damages are merely incidental to the injunctive relief which is sought. Under the pleadings, plaintiff was compelled to rely upon the theory of a breach of contract to wash laundry for an agreed price. But the complaint failed to allege such a contract with sufficient certainty, and the demurrer should have been sustained. If the complaint be deemed to charge appellant with damages for interference with the customers of his laundry route, the respondent has mistaken his remedy, for such an action at law will not lie. If the complaint be deemed to charge damages for breach of a contract to wash laundry at 72½ per cent. of the usual schedule prices, the evidence fails to show that respondent sustained a loss of this nature, for he immediately made a contract with the Sanitary Laundry Company for 70 per cent. of the schedule prices. Section 3301, Civil Code, provides:

> "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

[5] Moreover, since no time was fixed by either the pleadings or the evidence, during which the alleged contract was to continue, it could be terminated at will by either party. In 1 Williston on Contracts 59, § 38, it is said:

> "A promise which contemplates continuing performance for an indefinite time has been construed as stipulating only for performance terminable at the will of either party." Joliet Bottling Co. v. Joliet Citizens' Brewing Co., 254 Ill. 215, 98 N. E. 263; Gage v. Village of Wilmette, 315 Ill. 328, 146 N. E. 325; Arkansas Valley T. & L. Co. v. Atchison, T. & S. F. Ry., 49 Okl. 282, 151 P. 1028, 1032; Davis v. Fidelity Fire Ins. Co., 208 Ill. 375, 70 N. E. 359.

If the contract on the part of the laundry company can be said to be an agreement to allow respondent 27½ per cent. of schedule prices for washing laundry, as compensation for collecting and delivering the packages from a certain district, regardless of who owned the territory, the agreement would be indefinite for failure to limit the duration of the contract. In 6 California Jurisprudence 218, § 143, it is said:

> "If the * * * consideration be personal services, the agreement for such services must be definite and certain, not only with reference to their nature and character, but also with reference to the time of their continuance."

Section 1999, Civil Code, provides:

> "An employment, having no specified term, may be terminated at the will of either party, on notice to the other."

Under the circumstances of this case, where absolutely no limitation of time was fixed for the performance of services in washing laundry for a specified price, we are of the opinion that the laundry company was privileged to terminate the contract at will, without becoming liable for damages therefor. In the case of Otten v. Spreckels, 183 Cal. 252, 259, 191 P. 11, 13, which was a suit for damages for breach of contract in discharging an agent employed to take charge of a newspaper route, who was paid commissions upon the newspapers which he sold judgment in favor of the agent was reversed, and the court said:

> "* * * Where the agency is revocable at will, as in this case, he has no interest or right which he can assert against his principal who revokes it, as the basis of damages for such revocation. * * * The agency being terminable at will by the principal and being for an indefinite term and without a valuable consideration, its revocation was not a breach of the contract. The plaintiff has no cause of action and the judgment should have been for the defendant."

The same principle applies to the present case. Regardless of which party was the employer, either had a right to terminate the employment at will. The respondent paid no valuable consideration to the appellant for the contract. Walker was the individual owner who sold the laundry route to the respondent, and the Model Laundry Company was not a party to the contract of sale, and is not bound by the terms thereof. A mere agreement of agency or employment existed between the appellant and the respondent, which was continuing in its nature and failed to specify a limitation of duration. It was therefore terminable at the will of either party.

[6, 7] Regardless of whether the respondent or the laundry company be deemed to be the employer a confidential relationship existed between them in regard to the names and addresses of respondent's customers in his laundry district. The appellant had no lawful right to divulge its knowledge of the names and addresses of respondent's customers, nor use the information secured by virtue of their business relationship to alienate customers from the respondent or acquire them for its own benefit. Unlawful interference

with property rights in the good will of a business, or the benefits of trade or patronage of a specific list of customers in a definite laundry route, may be protected by injunctive relief in a court of equity. 14 Cal. Jur. 198, § 17; New Method Laundry Co. v. MacCann, 174 Cal. 26, 161 P. 990, Ann. Cas. 1918C, 1022; Cornish v. Dickey, 172 Cal. 120, 155 P. 629; Empire Steam Laundry v. Lozier, 165 Cal. 95, 102, 130 P. 1180 (44 L. R. A. [N. S.] 1159, Ann Cas. 1914C, 628); Mackechnie Bread Co. v. Huber, 60 Cal. App. 539, 213 P. 285; Olschewski v. Hudson (Cal. App.) 262 P. 43. But there is no such property right in the intangible interest of an exclusive privilege to collect laundry or sell newspapers in a specific district, which will authorize damages in a suit at law for conversion or trover. Olschewski v. Hudson, supra. In the case last cited it is said:

> "Manifestly a laundry route does not consist solely of a specific district or territory, nor does it consist of a vested right to, or monopoly of, the patronage of all the residents of said district. Competing laundry companies may possess independent lists of customers residing in the same house, block or district. * * * No laundry company may have a vested property right to claim, as customers, particular individuals, nor all the residents of a specific district. The field is open for fair competition on the part of any and all who desire to solicit patronage."

If a suit at law for damages for the conversion of a laundry route as a whole will not lie, neither will such a suit at law lie for damages for the conversion of the patronage of individual customers in a specific route. It follows that the measure of damages in the present case cannot be based upon the detriment sustained by the loss of customers through the inducements of appellant.

[8] In spite of the fact that a demurrer had been sustained to the second cause of action which was based upon a claim for damages for the loss of a prospective sale of the laundry route through the opposition of appellant, and that this cause of action was abandoned, the court erroneously permitted evidence of this nature to be received over the objection of the appellant. C. O. Blanchard was permitted to testify:

> "Q. Mr. Blanchard, do you remember * * * you had a talk with Mr. Adkins, relative to buying * * * the route? * * * A. Well, he was given the opportunity to get some one to buy it if he could. * * * Offers were made to him several times. * * * He was offered $1,200."

Mr. Hart was also permitted to testify over objection:

> "Q. What was said by Mr. Blanchard in regard to buying * * * his route? * * * A. He said Mr. Adkins was asking too much. * * * The original price asked for the route by Mr. Adkins was $1,700. I said to Mr. Blanchard, do you consider this fair. And he said I don't. And I said, well, what do you consider a fair price? And he said $1,500."

The alleged defeating of a prospective sale of the laundry route, and consequential damages therefor, was not an issue in the case. This evidence was prejudicial. Riverside Water Co. v. Gage, 108 Cal. 240, 245, 41 P. 299.

[9] The court also erred in giving certain instructions which assumed that damages in this case might be predicated on the detriment sustained by a violation of confidential information on the part of appellant with respect to the names of respondent's customers, and the wrongful means of inducing his customers to patronize the appellant. These acts might have been prohibited by injunction, but they were not an issue in this case, and furnished no proper measure of damages for a mere breach of contract. Among these prejudicial and erroneous instructions, so given, were the following:

> "* * * You may award him such damages * * * arising from the defendant Model Laundry Company writing letters to plaintiff's customers in said route informing them that plaintiff would be succeeded by another person upon said route representing said Model Laundry Company, * * * and by supplying him with a list of names and addresses of the customers whom plaintiff had served, * * * and that plaintiff thereby lost customers in or upon said route, and was deprived of * * * the profits therefrom. (If you find these to be facts) you will find for the plaintiff such damages as you may believe from all the circumstances, he has sustained. * * *"

And the following in part:

> "* * * If you believe from a preponderance of the evidence that Roy V. Adkins purchased said laundry route and list of customers from Walker, and * * * intrusted (the list of customers) to the defendant, * * * and that said defendant * * * used the same against the interest, or to the prejudice of the said Adkins, then you should find for the plaintiff, provided also you find from a preponderance of evidence that damages, if any, proximately resulted therefrom to the plaintiff."

It is apparent that the trial court erroneously assumed that damages for a tort in wrongfully divulging trade secrets and appropriating the customers of respondent were a proper measure of compensation in the present action. But a remedy for such intangible property rights does not exist in a mere suit at law for the breach of a contract.

For the foregoing reasons, the judgment is reversed.

We concur: KOFORD, P. J.; NOURSE, J.

92 Cal. App. 701

HAWBER v. RALEY et al. (Civ. 6228.)

District Court of Appeal, First District, Division 1, California. June 23, 1928.

1. Release 🔑7, 29(1)—Agreement not to sue owner of car in which plaintiff rode for injuries in collision constituted full release, barring action against owner of the other car.

Instrument signed by one injured in automobile collision, in which she agreed not to sue owner of car in which she rode, and authorized latter to plead agreement in full satisfaction and release of claim or suit, *held* to constitute full release and satisfaction, barring action against owner and driver of the other car, notwithstanding that owner of car in which plaintiff rode was not driving it, and that release was obtained before commencement of action, since, where there is single injury, there is but one cause of action, for which there can be but one satisfaction.

2. Release 🔑29(3)—Release by one injured in automobile collision to owner of automobile whose negligence did not cause injury barred action against owner of the other car.

Where plaintiff was injured in automobile collision, release to owner of car in which she rode barred action against owner and driver of the other car, notwithstanding that jury by special verdicts found injuries were not proximately caused by negligence of owner of car in which she rode, since, irrespective of source from which compensation for injury is accepted, payment will operate as satisfaction.

3. Release 🔑29(1)—Release held binding as respects joint tort-feasor, notwithstanding inadequate compensation.

Release executed by one injured in automobile collision to owner of one of colliding cars *held* to bar action against owner of the other car, notwithstanding that compensation was inadequate, since damages resulting from same wrongful transaction are ordinarily inseparable, and plaintiff could not recover part from one and part from another defendant.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Mrs. E. W. Hawber against Walter Raley, Sr., and another. Judgment for plaintiff, and defendants appeal. Reversed.

Ford, Johnson & Bourquin, of San Francisco, for appellants.

James C. Espey and J. Hampton Hoge, both of San Francisco, for respondent.

KNIGHT, J. This is an action to recover damages for personal injuries suffered by plaintiff as a result of an automobile collision which occurred in San Jose on January 6, 1924, between an automobile driven by E. L. Emery and owned by his wife, Mrs. Harriet E. Emery, in which plaintiff was riding, and one driven by the defendant Raley, Jr., and belonging to his father. The jury rendered a verdict in plaintiff's favor for the sum of $1,245, and judgment was entered thereon, from which defendants have appealed.

It appears from the evidence that Mrs. Emery, the owner of the automobile in which plaintiff was riding, was covered by a policy of public liability insurance issued by a company represented by one of plaintiff's attorneys, and that shortly after the accident, and while plaintiff was still confined in the hospital, said attorney paid plaintiff $380.27, which payment was evidenced by a written agreement, signed by plaintiff and witnessed by one of the insurance company's agents. These facts were developed by defendants at the trial, during the cross-examination of plaintiff, and thereupon defendants asked and were granted leave to amend their answer so as to plead said payment as a satisfaction for the injuries plaintiff received and as a discharge of these defendants from any liability for the tort sued upon. The cause was submitted to the jury, with instructions to render one general and three special verdicts; the latter being in the following forms: First, was any alleged injury to plaintiff proximately caused by the negligence of Mr. Emery? Second, was any alleged injury to plaintiff proximately caused by the negligence of Mrs. A. L. Emery? Third, was any alleged injury to plaintiff proximately caused by the negligence of the defendant Walter Raley, Jr.? The jury answered the first and second special verdicts in the negative, and the third in the affirmative, and consequently rendered a general verdict against defendants for the sum of $1,245.

It is contended by the defendants here, as it was before the trial court, that the effect of said payment to plaintiff and the execution by her of said agreement was to extinguish the cause of action sued upon; the contention being based upon the rule which declares that payment by, and the release of, one of two or more joint tort-feasors operates as a release of all, and estops the injured party from asserting that the person released was not in fault and not liable for the injury. Tompkins v. Clay Street R. R. Co., 66 Cal. 163, 4 P. 1165; Chetwood v. California Nat. Bank, 113 Cal. 414, 45 P. 704; Flynn v. Manson, 19 Cal. App. 400, 126 P. 181; Urton v. Price, 57 Cal. 270.

Plaintiff does not dispute the legal rule above mentioned, but contends that the present case is exempt therefrom, first, for the reason that the document executed by her did not constitute a release and satisfaction, but was merely a covenant not to sue Mrs. Emery, and therefore did not operate to extinguish the cause of action sued upon. The document reads as follows:

"*Agreement Not To Sue.*—Whereas, Mrs. E. W. Hawber, on the sixth day of January, 1924, was a passenger in an automobile owned by Mrs. Harriet T. Emery, and whereas, at the intersection of Sixth street with William street, San Jose, California, said automobile collided with another automobile, and whereas, the said Mrs. E. W. Hawber did, on account of said collision, then and there receive personal injuries and damages to property: Now therefore, in consideration of the payment of three hundred eighty and twenty-seven hundredths ($380.27) dollars, to the said Mrs. E. W. Hawber paid by the said Mrs. Harriet E. Emery, the receipt of which is hereby acknowledged by the said Mrs. E. W. Hawber, the said Mrs. E. W. Hawber covenants and agrees that she will not institute claim, demand, or suit at law, against the said Mrs. Harriet E. Emery in consequence of said collision. It is further agreed and understood between the parties hereto that the payment of the amount above stated is not to be construed as an admission on the part of said Mrs. Harriet E. Emery of any liability whatever in consequence of said collision. And it is further understood and agreed that, should the said Mrs. E. W. Hawber at any time in the future institute claim, demand, or suit at law, against the said Mrs. Harriet E. Emery, the said Mrs. Harriet E. Emery may plead this agreement in full satisfaction and release of said claim, demand, or suit at law. In witness whereof the said Mrs. E. W. Hawber had hereunto set her hand and seal this twenty-third day of January, 1924.

"[Signed]
"(Mrs.) Elletta W. Hawber. [Seal.]
"Witnesseth: J. A. Stewart."

In dealing with the question of the legal effect of a covenant not to sue as contradistinguished from a release and satisfaction, Ruling Case Law, vol. 23, p. 408, states:

> "The authorities almost uniformly hold that a covenant or agreement not to sue one of several joint tort-feasors made on a sufficient consideration is not a technical release of the damages sustained, and will not be held to release either, *but the person with whom the agreement or covenant was made must be left to his action on it.*" (Italics ours.)

And, upon the same subject, Cyc. vol. 34, p. 1090, declares:

> "An absolute covenant not to sue one or less than all of several joint tort-feasors never operates as a release, *and not even the covenantee can plead it as a defense,* for such a covenant does not extinguish the cause of action, *but he must seek his remedy in an action on his covenant.*" (Italics ours.)

In other words, as said in City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271:

> "The legal effect of such a covenant [not to sue] is not the same as that of a release. A covenant not to sue a sole tort-feasor is, to avoid circuity of action, considered in law a discharge, and a bar to an action against such tort-feasor. But the rule is otherwise where there are two or more tort-feasors, and the covenant is with one of them not to sue him. In such case the covenant does not operate as a release of either the covenantee or the other tort-feasors, but the former must resort to his suit for breach of the covenant, and the latter cannot invoke the covenant as a bar to the action against them."

[1, 2] It would therefore appear to be a rule of construction that, where two or more tort-feasors are involved and the document is such that the covenantee may plead the same in abatement of any action which the covenantor might subsequently commence in breach of the obligation contained in said document, and the remedy thereunder is not restricted to an action on the covenant, the document constitutes a release and satisfaction, and not a mere covenant not to sue. An inspection of the document in question here discloses that by its very terms it was agreed "that, should the said Mrs. E. W. Hawber at any time in the future institute claim, demand, or suit at law against the said Mrs. Harriet E. Emery, the said Mrs. Harriet E. Emery may plead this agreement in full satisfaction and release of said claim, demand, or suit at law"; and it would follow, therefore, under the rule of the authorities above cited, that said document constitutes a full release and satisfaction for the injuries received by plaintiff, and that the same is not merely a covenant not to sue. That being so, the second question to be determined is whether, as plaintiff contends, the case is taken out of the operation of the general rule above mentioned because of the fact that the jury by its special verdicts found that plaintiff's injuries were not proximately caused by the negligence of Mrs. Emery, which in effect was a declaration that she was not a joint tort-feasor.

Upon this latter question the authorities are apparently not agreed, but, whatever may be the law elsewhere, the rule seems to obtain in this state that, irrespective of the source from whom the compensation for the injury is accepted, the payment will operate as a satisfaction, which in equity and good conscience does not permit the party so compensated to recover again for the same injury; the ground of the rule being that the validity of the release is in no way dependant upon the validity of the claim, and that therefore it is immaterial whether the person from whom the satisfaction came was or was not legally liable (Tompkins v. Clay Street R. R. Co., supra; Chetwood v. California Nat. Bank, supra); nor does it make any difference however small the compensation thus paid may have been (Flynn v. Manson, supra; Chetwood v. California Nat. Bank, supra). The bar arises, not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction or what the law deems is the equivalent. Urton v. Price, supra. Cooley on Torts (3d Ed.) vol. 1, p. 236, states the same proposition in the following language:

> "* * * This rule is held to apply, even though the one released is not in fact liable. 'It does not lie in the mouth of such a plaintiff to say he had no cause of action against one who paid him for his injuries.'"

And in Cyc. vol. 34, p. 1088, the rule is given thus:

> "If the release is given on a consideration received in complete satisfaction of the injury, then of course it is immaterial that the releasee was not a guilty party, not even claimed to be such. In any event, an action against the real tort-feasor is barred, since the person injured is entitled to but one satisfaction."

The above rule finds support also in the federal jurisdiction, for in the case of Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129, it is declared:

> "When the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages."

And in dealing with the same question, the case of Kirkland v. Ensign-Bickford Co. (D. C.) 267 F. 472, holds:

> "One who compromises a claim does not necessarily admit that the claim was well founded, but the one who receives the consideration is precluded from denying that it was. So it may be said that, when a pretended claim for a tort has been settled by treaty, and satisfaction rendered the claimant by one so connected with the trespass as to be reasonably subject to an action and possible liability as a joint tort-feasor, the satisfaction rendered will release all who may be liable, whether the one released was liable or not. In such a case it is not necessary that it should appear that the party making the settlement was in fact liable. It will be deemed sufficient if there is an appearance of liability; that is, something in the nature of a claim on the one hand, and a possible liability under the rules of the law on the other."

As the decision just quoted from points out, in many of the cases in which it has been held that the releases there dealt with operated only in favor of the covenantees, the releases related to some liability independent of and separate from the tortious act sued upon. Such was the case of Aigeltinger v. Whelan, 133 Cal. 110, 65 P. 125, upon which plaintiff strongly relies, it being there shown that the release pleaded as a bar was given in favor of certain sureties, and was founded on contractual liability not in any way connected with the tortious act for which their principal was being sued in damages. In the present case there is but the single liability or cause of action growing out of one tortious act.

In further support of her position that the present case is not controlled by the general rule above mentioned, plaintiff points out that in those cases arising in this jurisdiction wherein the rule has been applied the releases were obtained subsequent to the commencement of the actions, whereas in the case at bar no action ever was instituted against Mrs. Emery, on behalf of whom the payment was made. We think this distinction cannot be held to alter the application of the rule, however, for it will be found that in a number of well-considered cases from other jurisdictions the rule has been applied, notwithstanding the party from whom the satisfaction was accepted was not sued or even claimed to be liable. Cleveland, etc., Ry. Co. v. Hilligoss, 171 Ind. 417, 86 N. E. 485, 131 Am. St. Rep. 258; Cormier v. Worcester Consol. St. Ry. Co., 234 Mass. 193, 125 N. E. 549; Carpenter v. McElwain Co., 78 N. H. 118, 97 A. 560; Muse v. De Vito, 243 Mass. 384, 137 N. E. 730.

[3] Nor does it matter, as plaintiff urges, that the settlement was made with Mrs. Emery, the owner of the automobile in which plaintiff was riding, and not with Mr. Emery, who was driving the same, for, as already shown, the application of the rule is based upon the fundamental fact that, where there is a single injury, there is but one cause of action, indivisible and inseparable for which both in law and good conscience there can be but one satisfaction. It is immaterial, therefore, from what source the satisfaction may come. Lovejoy v. Murray, supra; Hunt v. Ziegler (Tex. Civ. App.) 271 S. W. 936. It appears from the testimony of plaintiff in the case before us that the money was paid to her by the insurance company on behalf of Mrs. Emery while she was in the hospital, so that she might be able to meet the expenses for medical services and hospitalization; and the record discloses that these same items of expense were included in her demand for damages against these defendants, which the trial court instructed the jury she was entitled to recover, providing it found that the defendants were negligent. Presumably the jury followed the instructions and included these elements of damage in its verdict. It would seem clear, therefore, that, if the judgment herein is allowed to stand, plaintiff will be twice compensated for the same elements of damage. True, she may have received from Mrs. Emery only a part of the damages accruing from her injuries, but, as said in Tompkins v. Clay Street R. R. Co., supra:

> "Damages resulting from the same wrongful transaction are ordinarily inseparable; she could not recover part from one and part from the other defendant."

And again in Flynn v. Manson, supra, as follows:

> "However conflicting may be the current of authorities in respect to the proper construction of a release of the kind in question, it is a well-settled principle of law that in actions ex delicto plaintiff can recover compensation but once. Where the demand is unliquidated, as in the case here, the court cannot hold that the payment of any sum, however small, in consideration of a release does not or cannot operate as compensation for the alleged injuries."

The same proposition is aptly stated in the case of Abb v. Northern Pac. R. Co., 28 Wash. 428, 68 P. 954, 58 L. R. A. 293, 92 Am. St. Rep. 864, as follows:

> "* * * But, when an injured party makes an estimate of the amount of damages he is willing to receive from one, and accepts such sum with the agreement that it shall fully release and discharge the one making the payment, we think it is more than a mere agreement not to sue. It is a release of his cause of action in consideration of a satisfaction."

Under the authorities and for the reasons hereinabove set forth, the judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.

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92 Cal. App. 697

WILLIAMS v. SUTPHEN. (Civ. 6326.) ★

District Court of Appeal, First District, Division 2, California. June 22, 1928.

Hearing Denied by Supreme Court Aug. 20, 1928.

1. Husband and wife ⟹133(1)—Evidence held to sustain finding that certain stocks and bonds claimed by wife's residuary legatee were separate property of deceased wife.

In action for accounting of assets of estate by residuary legatee under will against husband of deceased wife individually and as administrator of her estate, evidence *held* to sustain finding that certain stocks and bonds claimed as part of residuary estate were separate property of deceased wife at time of her death.

2. Appeal and error ⟹1071(1)—Finding that deceased attempted to make gift to plaintiff held not prejudicial to defendant.

In action for accounting of assets of estate by residuary legatee under will against husband of deceased wife, finding that deceased attempted to make a gift of certain stocks and bonds to plaintiff *held* not prejudicial.

Appeal from Superior Court, Los Angeles County; E. P. Shortall, Judge.

Action by Elizabeth S. Williams against Perry D. Sutphen, individually and as administrator of the estate of his deceased wife. Judgment for plaintiff, and defendant appeals. Judgment affirmed, and cause remanded for a new trial on certain issue.

E. E. Morris, Robt. E. Austin, and John N. Helmick, all of Los Angeles, for appellant.

Chas. C. Montgomery and Earl S. Wakeman, both of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued the defendant individually and as administrator of the estate of his deceased wife for an accounting of the assets of the estate. Plaintiff had a judgment, from which the defendant has appealed on a bill of exceptions.

The issues raised by the complaint were that plaintiff, a sister of deceased, was the residuary legatee under the will; that defendant, as administrator with the will annexed, made an inventory of said estate which was not complete, but that the defendant concealed and claimed as his own, adversely to the interest of the estate, certain personal property, consisting of stocks and bonds of the value of $15,000. It was also alleged that the deceased had in her possession, as her separate property, at the time of her death, certain jewelry and certain stocks and bonds of the value of $7,100, of which she had made a gift to the plaintiff, but that the defendant claimed the jewelry as a part of the estate. The answer denied that any of the property mentioned in the complaint belonged to the estate and denied specially that the deceased had made any gift to the plaintiff of either the jewelry or the stocks and bonds mentioned.

The trial court found that the stocks and bonds enumerated in finding No. 5 were the separate property of the deceased and a part of the estate; that the jewelry referred to in the complaint was given to the plaintiff by the deceased and was not property of the estate; and that the deceased attempted to make a gift to the plaintiff of the stocks and bonds, valued at $7,100; but it was not found whether this gift was completed or whether these stocks and bonds were separate or community property.

On this appeal the appellant attacks finding No. 5 as not supported by the evidence and, as a separate ground for reversal, assigns the failure of the trial court to find whether the stocks and bonds referred to in finding No. 7, which the deceased attempted to give to the respondent, were the separate property of the deceased, and whether they became the property of the respondent.

[1] In support of finding No. 5 respondent points out that the evidence discloses that the appellant and his wife commenced in 1913 to invest in stocks, bonds, and mortgages, keeping a book of account of all these investments, some of which were entered in his name and some in the name of the deceased; that these investments were made while the parties were residents of Portland, Or., and were continued over a period of eight years and until 1921, when the parties returned to California; that under the laws of the state of Oregon all property acquired there in the name of the wife was deemed to be her separate property; and that at all times prior to the death of deceased this property was recognized and treated by both husband and wife as the separate property of the latter. The evidence, as is usual in cases of this kind, was meager, the husband being the one person who had the most intimate knowledge of the facts and circumstances, and he, being adverse to the interests of the respondent, disclosed no more than he deemed necessary.

We have examined the record, and we are

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

satisfied that the trial court was justified in reaching the conclusion, from the facts proved and the inferences applicable, that the bonds referred to in finding No. 5 were at all times the separate property of the deceased and, accordingly, a part of her estate. We should add, however, that if the direct evidence should be insufficient to support this finding, the inference to be drawn from the fact that all this property was acquired in the wife's name, in a state whose laws favor the separate property of husband and wife and are adverse to the theory of community property (Bosma v. Harder, 94 Or. 219, 185 P. 741, 744, 745), would compel us to affirm in the absence of a satisfactory explanation on the part of the appellant. This witness' testimony was so equivocal and unsatisfactory that the trial court could well have rejected it altogether.

[2] Both parties urge that the cause be remanded for the purpose of retrying the issue relating to the stocks and bonds mentioned in finding No. 7. The trial court merely found that the deceased "attempted" to make a gift of these stocks and bonds to the respondent. This would imply that, though a gift was attempted, it was not consummated. Thus the finding is not prejudicial to the appellant, and, as the judgment is wholly silent on the issue, he is not prejudiced by the judgment. But as the respondent consents that the cause be remanded for a trial on this issue, such will be the order.

The judgment is affirmed, but the cause is remanded for a new trial on the sole issue of the ownership of the $7,100 stocks and bonds, referred to in finding No. 7, each party to bear his own costs on this appeal.

We concur: KOFORD, P. J.; STURTEVANT, J.

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92 Cal. App. 156

FAIRBANKS et al. v. MACREADY. ★

(Civ. 6273.)

District Court of Appeal, First District,
Division 1, California. June 20, 1928.

Hearing Denied by Supreme Court July 19, 1928.

1. Judgment 🔑198—Absence of finding that building was first-class residence, required by restrictions, did not invalidate judgment refusing to enjoin alleged violation.

Assuming there was no finding on issue as to whether building at time of its completion was first-class residence required by restrictions, judgment refusing to enjoin alleged violation of restrictions was not invalidated thereby, since finding which may invalidate judgment supported by findings made is not ground for reversal unless it is shown that evidence was submitted authorizing finding that would invalidate the judgment.

2. Appeal and error 🔑544(2)—Appellate court could not review evidence and ruling on issue, where appeal was taken on judgment roll alone.

Where appeal was taken on judgment roll alone, court could not review ruling striking out evidence on issue as to whether or not building was first-class residence, since evidence and proceedings were not embodied in record.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Modification of opinion.

For former opinion, see 267 P. 716.

Joe Crider, Jr., and Denis & Griffith, all of Los Angeles, for appellants.

F. R. McNamee and Luke J. McNamee, both of Los Angeles, for respondent.

PER CURIAM. It is ordered that the opinion in the above-entitled cause be modified by inserting at the end thereof, and immediately preceding the sentence, "The judgment is therefore affirmed," the following:

[1, 2] The general finding relating to the observance of the building restrictions was that said structure "does not now violate the building restrictions, conditions, and reservations imposed upon said tract No. 3752, but, on the contrary, now conforms thereto." Elsewhere in the trial court's decision, however, wherein it declared that the restriction limiting the use of said lots to "first-class" private residences was indefinite and unenforceable, the statement was added that "all evidence on such subject has been and is stricken out"; and plaintiffs therefore contend that the effect of the latter statement was to qualify the general finding so that as the trial court's decision now stands there is no finding on the issue as to whether or not said building at the time of its completion was deemed to be a "first-class" residence. Even assuming this to be true, the judgment is not invalidated thereby, for it has been repeatedly held that failure to find upon an issue, the finding upon which may have the effect of invalidating a judgment fully supported by the findings made, is not ground for reversal unless it be shown by a statement, bill of exceptions, or substitute therefor, that evidence was submitted in relation to the issue, sufficient to authorize such a finding as would have the effect of invalidating the judgment. Llano Investment Co. v. Minton, 190 Cal. 752, 214 P. 855; Kaiser v. Dalto, 140 Cal. 167, 73 P. 828; John A. Roebling's Sons Co. v. Gray, 139 Cal. 607, 73 P. 422; 24 Cal. Jur. 947; 2 Cal. Jur. 525. And, as already noted, none of the evidence in the present case has been brought before us, the appeal having been taken on the judgment roll alone; therefore we have no way of knowing whether plaintiffs offered any evidence whatever to prove that the building, at the time of its completion,

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★Hearing denied by Supreme Court.

was not a "first-class" private residence; or, if any such evidence was so introduced, of determining whether it would be legally sufficient to support an affirmative finding on that issue; nor in the absence of a record on appeal embodying the evidence and the proceedings had before the trial court are we permitted to review the ruling striking out the evidence on that issue. 2 Cal. Jur. 525.

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92 Cal. App. 715

CONNELL v. CRAWFORD. (Civ. 6258.)★

District Court of Appeal, First District, Division 1, California. June 25, 1928.

Rehearing Denied July 25, 1928. Hearing Denied by Supreme Court Aug. 23, 1928.

1. Appeal and error ⟹1058(3)—Rejection of deposition of appraiser as to value held not prejudicial, where testimony of another appraiser, who was duly qualified and appraised property at same price, was admitted.

In suit to rescind exchange of properties, refusal to allow deposition of one of appraisers to be read in evidence on ground that he was not an expert was not prejudicial, where another appraiser was adequately qualified and appraised property at same price and his testimony was admitted.

2. Exchange of property ⟹8(4)—Evidence held to support findings of fraud in suit to rescind exchange of property for false representations of defendant's husband.

In suit to rescind exchange of properties on ground of misrepresentations of defendant's husband, acting as her agent, who stated value of timber lands exchanged was $12,000, where value did not in fact exceed $1,000, evidence *held* sufficient to support court's findings of fraud and deceit.

3. Evidence ⟹588—Trial court sitting as jury may disregard or reconcile inconsistencies in witness' testimony.

Trial court sitting as a jury is judge of the facts and may disregard or reconcile inconsistencies in the testimony of a witness, and witness' entire testimony need not be disregarded by virtue of fact that it was inconsistent or even false in some particulars.

4. Equity ⟹39(1)—Court of equity can mold decree to suit exigencies of case and determine parties' ultimate rights.

Court of equity may do exact justice between parties, and can mold its decree to suit the exigencies of the case and determine the parties' ultimate rights.

5. Exchange of property ⟹8(1)—Finding as to age and condition of person suing to set aside exchange of properties on ground of fraud was immaterial.

In suit to set aside and rescind exchange of properties on ground of fraud, finding that plaintiff was at the time of the exchange of the age of 64 years and infirm in mind and body was immaterial.

6. Contracts ⟹270(2)—Each case must be determined on its own facts as regards applicability of laches to prevent rescission for fraud.

While doctrine of laches applies equally to all fraud, each case must be considered on its own facts, and actions for rescission must be distinguished from actions for damages, for accounting, recovery of money, and the like.

7. Exchange of property ⟹5—Two months' delay in making demand for restitution of premises, after discovery of fraud in contract for exchange of properties, held not to bar rescission.

Two months' delay of plaintiff in seeking restitution of property exchanged after discovery of false representations of defendant's husband *held* not to bar plaintiff's rescission suit on ground of laches, since delay under the circumstances was not unreasonable.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Mary A. Connell against Jennie C. Lewis Crawford. Judgment for plaintiff, and defendant appeals. Affirmed.

Sooy & Heywood, of San Francisco, for appellant.

Lovett K. Fraser, of San Francisco, for respondent.

CAMPBELL, Justice pro tem. This is an action in which plaintiff seeks to rescind an exchange of two flats which belonged to her in the city of Oakland for timber land in Idaho, the property of defendant. The defendant having transferred the Oakland property received from plaintiff to an innocent purchaser for value, judgment was rendered in favor of plaintiff rescinding the exchange, adjudging that plaintiff return the timber land to defendant, and that plaintiff have judgment against defendant for $7,500, the amount received by defendant from the sale of the two flats.

[1] The following evidence is contained in the record: Plaintiff, a woman, 64 years of age, owned two flats in the city of Oakland of the value of $7,500, which had been renting for $80 per month, and also had $3,000 cash on deposit in an Oakland bank. J. G. Crawford, a real estate agent, had offices and was in the real estate business under the name of Shattuck Realty Company within two blocks of plaintiff's property, and at the time of the transaction in question was the husband of defendant Jennie C. Lewis Crawford. The plaintiff listed her property with Crawford to rent or sell. While the property, was so listed and while Crawford was acting as her agent, he borrowed from plaintiff $3,000 on his unsecured note, which has never been paid. After borrowing this money—all that plaintiff had—he started out to get possession of her flats. He told plaintiff that her two flats would not rent nor sell, but that he

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

had a fine proposition whereby she could exchange her two flats in Oakland for 160 acres of fine timber land in Idaho of the value of $14,000 owned by his wife; that the timber land was insured for $12,000; that an offer of $12,000 had been made for it, but that $12,000 was not enough and had been refused, and that this timber property of his wife was of much greater value than plaintiff's property; that it would be a good thing; that her flats were running down so that the only way she could get money would be in a trade. The plaintiff believed everything Crawford, the agent, told her about the timber land in Idaho and signed a deed exchanging her two flats valued at $7,500 for the Idaho timber land, which the court found to be of a value not to exceed $1,000. Crawford was a notary and took his wife's acknowledgment to the deed from her to plaintiff. Plaintiff made the exchange on the advice of Crawford, the husband of defendant, who told her not to talk to anybody about the deal, and without consulting any other person, as he told her that he was a man of honor and would do the very best for her in this deal. As soon as the exchange was made, Crawford and his wife sold the Oakland flats and took a trip East. Plaintiff did not get her deed to the timber land until September, 1923, after the Crawfords returned from the East. Not being able to collect the interest on the $3,000 Crawford note, plaintiff placed the matter in the hands of her attorney, Lovett K. Fraser, to investigate. After investigation by her attorney, she found the timber property to be of little value. Defendant Jennie C. Lewis Crawford had never seen the timber property herself, although she had owned it since 1914, and she had been trying to sell it, through her husband as her agent, without success since that time. Plaintiff had the Idaho property appraised by S. S. Taylor, one of the appraisers who appraised the estate of Lewis, from which appellant received the property, and also had W. H. Herrick, the county assessor of the county wherein the timber land is located, go out with S. S. Taylor and appraise it. After viewing the property and making investigation, they each appraised the property at $600. The court refused to allow the deposition of Taylor to be read in evidence on the ground that he was not an expert. Respondent contends that his deposition should have been received. The disposition of this question is of no moment, as W. H. Herrick, being county assessor and charged with the duty of appraising the property, is deemed adequately qualified, and his testimony is sufficient to support the finding as to the value of the Idaho land. This appraisement was made July 28, 1924, and was the first time plaintiff knew Crawford's statements were false. There was never any insurance on the timber of $12,000 and there was no option on it for $14,000, as stated by Crawford.

[2] The court found that J. G. Crawford was the agent for his wife in making the exchange; that he made the representations; that the plaintiff relied upon the representations; that such representations were false; that the value of the Idaho timber land did not exceed $1,000; and that the value of the Oakland flats was $7,500.

Appellant assigns several reasons wherein the evidence does not support the findings and, further, "that, notwithstanding the finding of dual agency, it appearing that the fraud was practiced upon plaintiff by her own agent, the defendant neither participating in nor knowing it, and plaintiff's confessed negligence having made it possible, there can be no recovery," and that "a cause of action for rescission being pleaded for one fraud, and a cause of action for cancellation for a different fraud having been proved, the lower court erred in denying defendant's motion for a nonsuit."

The facts sufficiently support the finding of fraud and deceit. The fraudulent misstatement of value being sufficient (Scott v. Delta Land and Water Co., 57 Cal. App. 320, 207 P. 389; Harris v. Miller, 196 Cal. 8, 235 P. 981; Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011), the judgment must therefore be affirmed unless the latter assignments quoted possess sufficient merit to require a reversal.

[3, 4] It is true that plaintiff did testify that she did not agree to take the Idaho property and did not sign any agreement to that effect, that she did not know that she had signed a deed, that she thought that she was signing a paper to the effect that Crawford had given a correct report of this timber land, but plaintiff also testified that she did sign the deed and would not have signed it but for the representations made by Crawford, and that the deed was acknowledged by Crawford. Aside from the testimony of respondent, the testimony of Crawford and the instrument itself in evidence establish the fact that she did sign and deliver the deed for the purpose of exchanging the properties. In determining the questions whether or not the respondent executed the deed to appellant for the purpose of such exchange, and whether or not she relied upon the representations of Crawford, the court was not limited to a consideration of the testimony of respondent, but was at liberty to consider any and all evidence in the record in determining this and all issues in the case. The trial court is the judge of the facts and may disregard or reconcile inconsistencies in the testimony of the party defrauded. The entire testimony of the party need not be disregarded or disbelieved because it may be found to be inconsistent or even false in some particulars. Brandt v. Krogh, 14 Cal. App. 39, 111 P. 275; Lindley v. Blumberg, 7 Cal. App. 140, 93 P. 894. Furthermore, a court of equity may do exact justice between the par-

ties (Wills v. Porter, 32 Cal. 516, 64 P. 896), and can mold its decree to suit the exigencies of the case, and may determine the ultimate rights of the parties (Cal. Farm, etc., Co. v. Schiappa-Pietra, 151 Cal. 732, 91 P. 593).

In view of the circumstances surrounding the transaction, it is difficult to see how counsel for appellant can treat seriously his claim that "plaintiff cannot recover on account of a fraud practiced upon her by her own agent of which defendant had no knowledge, and which was made possible by plaintiff's own negligence." It is true that appellant testified that she had no knowledge of the contemplated exchange, but the court evidently did not believe this testimony, nor is it surprising that it did not. Appellant had owned this Idaho property since 1914, and, as stated by her husband Crawford, had been trying since then to sell it and had it listed for sale with him. Crawford brought respondent to his home during the negotiations leading up to the exchange and during the time he was trying to induce her to trade her property with his wife for her Idaho property and introduced respondent to appellant. According to appellant's testimony, they never mentioned the exchange of properties—the only matter in which they had any common interest, each desiring to dispose of her property—but discussed physical ailments. They met again in Crawford's office, and at that meeting no mention was made of property. Appellant signed the deed conveying the Idaho land to respondent and intrusted it to her husband to exchange for the property of respondent, and also testified that her husband did not handle the exchange—that she never allowed him to handle her property. Appellant did not take the trouble to go and see respondent's flats; all she knew about them was that she had seen them from the street and that respondent had paid $6,300 for the property. She did not know whether the exchange was to be even or whether her husband was going to give anything to boot; that her Idaho land was worth $7,000. In other words, her husband brought respondent—a stranger to appellant—to call on her for no other purpose than a social call; that she deeded property worth $7,000 without knowing whether she was exchanging even or was to give a bonus and without knowing the condition of the property she was to receive in exchange. It is not surprising that the court gave no credence to this testimony, nor that it drew the inference therefrom that appellant had knowledge of the fact that her husband was trading her property, which she unquestionably knew was of little value, to respondent for property greatly in excess of the value of her Idaho land, and also that she had knowledge of his false statements.

[5] As to appellant's contention that the finding "that plaintiff was at the time of the exchange of the age of 64 years and infirm in mind and body" is outside the pleadings and unsupported by the evidence, it may be said that, conceding the contention to be correct, the finding is immaterial and in no way affects the judgment.

[6, 7] Appellant's claim that respondent is guilty of laches may be answered by saying that while the doctrine of laches applies equally to all frauds, each case must be considered on its own facts (Dufour v. Weissberger, 172 Cal. 223, 155 P. 984); that in applying the doctrine after discovery it must be borne in mind that a distinction exists between actions in which relief is sought by way of rescission and other actions based on fraud, such as actions for damages, for accounting, for the recovery of money, and the like (12 Cal. Jur. 796). Here, the Oakland flats having been sold to an innocent purchaser, plaintiff was merely seeking the money received from such sale on the return of the Idaho property. The court found that plaintiff first learned that the representations were false—which finding finds support in the evidence—on July 28, 1924, and sought restitution on September 30, 1924, two months thereafter. This delay in making demand under the circumstances was not unreasonable. Munson v. Fishburn, 183 Cal. 206, 190 P. 808.

From what has been said it follows that there is no merit in appellant's final contention that the court erred in denying defendant's motion for a nonsuit.

We find no error in the record. The evidence sufficiently supports the finding of fraud and deceit, and the judgment rendered was the only one that in equity and good conscience could have been rendered.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

SPRINGER et al. v. PACIFIC FRUIT EXCHANGE et al. (Civ. 3462.) ★

District Court of Appeal, Third District, California. June 25, 1928.
Rehearing Denied July 25, 1928. Hearing Denied by Supreme Court Aug. 23, 1928.

1. Appeal and error ⇨979(2)—Granting new trial for insufficient evidence is conclusive, where there is substantial conflict, in absence of abuse of discretion.

Granting or denying new trial on ground that evidence is insufficient to justify verdict, where there is substantial conflict in evidence, rests so fully in discretion of trial court that its action is conclusive unless it appears that there has been an abuse of discretion.

2. Appeal and error ⇨1015(1)—Order granting new trial for insufficient evidence cannot be sustained, where there is no sufficient material evidence to support contrary verdict.

Where there is no sufficient material evidence upon which contrary verdict could be based, order granting new trial for insufficiency of evidence cannot be sustained on appeal.

3. New trial ⇨70—Trial judge has absolute discretion and must grant new trial for insufficient evidence if not satisfied with verdict, where verdict for moving party would have had support in evidence.

Where motion for new trial is made on ground of insufficiency of evidence and verdict in favor of moving party would have had support in evidence, trial judge has absolute discretion and must grant new trial if he is not satisfied with verdict.

4. New trial ⇨70—Granting plaintiff new trial for insufficiency of evidence held not abuse of discretion in action for injuries in automobile collision.

In action for injuries received in automobile collision, trial court *held* not to have abused discretion in granting plaintiff new trial for insufficiency of evidence, where evidence would justify belief that defendant and another were both negligent and that their concurring negligence caused collision between cars.

5. Negligence ⇨56(1)—Before negligence is actionable, causal connection must be shown between negligence and injury.

Before negligence can be actionable, causal connection, which proceeds in an unbroken course to very point of infliction of injury, must be shown between negligent act and injury.

6. Automobiles ⇨167(2, 3)—Automobile driver, entering paved portion of highway without signaling intention or yielding right of way to approaching car, held negligent (Motor Vehicle Act, § 131, subd. b, as amended by St. 1925, p. 398).

Automobile driver, entering paved portion of highway without giving any signal of intention and failing to look for approachng car and to yield right of way to approaching car, *held* guilty of negligence under Motor Vehicle Act (St. 1923, p. 517) § 131, subd. b, as amended by St. 1925, p. 398.

7. Automobiles ⇨245(2)—Whether negligence of defendant entering highway without signal was direct contributing cause of plaintiff's injury caused by car which struck defendant's car held for jury (Motor Vehicle Act, § 131, subd. b, as amended by St. 1925, p. 398).

In action for injury in automobile collision, evidence *held* sufficient to take to jury question whether negligence of defendant entering paved portion of highway without signal and without looking for approaching car, contrary to Motor Vehicle Act (St. 1923, p. 517) § 131, subd. b, as amended by St. 1925, p. 398, was direct contributing cause of plaintiff's injury, where approaching car struck defendant's car and bus before striking car in which plaintiff rode.

8. Automobiles ⇨244(36)—Where automobile after striking defendant's car caused injury, evidence to establish negligence of driver of such other car as sole proximate cause must show damage was not natural or probable consequence of defendant's original negligence (Motor Vehicle Act, § 131, subd. b, as amended by St. 1925, p. 398).

Where defendant drove automobile onto paved portion of highway without signal contrary to Motor Vehicle Act (St. 1923, p. 517) § 131, subd. b, as amended by St. 1925, p. 398, and approaching car, after striking his car, struck car in which plaintiff was riding and injured her, in order that independent negligence of driver of such other car might constitute sole proximate cause of injury and displace defendant's original negligence, evidence must show that damage was in no way natural or probable consequence of defendant's original negligence.

9. Automobiles ⇨245(64)—Where automobile caused injury after colliding with defendant's car, distance car might go after colliding with defendant's car before driver would be chargeable as independent actor held fact question (Motor Vehicle Act, § 131, subd. b, as amended by St. 1925, p. 398).

Where injury from automobile collision resulted when approaching automobile struck defendant's car entering paved portion of highway without signal contrary to Motor Vehicle Act (St. 1923, p. 517) § 131, subd. b, as amended by St. 1925, p. 398, and then struck car in which plaintiff rode, question as to how far such car might go after colliding with defendant's car before driver would be chargeable as independent actor *held* fact question.

10. Negligence ⇨15—Persons whose concurrent negligence caused injury are jointly and severally liable.

Where plaintiff is injured by concurrent negligence of defendant and another, she may recover from either or both at her election.

11. Negligence ⇨61(1)—Each and both of concurrent negligent acts are proximate cause of injuries.

Where plaintiff is injured by concurrent negligence of defendant and another, each and both acts of negligence are proximate cause of injuries.

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Myrtle Springer and another against the Pacific Fruit Exchange and others. Verdict for defendant John Franzoia, and from an order granting a new trial, he appeals. Affirmed.

Irving D. Gibson, of Sacramento, for appellant.

Evan J. Hughes, of Sacramento, for respondents.

PRESTON, Justice pro tem. This is an appeal by defendant John Franzoia from an order granting plaintiffs a new trial after a jury had rendered a verdict in his favor in an action against him for damages for personal injuries.

This action was originally brought by plaintiffs against the Pacific Fruit Exchange, a corporation; the appellant John Franzoia; and two fictitious defendants.

Plaintiffs alleged in their complaint, among other things:

> That "at the time of the accident a Buick automobile owned by Pacific Fruit Exchange was in charge of S. J. Ritchie, an employee of said exchange, and was being operated by Ritchie in the course of his employment; that defendants so carelessly drove their automobiles, that they ran into and collided with the car in which plaintiff Myrtle Springer was riding, and as a direct result of said negligence of defendant plaintiff Myrtle Springer was injured," etc.

Both appellant and the Pacific Fruit Exchange answered. When the case was called for trial plaintiff's counsel in open court dismissed the action as to the Pacific Fruit Exchange and proceeded to trial against appellant John Franzoia alone.

The jury returned a unanimous verdict in favor of the appellant John Franzoia. Subsequently, upon motion of plaintiffs, an order was made granting a new trial as against Franzoia, on the ground of insufficiency of the evidence to support the verdict. The appeal is from this order.

[1-3] The rule is well established that the granting or denying a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon this court, unless it appears that there has been an abuse of discretion. Domico v. Casassa, 101 Cal. 413, 35 P. 1024; Warner v. Thomas, etc., Works, 105 Cal. 411, 38 P. 960; Eidinger v. Sigwart, 13 Cal. App. 667, 110 P. 521; Bjorman v. Fort Bragg Redwood Co., 92 Cal. 500, 28 P. 591; Waltz v. Silveria, 25 Cal. App. 717, 145 P. 169; Colusa R. R. Co. v. Glenn, 25 Cal. App. 634, 144 P. 993; People v. Petros, 25 Cal. App. 236, 143 P. 246; Gordon v. Roberts, 162 Cal. 506, 123 P. 288; Rosenberg v. Moore, 194 Cal. 392, 229 P. 34; Bledsoe v. Decrow, 132 Cal. 312, 64 P. 397. Appellant admits the correctness of this rule, but insists that in this case there is no evidence that would support a verdict against him and, therefore, the trial court abused its discretion in granting a new trial to plaintiffs.

If there is no sufficient material evidence upon which a contrary verdict could be based, the order granting a new trial cannot be sustained on appeal. Harvey v. Machtig, 73 Cal. App. 667, 239 P. 78; Empire Investment Co. v. Mort, 169 Cal. 732, 147 P. 960; Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 P. 1029. On the contrary, if the case be one where a verdict in favor of the moving party would have had support in the evidence, the judge of the trial court is vested with absolute discretion in the matter and it would be his duty to grant a new trial if he is not satisfied with the verdict, and this court will not interfere with the action of the trial court in such a case, even if it believes that the weight of the evidence was the other way. Condee v. Gyger, 126 Cal. 546, 59 P. 26; Wendling Lumber Co. v. Glenwood Lumber Co., supra; Curtiss v. Starr, 85 Cal. 376, 24 P. 806; Bjorman v. Fort Bragg Redwood Co., supra.

With these rules in mind, the record has been examined with a view to determining whether it can be said that the trial court abused its discretion in granting the motion.

Appellant strenuously contends that there is a total failure of proof of negligence, and particularly any negligence whatever on his part, which was the proximate cause of the injury to plaintiff Myrtle Springer.

[4] The plaintiff Myrtle Springer was injured when a Buick touring car owned by defendant Pacific Fruit Exchange, and driven by its employee S. J. Ritchie, collided with a Franklin automobile driven by J. M. Bryan, in which plaintiff and others were riding. The Buick was traveling west and the Franklin car east. The accident occurred about 5:30 p. m. on Sunday, September 27, 1925, on the state highway in Yolo county, about three miles west of the city of Sacramento and at a point near a gasoline service station abutting the highway, known as "Hart's Service Station." The appellant Franzoia, prior to the accident, had parked his Peerless automobile off of the paved portion of the highway and on the private property or private driveway of the "Hart Service Station," and was headed west. Franzoia started his machine and turned it towards the highway and was attempting to drive onto the paved portion of the highway. A Buick automobile, driven west by said Ritchie, was approaching from the east on the right or north half of the 18-foot pavement. Many other machines were going east on the left or south half of the pavement. Franzoia's automobile had gone onto the pavement a distance of about 3 feet at the time it came in contact with the oncoming Buick. At the time the Peerless and

Buick came together, both machines were moving, the Peerless very slowly and the Buick very fast, but according to Ritchie about 25 miles per hour, and came in contact with one another at an angle of about forty-five degrees, and on the right or north half of the pavement; both machines being headed in a general westerly direction. The left front wheel and fender of the Peerless came in contact with the right front wheel and fender of the Buick. The Buick, after colliding with the Peerless, went in a southwesterly direction across the highway a distance of about 30 or 40 feet, and hit a stage coach which was moving east on the south side of the highway and entirely off of the paved portion thereof. After hitting the stage coach back of the front seat, knocking a hole in its gasoline tank, tearing off part of the running board and back fender, and knocking the back wheel out of line, the Buick, apparently uninjured, did not stop, but veered back to about the center of the highway and traveled west on the paved portion thereof about 40 or 50 feet, and then turned south again and hit the rear end of a Franklin automobile that was moving east on the south side of the paved highway, and in which plaintiff Myrtle Springer was riding, overturning the Franklin and inflicting serious and permanent injuries upon plaintiff. There is no evidence in the record that the Buick was injured until it ran into the Franklin, and in this collision the radiator, front left wheel, and fender on the left side of the Buick were demolished. The Buick, after hitting the Franklin, continued west for about 30 feet, and when it came to a standstill was headed off the pavement to the southwest. The Franklin was also badly damaged.

Mr. Ritchie, the driver of the Buick, testified that he was within 25 or 40 feet of the Peerless when he first saw it approaching the paved portion of the highway in front of him; that he immediately applied the footbrake and held fast to the steering wheel; that at this time about 3 feet of the front portion of the Peerless car was on the pavement and that the driver was looking straight ahead and gave no signal that he intended to enter the highway, and that there was no automobile between his machine and the Peerless when he first saw the Peerless, and that the front wheel of his car came in contact with the left wheel of the Peerless. He further testified that when his machine came in contact with the Peerless, his machine skidded across the highway and struck the stage, which was traveling east, and he made every effort to steer his car in the middle of the road, but it would not respond to his efforts after he collided with the Peerless.

The respondents contend that the Peerless car driven by appellant incapacitated the Buick and its driver and forced the Buick off its course, and upon the left side of the highway, and rendered it uncontrollable by the driver. There is no testimony in the record, except that given by Ritchie, that the contact of the Peerless with the Buick in any way accelerated the motor of the Buick, and no evidence at all that any part of the steering gear or machinery of the Buick was injured, or that Ritchie himself was incapacitated by the collision with the Peerless.

[5] Counsel for appellant contends that if it be admitted that appellant was negligent in not giving the proper signal when he came upon the paved portion of the highway, still such negligence was not the proximate cause of the injury to plaintiff. The law is, of course, well settled that before negligence can be actionable, a causal connection, which proceeds in an unbroken course to the very point of the infliction of the injury, must be shown between the negligent act and the injury; for no matter how negligent a defendant may have been in the abstract, a cause of action is not made out unless that negligence is in some way fastened to the particular injury for which recovery is sought.

[6, 7] The Motor Vehicle Act (Stats. 1923, p. 517, and Stats. 1925, p. 398), section 131, subdivision b, provides:

> "The driver of a vehicle entering a public highway from a private road or drive shall yield the right of way to all vehicles approaching on said public highway."

It was therefore the duty of appellant, the operator of the Peerless, to yield the right of way in order to avoid the collision with the approaching Buick.

We think the evidence is sufficient to show that appellant failed to give any signal of his intention to enter the paved portion of the highway, and that he also failed to look out for the approaching Buick and to yield the right of way to avoid the collision with the Buick. Appellant was therefore guilty of negligence.

We also think, from a careful examination of the record, that there is abundant evidence to warrant the court or jury in finding that Ritchie, the driver of the Buick, was traveling at a dangerous and excessive rate of speed when he collided with appellant's Peerless, notwithstanding his testimony to the contrary. If Ritchie had been traveling at a lawful rate of speed and had his car under control, he could have avoided the collision with the appellant. On the other hand, if appellant, when he approached the paved portion of the highway, had looked in the direction from which the traffic was coming, he would have seen the approaching Buick and could have waited until it passed him, and thus have avoided the collision. The court or jury would therefore be warranted in saying that appellant and Ritchie were both negligent and that their concurrent negligence caused the collision between their two cars. This being true, the appellant would be a participant in whatever injury might reasonably follow from his negligent acts. The Peerless deflected the Buick from its course, and as the Buick veered from one side of the road to the other it finally came in contact with the Franklin and caused the injury to plaintiff.

The next question that arises is this: Was the negligence of appellant one of the direct contributing causes to plaintiff's injury, or was it the independent negligence of Ritchie, after he had collided with appellant, that was the sole cause of the injuries to plaintiff? We think this is a question of fact to be determined from all the evidence in the case.

Mr. Justice Henshaw, in the case of Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 111 P. 534, 139 Am. St. Rep. 134, in discussing the proximate cause of an explosion, used an illustration which we think is applicable to the case at bar, to wit: An explosion occurred outside of a vessel which caused a leakage in the hold of the vessel through which sea water entered and damaged some goods. A logician would say that the sea water damaged the goods, while the law would say that the explosion was the proximate cause of the damage, and whosoever caused the explosion would be liable.

In 19 California Jurisprudence, 573, it is said:

> "Although, in order to be concurrent, the negligence of two persons must be simultaneous, a primary act of negligence may be so continuous in its character that it conjoins with an act of negligence of another committed at a much later date."

[8-11] In order that the independent negligence of Ritchie might constitute the sole proximate cause of the injury to plaintiff, and displace the original negligence of appellant, it must appear from the evidence that Ritchie's negligence was so disconnected in time and nature as to make it plain that the damage occasioned was in no way the natural or probable consequence of the original negligence of appellant. Therefore, how far the Buick car might go after it collided with the Peerless before the driver would be chargeable as an independent actor would also be a question of fact.

When we consider the evidence as disclosed by the record in the light of the foregoing well-established rules, we cannot say, as a matter of law, that the injuries to plaintiff were caused either by the concurrent negligence of appellant and Ritchie, or by the independent negligence of Ritchie, for, as heretofore stated, this is a question of fact for the court or jury. While we think that the greater weight of the evidence favors the contention of appellant, that plaintiff's injuries were caused by the independent negligence of Ritchie; still, there is substantial evidence in the record to support a finding that plaintiff was injured by the concurrent negligence of both appellant and Ritchie. If plaintiff was injured by the concurrent negligence of both appellant and Ritchie then each is and both are the proximate cause of her injuries, and she may recover from either or both at her election. Merrill v. Los Angeles Gas & Electric Co., supra; Shearman & Redfield on Negligence (3d Ed.) § 338a; Doeg v. Cook, 126 Cal. 213, 58 P. 707, 77 Am. St. Rep. 171; Keiper v. Pacific Gas & Electric Co., 36 Cal. App. 362, 172 P. 180; Lininger v. San Francisco, etc., Railroad Co., 18 Cal. App. 411, 123 P. 235; Muller v. Hale, 138 Cal. 163, 71 P. 81; Blackwell v. American Film Co., 48 Cal. App. 681, 192 P. 189; Spear v. United Railroads, 16 Cal. App. 637, 117 P. 956; Noce v. United Railroads, 53 Cal. App. 512, 200 P. 819; Martin v. Southern Pacific Co., 44 Cal. App. 3, 185 P. 1030; Hansen v. Market St. Ry. Co., 64 Cal. App. 426, 221 P. 955.

Therefore, there being sufficient evidence to support a conclusion contrary to that reached by the jury, we are not authorized to hold that the trial court abused its discretion in granting plaintiffs a new trial.

The order appealed from is, therefore, affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

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92 Cal. App. 767

MEYER v. ZUBER. (Civ. 3540.)

District Court of Appeal, Third District, California. June 26, 1928.

1. Contracts 🔑94(1)—Friendship and affection of parties do not constitute "confidential relation."

Mere friendship and affection existing between parties to contract do not constitute "confidential relation."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Confidential Relation.]

2. Pleading 🔑8(15)—Mere conclusions of pleader are not sufficient pleading of fraud.

Fraud cannot be pleaded by allegations consisting of mere conclusions of pleader without statement of any fraudulent act.

3. Mortgages 🔑369(3)—Inadequacy of price is not ground for setting aside sale under deed of trust.

Sale under deed of trust will not be set aside for mere inadequacy of price.

4. Mortgages 🔑356—In view of dates of execution of and sale under deed of trust and its requirement as to notice of sale, notice by publication held enough (Code Civ. Proc. § 692; Civ. Code, § 2924).

Where trust deed required only that notice of sale be published in a newspaper, it was immaterial that no other notice was given;

Code Civ. Proc. § 692, and Civ. Code, § 2924, being inapplicable, because the provisions of the former section relating to notice were added after the sale in question, and the similar provisions of the latter section were limited to sale authorized by instrument executed after a date subsequent to that of the trust deed in question.

5. Mortgages ⚷369(7)—Statement of mortgagee, after commencing proceedings for sale, that he would commence them unless further security was given, held shown harmless by complaint.

That five days before the sale under trust deed, but long after commencement of the necessary proceedings to effect the sale, mortgagor made the misleading statement to mortgagee that he was going to direct the commencement of such proceedings unless mortgagee gave further security, is shown not to have been injurious by allegation, of mortgagor's complaint to have the sale set aside, that mortgagee well knew that five days was not enough to enable mortgagor to acquire the money necessary to satisfy the trust deed.

6. Mortgages ⚷369(7)—Complaint to set aside sale held not to show compliance with condition of promise of forbearance—payment of interest as best mortgagor could.

Complaint to set aside sale under trust deed, alleging that mortgagee promised that he would not attempt sale if mortgagor paid the interest as best he could, does not show compliance with the condition on which the promise was dependent; it not alleging that mortgagor was unable to pay the interest, but alleging that he with reasonable notice of sale could have obtained funds to satisfy the indebtedness.

7. Mortgages ⚷335—Rule of waiver, by acceptance of overdue payment, to thereafter insist without demand on prompt payment, held not to affect sale proceedings after entire indebtedness is due.

Rule that mortgagee, by acceptance of overdue payment of interest, waives right thereafter to insist on prompt payments, without first demanding that such payments be made at the time specified in note and trust deed, applicable to prevent exercise of right under acceleration clause, has no application to prevent sale under the trust deed, where there was no election to accelerate time of payment by reason of mortgagor's numerous defaults, but proceedings for sale were commenced long after the entire indebtedness became due and payable.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by H. E. Meyer against Herman Zuber. Judgment for defendant, and plaintiff appeals. Affirmed.

Faucett & Ring, of Los Angeles, for appellant.

Howard F. Sheperd and B. L. Hoyt, both of Los Angeles, for respondent.

FINCH, P. J. The trial court sustained the defendant's demurrer to the third amended complaint, without leave to amend, and judgment was thereupon entered against the plaintiff, who prosecutes this appeal from the judgment.

The action was commenced January 20, 1926, for the recovery of certain real property purchased by the defendant at a sale under a trust deed on January 20, 1921. The facts herein stated are alleged in the complaint.

The trust deed was executed by the plaintiff October 18, 1915, to secure the payment of his promissory note of the same date for $13,868, payable to the defendant two years after date, with interest at 7 per cent. per annum, payable quarterly, and if not so paid to be compounded quarterly. No payments were ever made on the principal, and only the following payments of interest were made: 1915, $250; 1916, $400; 1917, $950; 1918, $286.70; 1919, $582; 1920, $114.50.

At all times up to about five days before the sale, "the relationship between plaintiff and defendant Zuber was friendly and intimate and * * * Zuber pretended to said plaintiff and plaintiff believed that he, the said defendant, entertained an affectionate and friendly feeling and regard for him. * * * Zuber at all of the times herein mentioned represented to said plaintiff that if he paid the interest on said indebtedness, as best he could, said Zuber would not attempt to sell or foreclose for sale said property, * * * that he would not press plaintiff for the principal amount thereof, but that plaintiff could pay the same when and as he was financially able so to do. * * * Relying upon all of the foregoing representations and believing them to be true, said plaintiff made no effort or attempt to satisfy and was not financially able to satisfy said indebtedness, excepting the interest thereupon." Payments of interest were made as stated herein. "Said payments were made as aforesaid from time to time and at irregular intervals without objection or protest from the said Zuber. * * * At none of said times or at any time, except as hereinafter alleged, did said Zuber notify or intimate to said plaintiff that said interest and principal must be paid as in said trust deed provided, or that he would cause said premises to be sold because of the default of said plaintiff."

At the time of the sale "there was upon said premises a winery and distillery, tools, equipment and paraphernalia used for the fermentation and manufacture of wine, and several thousand gallons of wine; that at said time said personal property, equipment and wine was of the reasonable market value of upwards of $10,000. * * * No ready market was available for the sale of

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

said wine in wholesale lots, and * * * said wine could only have been sold after considerable negotiation, requiring the expenditure of considerable time. * * * Said winery and equipment could have been moved therefrom in the course of a month or thereabouts, and said premises sold for upwards of $100,000 and on or about the 21st day of January, 1921, said premises were of a reasonable market value in excess of $100,000."

"Having fraudulently and deceitfully led plaintiff to believe that he would not cause said premises to be sold in satisfaction of the indebtedness secured by said trust deed, and having lulled plaintiff into a false security, * * * said defendant Zuber falsely, wrongfully and fraudulently suffered said belief to continue in plaintiff until such time as the said defendant well knew that * * * plaintiff could not readily and immediately market said wine or readily and immediately dispose of the said personal property used in the manufacture thereof, and * * * could not acquire the funds necessary to satisfy his said indebtedness to defendant Zuber, defendant Zuber, without reasonable notice and without any demand for his debt, wrongfully, fraudulently and deceitfully caused the trustee named in said trust deed to sell said premises that said defendant might acquire the same for a mere pittance without notifying said plaintiff of his intention so to do until about five days prior to said sale, and without theretofore demanding satisfaction of said indebtedness, and without affording plaintiff any reasonable opportunity to obtain the money necessary therefor, though defendant Zuber well knew that had he not deceived plaintiff by his representations that he would not press plaintiff for said money and that said premises would not be sold, said plaintiff with ample, reasonable and adequate notice of the intended sale, could have obtained the funds necessary to satisfy said indebtedness."

Five days before the sale the defendant "for the first time informed said plaintiff that he was going to direct the commencement of the necessary proceedings to effect such sale unless plaintiff gave defendant further security for said debt. * * * At that time, as said defendant well knew, plaintiff was in ill health and unable to attend to his business affairs. * * * Prior thereto * * * defendant had already caused to be published notice of said intended sale for the 20th day of January, 1921." Defendant then knew that the plaintiff was ignorant of the fact of such publication. "Zuber thus falsely, fraudulently, deceitfully and wrongfully misrepresented said matter to plaintiff that said plaintiff might not arrange for the satisfaction of said indebtedness prior to said trustee's sale. * * * Zuber then and there well knew that five days or less was an inadequate length of time to enable plaintiff to acquire the money necessary to satisfy said trust deed."

"Plaintiff is informed and believes, and accordingly avers, that said sale was advertised at least once a week for four successive weeks in the California Independent, an obscure newspaper published in Los Angeles, Cal., for the dissemination of trade and mercantile news, and the publication of legal notices, and not read by the public generally, to wit, on the 23d and 30th days of December, 1920, and on the 6th and 13th days of January, 1921." No notice was posted upon the premises or at any other place. "Plaintiff had no notice or knowledge of said sale until about three days prior to the date thereof. * * * Zuber wrongfully, fraudulently and deceitfully caused notice thereof to be withheld from plaintiff that he might not be afforded the opportunity of acquiring the funds necessary to satisfy said indebtedness, and that defendant Zuber might acquire said premises himself."

"At said sale, and according to the plan and design of said defendant Zuber, there was no competitive bidding. * * * No other bids were made for the purchase of said premises except the bid of said Zuber, as plaintiff is informed and believes, in the sum of $6,388. * * * At the time of said sale and during most of the time thereafter, the plaintiff has been feeble and ill and is now 74 years of age."

"Within two or three months after said trustee's sale, he sought the advice and counsel of several attorneys at law respecting his rights in said premises, and was by them advised, after stating the facts in the case to them, that said sale was valid and binding. * * * In reliance upon said advice and counsel, plaintiff did not institute any action for the prosecution of his rights in the premises." Plaintiff was first advised "as to his rights in the premises * * * shortly prior to the 20th day of January, 1926." The defendant has not been "prejudiced by reason of the delay in the institution thereof."

The trustee's deed, which is attached to and made a part of the complaint, recites that Zuber "has been obliged to and has paid out and advanced the sum of $2,016.88 on account of taxes and assessments levied and assessed against the property, * * * all of said payments and advancements having been made in accordance with the provisions of said deed of trust, * * * there being due and unpaid the total sum of $21,065," and that the property was sold by the trustee to Zuber for the sum of $14,000.

The defendant demurred to the complaint on the grounds that it does not state facts sufficient to constitute a cause of action, that the action was barred by the statute of limitations, that the plaintiff had been guilty of laches, and on numerous other grounds. It is unnecessary to consider any other than the first ground stated.

[1-3] The allegations to the effect that "the relationship between plaintiff and defendant Zuber was friendly and intimate" may be dismissed from consideration, as mere friendship and affection existing between parties to a contract do not constitute a confidential relation. Cox v. Schnerr, 172 Cal. 371, 378, 156 P. 509. The allegations of fraud, with one exception to be hereinafter discussed, consist of the mere conclusions of the pleader, without the statement of any fraudulent act. Fraud cannot be so pleaded. 12 Cal. Jur. 800. Mere inadequacy of price is not a sufficient ground for setting the sale aside. Winbigler v. Sherman, 175 Cal. 270, 275, 165 P. 943.

[4] The fact that no notice of sale was given except by publication is immaterial. The trust deed required only that notice of sale be published "at least once a week for two weeks, in some newspaper published in Los Angeles." The complaint alleges that notice was published for four weeks in "a newspaper published in Los Angeles." No other or different notice was required. Sargent v. Shumaker, 193 Cal. 122, 130, 223 P. 464. The provisions of section 692 of the Code of Civil Procedure relating to notice of sale under a trust deed were added to that section after the sale here in question had been made, and the similar provisions of section 2924 of the Civil Code are expressly limited to sales authorized by instruments executed after July 27, 1917. Neither of those sections, therefore, is applicable.

[5] Relying on Winbigler v. Sherman, supra, appellant contends that he was misled to his prejudice by Zuber's statement, made five days before the sale, "that he was going to direct the commencement of the necessary proceedings to effect such sale unless plaintiff gave defendant further security for said debt," the statement implying that such proceedings had not been commenced. It may be conceded that this is a sufficient allegation of a fraudulent act. Since the trust deed required a notice of two weeks to be given of any contemplated sale thereunder, the alleged statement tended to create a belief in the plaintiff's mind that he had at least two weeks thereafter in which to raise the money necessary to pay the indebtedness. The weakness of appellant's argument, however, appears from the further allegation in the same paragraph that "Zuber then and there well knew that five days or less was an inadequate length of time to enable plaintiff to acquire the money necessary to satisfy said trust deed." The plaintiff, therefore, was not injured by the defendant's alleged statement, because he could not have raised the money if he had been correctly informed at that time of the true facts, and the defendant was under no legal obligation, either at that or at any prior time, to give the plaintiff any notice other than by the publication which was made.

[6] The complaint alleges that the defendant's promise of forbearance was conditional upon the plaintiff's payment of "the interest on said indebtedness, as best he could." The complaint does not allege that the plaintiff was unable to pay such interest, even if it be conceded that he was justified in relying upon such an uncertain and indefinite promise. To the contrary, it is alleged that "plaintiff with ample, reasonable and adequate notice of the intended sale could have obtained the funds necessary to satisfy said indebtedness." If he could have obtained sufficient money to satisfy the whole indebtedness, he certainly could have obtained enough to pay the interest, and he was in default in the payment thereof from the first year. It does not appear, therefore, that the plaintiff performed the condition upon which the defendant's promise was dependent.

[7] Appellant contends that by accepting payments of interest from time to time long after the same became due the defendant waived his right thereafter to insist on prompt payments, without first demanding that such payments be made at the times specified in the promissory note and trust deed. The rule for which appellant contends has been applied to the acceptance of overdue payments by a mortgagee where the mortgage or the promissory note secured thereby contained an acceleration clause. The promissory note secured by the trust deed involved in this action contained such a clause, but the defendant did not elect to accelerate the time of payment by reason of the plaintiff's numerous defaults. This action was commenced long after the entire indebtedness became due and payable, without reference to the acceleration clause. The doctrine for which appellant contends is inapplicable in such a case.

The respondent contends that the complaint is insufficient in many other respects, but it is unnecessary to discuss any other alleged defects, as enough has been stated to show that the demurrer was properly sustained.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

93 Cal. App. 32

PEOPLE v. SINGH. (Cr. 1036.)

District Court of Appeal, Third District,
California. June 28, 1928.

1. Sodomy 🔑1—Sexual penetration is essential to offense under statute (Pen. Code, § 287).

Under Pen. Code, § 287, sexual penetration of the anus is essential to establish the crime against nature.

2. Sodomy 🔑6—Evidence held to sustain conviction of crime against nature (Pen. Code, § 287).

Evidence *held* to sustain conviction of crime against nature under Pen. Code, § 287.

3. Sodomy 🔑6—Penetration may be established by circumstantial evidence (Pen. Code, § 287).

Under Pen. Code, § 287, penetration may be established by circumstantial evidence.

Appeal from Superior Court, Yuba County; E. P. McDaniel, Judge.

Rola Singh was convicted of the crime against nature, and he appeals. Affirmed.

Ray Manwell, of Marysville, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted in the superior court in and for the county of Yuba of the infamous crime against nature (Pen. Code, § 286), and he appeals from the judgment of conviction and the order denying him a new trial.

The alleged pederastic performance is alleged to have taken place in the city of Marysville, on or about the 4th day of February, 1928. The party upon whom the crime is alleged to have been committed was a boy approaching, if not just past, his majority.

It appears that two police officers, while patrolling their "beats" in the neighborhood of Tenth and D streets in the city above named, at or near the hour of 2 o'clock a. m. of the day, also named above, noticed a Ford coupé parked or standing "in a secluded spot," on the east side of D street, near Tenth, and facing or heading in a northerly direction. In that immediate vicinity there were no residences. Conceiving that an automobile parked in so unusual a place in the city at that time of the day was a circumstance of more or less a suspicious character, or at least one justifying an investigation, the officers went to the coupé, and, turning a flashlight into the car, found the defendant awake and "crowded right over" the young man referred to, who was asleep and lying across the seat of the coupé on his left side, with his head partly under the steering wheel. The officers testified that the trousers of the young man were down and below the posterior part of his anatomy, that his union undersuit was open behind, that his coat was turned up, and that his buttocks were bare or exposed. The officers awakened the young man and, when they attempted to take him from the car, he resisted and started to fight. They arrested and took the two men to the city jail. Suspecting from appearances that the crime charged in the information had been committed, the officers sent for Dr. P. B. Hoffman, a physician of Marysville, and the doctor, immediately after the arrest of the two men—near the hour of 3 o'clock a. m.—appeared at the jail and subjected the anus of the young man and the private parts of the defendant to a critical examination. He took from the private parts of the defendant some filthy matter, placed it in a tin box, and caused it to be subjected to a chemical test by the director of the laboratory at the Rideout Hospital in said city. The following day Dr. Hoffman, assisted by Dr. Sloan, a physician of Marysville, again made an examination of the rectal regions of the young man's anatomy and also the private parts of the defendant and found the physical condition of the young man and to some extent that of the defendant as Dr. Hoffman had found them an hour approximately after the two men were brought to the jail.

The foregoing comprehends a sufficient general statement of the facts.

[1] The only point urged here by the defendant for a reversal is that there was an utter failure on the part of the people to show that, assuming that the accused attempted or had an intent to commit the abomination of which he stands convicted, there was effected by the accused a sexual penetration of the young man's anus. Of course, as is true of the crime of rape, to establish the infamous crime against nature it must be shown by the prosecution beyond a reasonable doubt that the accused had effected a sexual penetration of the anus of the party upon whom it is alleged that he satiated his bestial lust. Pen. Code, § 287. That section of the Code, referring to the crime against nature as denounced and penalized by section 286 of said Code, declares that "any sexual penetration, however slight, is sufficient to complete the crime."

[2, 3] The record discloses sufficient evidentiary support to the verdict. The circumstances revealed by the testimony of the police officers and that of the two medical doctors who professionally examined the body of the young man and the private parts of the defendant within a short time after the latter and his companion were arrested and incarcerated in the city jail—Dr. Hoffman within an hour after the arrest and Dr. Sloan with Dr. Hoffman the following day—point with convincing directness to the guilt of the accused. The condition of unspeakable filth

in which the doctors, upon a physical examination of the two men, found the respective parts of their bodies directly employed in the perpetration of the abomination, imperatively forbids, from every consideration of decency, a description thereof in this opinion. We therefore purposely refrain from reproducing herein the sickening results of the examination of the parts of the bodies of the two men as the doctors detailed them before the jury. It is enough to say that a reading of all the testimony of the police officers making the arrest, of the doctors who conducted the appropriate physical examination of the defendant and the young man, and of the testimony of the chemist who subjected to the test of a chemical analysis the filthy feces taken by Dr. Hoffman from the private parts of the defendant, will clearly show that the people, in their presentation of this case to the jury, developed facts and circumstances from which the jury, believing said testimony, as presumptively they did, were justified in inferring and concluding that sexual penetration was effected by the accused. People v. Howard, 143 Cal. 316, 317, 76 P. 1116. Obviously, the fact of penetration in a case of this character, as in that of rape, may be shown, as may any other ultimate fact, by circumstantial as well as by direct evidence. Indeed, it is undoubtedly true that in many of such cases as this, as well as of cases of rape, it is essential to prove the fact of penetration by means of circumstantial evidence.

The defense sought to show, by means of hypothetically framed questions to a local physician of Marysville other than either of those above named, that the filth removed from the private parts of the defendant consisted of matter which might naturally accumulate where a person is habitually lacking in cleanliness, so far as his person is concerned, and that the abrasions found by Drs. Hoffman and Sloan in the orifice of the anus of the young man could and might have been produced by certain causes other than that which, in the opinion of the physicians and the chemist testifying for the people, produced the conditions from which their opinions were formed. The most that can be said of the testimony thus presented by the defendant is that it created a substantial conflict in the evidence, the probative effect of which was solely for the jury's determination.

Both the young man and the defendant testified for the defense. The first named stated that he was under the influence of liquor when arrested, and the defendant testified that he was more or less in a like condition. The former declared that he had no recollection of anything which might have occurred prior to his arrest or thereafter until he found himself early in the morning of his arrest at the police station. He remembered having been subjected to a physical examination by Dr. Hoffman. He denied having permitted the accused to treat him in the manner indicated by the charge in the information. The accused denied having committed the offense charged. All this testimony was for the jury to consider in comparison with that introduced by the people showing circumstances which, as before we have stated, strongly support the truth of the charge against the accused.

No sound reason has been shown why the judgment and the order should not stand, and, accordingly, both are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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92 Cal. App. 708

ADAMS v. SLEE. (Civ. 3448.)

District Court of Appeal, Third District, California. June 23, 1928.

1. Waters and water courses 🔑231—Statutory provision that certificate of sale must be dated on day of tax sale held merely directory (Irrigation District Act, § 45).

Provision of Irrigation District Act, § 45 (St. 1897, p. 269), that certificate of sale shall be dated on day of tax sale, *held* merely directory, since object of statute is satisfied if actual date of sale is recited, so as to enable those concerned to know when time for redemption expired.

2. Waters and water courses 🔑231—Delayed publication of delinquent tax list does not of itself invalidate tax sale and deed based thereon (Irrigation District Act, § 42).

Delayed publication of delinquent tax list of irrigation district does not of itself invalidate tax sale and deed based thereon, notwithstanding Irrigation District Act, § 42 (St. 1897, p. 268).

3. Waters and water courses 🔑231—Right of redemption is fixed and controlled by law in force at time of tax sale (Irrigation District Act, § 47 [1909, p. 429], as amended by St. 1921, p. 1109).

Right of redemption of property of irrigation district sold for taxes is fixed and controlled by law in force at time of tax sale, Irrigation District Act, § 47 (St. 1909, p. 429), providing for five-year period, having been amended by St. 1921, p. 1109, reducing period to three years.

4. Waters and water courses 🔑216—Provisions of Irrigation District Act requiring bidders to pay for duplicate certificate of sale, and excusing payment when district is purchaser, held not unconstitutional (Irrigation District Act, § 44).

Irrigation District Act, § 44 (St. 1897, p. 269), requiring bidders to pay $2 for duplicate certificate of sale and redemptioner to repay same, and excusing such payment when district is purchaser, *held* not unconstitutional as discriminatory.

5. Waters and water courses ⟹231—Description of property in tax deed held not fatally uncertain and defective, in view of recorded map and judicial knowledge of relative location of sections.

In action to quiet title, in which plaintiff's claim was based on tax deed executed by collector of irrigation district after sale of land for failing to pay taxes levied by such district, description of property in deed *held* not fatally uncertain and defective, in view of recorded map which was introduced in evidence and judicial knowledge that court may take of relative location of sections.

6. Evidence ⟹460(4)—Recorded map is admissible to make complete descriptions set out in tax deed.

It is proper to receive recorded map in evidence in order to make complete descriptions set out in tax deed.

7. Evidence ⟹10(4)—Court takes judicial notice of location of townships and sections and fact that they can be identified on ground by reference to government records (Code Civ. Proc. § 1875, subds. 2, 3).

Court can take judicial notice of location of townships and sections and of fact that they can be identified on ground by reference to official government records, under Code Civ. Proc. § 1875, subds. 2 and 3.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action to quiet title by David Adams against J. Noah H. Slee. Judgment for plaintiff, and defendant appeals. Affirmed.

Walter C. Maloy, of Covina, for appellant.
H. E. Gleason and John F. Poole, both of Los Angeles, for respondent.

BUCK, Justice pro tem. The defendant appeals from a judgment quieting the title of plaintiff and respondent to 40 acres of land in Madera county within the boundaries of the Madera irrigation district. Plaintiff's claim of title is based on a tax deed executed by the collector of the Madera irrigation district after a sale of the land for failure to pay certain taxes levied by the irrigation district.

Appellant claims that the tax deed relied on by respondent is void for the following reasons: (1) That the tax deed was prematurely executed; (2) that there was an unlawful delay in the publication of the delinquent tax list; (3) that the provisions of section 44 of the Irrigation District Act (St. 1897, p. 269), requiring bidders to pay $2 for a duplicate certificate of sale and redemptioner to repay the same and excusing such payment when the district is the purchaser, is discriminatory and unconstitutional; and (4) that the description of the property in the deed is fatally uncertain and defective.

[1] And, first, as regards the claim that the deed was prematurely issued: It is true, as contended by appellant, that section 45 of the Irrigation District Act provides that a certificate of sale shall be dated on the day of the sale. But this provision has been held to be merely directory and not mandatory, since the object of the statute is satisfied if the actual date of sale is recited, so as to enable those concerned to know when the time for redemption expires. Corson v. Crocker, 31 Cal. App. 626, 161 P. 287; 26 Cal. Jur. p. 422.

[2, 3] In this case the sale was made August 26, 1921, the certificate of sale was issued August 27, 1921, and the tax deed was issued August 27, 1924. Appellant's point as to the delay in the publication of the delinquent tax list is made only in his closing brief and is made with the suggestion that it "may be met by oral argument." There, however, was no oral argument. But the point will be considered.

The district was required by section 42 of the Irrigation District Act to publish the delinquent list on or before the 1st day of February. The list must be published at intervals for a period covering 3 weeks. The sale must then take place within 28 days after the completion of the publication of the delinquent list. By the provisions of section 47 of the Irrigation District Act (Stats. 1909, p. 429), the delinquent taxpayer had the right to redeem his property at any time within 5 years after the date of the sale; and the purchaser, at the expiration of the 5 years after the date of the sale, had the right to have a tax deed issued to him, providing that the owner had not redeemed.

In this case the district, acting pursuant to a resolution of its board of directors, did not publish its delinquent list until July 30, 1921. On July 31, 1921, an amendment of section 47 of the act became effective (Stats. 1921, p. 1109). By this amendment the period of redemption was shortened from five years to three years, so that the taxpayer must redeem within three years instead of five years, as under the old law (Stats. 1909, p. 429). Under the new law, the purchaser could get his deed after the expiration of only three years and need not wait for five years, as under the old act.

It has been held, however, that the delayed publication of the delinquent tax list does not of itself invalidate the tax sale and the deed based thereon. Smith v. Los Angeles City, 158 Cal. 702, 112 P. 307; San Francisco v. Society etc., 131 Cal. 612, 614, 63 P. 1016. Also, it has been held that the right of redemption is fixed and controlled by the law in force at the time of the tax sale. Teralta Land, etc., Co. v. Shaffer, 116 Cal. 518, at pages 524, 525, 48 P. 613 (58 Am. St. Rep. 194); Biaggi v. Ramont, 189 Cal. 675, 209 P. 892.

[4] As regards the contention that the irrigation statute is unconstitutional for the rea-

son indicated in appellant's third point, the principle enunciated in the following cases is sufficient to sustain the constitutionality of the act in the particular wherein it is attacked by appellant. San Francisco, etc., L. Co. v. Banbury, 106 Cal. 129, 39 P. 439; Russ & Sons Co. v. Crichton, 117 Cal. 695, 49 P. 1043; County of San Luis Obispo v. Murphy, 162 Cal. 588, 123 P. 808, Ann. Cas. 1913D, 712. In other words, the classification made by the Legislature was not an improper one.

Furthermore, even conceding that the provision of the statute attacked was not constitutional: In the case at bar, defendant and appellant was not affected for the reason that he had neither redeemed nor attempted to redeem his property.

[5] And finally, as regards the alleged uncertain description in the deed: The amended complaint described the property whose title is sought to be quieted as follows:

> "That certain real property situate in the county of Madera, state of California, and described as follows: The east one-half (E. ½) of the northeast quarter (N. E. ¼) of the southwest quarter (S. W. ¼) and the north half (N. ½) of the southeast quarter (S. E. ¼) of the southwest quarter (S. W. ¼) of block six (6) of the Chowchilla Ranch Subdivision No. 2, in section five (5), township eleven (11) south, range fifteen (15) east, M. D. B. & M., containing forty (40) acres, more or less."

The following is the description set out in the tax deed:

> "Chowchilla Ranch Subd. No. 2 Blk. 6, E ½ of NE ¼ of SW ¼—N ½ of SE ¼ of SW ¼ in Sec. 5 Tp. 11 S. R. 15 E., M. D. B. & M., 40 acres"

The description in the assessment roll for the district is set out as follows:

Description of property		Mt. Diablo Meridian			Number of acres.
	Block	Section	Township So.	Range East	
Chowchilla Ranch Subdivision No. 2, Block 6, E^2 of NE^4 of SW^4-N^2 of SE^4 of SW^4		5	11	15	40

In the published delinquent list the description was set out as follows:

> "Chow. Ranch Sub. No. 2, blk 6, E ½ of N E ¼ of S. W. ¼, N ½ of S. E. ¼ of S. W. ¼, 40 acres."

The delinquent list as published also contained obvious explanations of the above abbreviations, and also stated as follows:

> "Wherever reference is made in the following descriptions of land in the Chowchilla Ranch Subdivision No. 2, it is understood that such reference is to the official map recorded Oct. 10, 1912, in Vol. 3 of Maps, page 9 Madera County Records."

[6, 7] At the trial the deed containing the description just referred to was offered in evidence and also the official record of the map in book 3 of official maps at page 9, Chowchilla ranch, subdivision No 2. The deed itself, however, makes no reference to the map. But it has been held proper to receive a recorded map in evidence in order to make complete the description set out in the deed. It was also testified that the lands shown on this map are "usually throughout the county referred to by reference to this map," and that it is a well-known map of the Chowchilla subdivision. Fox v. Townsend, 152 Cal. 53, at page 58, 91 P. 1004, 1007; Fitzimons v. Atherton, 162 Cal. 630, at page 632, 124 P. 250.

Furthermore there is delineated on said map the location of the northeast corner of township 11 south, range 15 east, in the United States government survey and also the north, east, south, and west township lines and government courses, together with distances and actual acreages, so that the survey and map of the subdivision was physically tied into and connected with the government surveys. As indicated on the map itself, the subdivision comprises all of sections 6, 7, 16 of township 11 south, range 16 east, and all of sections 1 to 21, inclusive, and 28 to 32, inclusive, and 38 of township 11 south, range 15 east, M. D. B. & M. The court can take judicial notice of the location of these townships and sections, and of the fact that they can be identified on the ground by reference to the official government records. Code Civ. Proc. § 1875, subds. 2 to 3; Rogers v. Cady, 104 Cal. 288, 291, 38 P. 81 (43 Am. St. Rep. 100); vol. 23, Cor. Jur. p. 95. The distances from east to west indicated on the map give room for exactly seven sections, including section 5, having the contemplated official width of 320 rods, or 5,280 feet, and this is the exact width from east to west of each of the northern rows of blocks, including block 6.

Therefore, from this map and with the judicial knowledge that the court can take of the relative location of section 5, in township 11 south, range 15 east, it is evident that the north, east, and west boundaries of block 6 of the subdivision referred to in the deed and map are coincident with the north, east, and west boundary lines of section 5 of township 11 south, range 15 east. And, as regards the southern boundary of block 6 and section 5, respectively, it appears from the location of the northern and southern township lines on the map of township 11 south, range 15 east, and the distances between them as indicated on the map, that this township, if cut into official sections containing "as near as may be" 640 acres each, will then include a number of sections containing more than 640 acres. And non constat but what section 5 may be one of these.

Therefore, from the mere fact that block 6 contains 653 acres, it does not necessarily follow, as appellant appears to contend, that such block is not contained within section 5 or is substantially identical therewith, so far as the southern boundary also is concerned. It is therefore evident that the mere addition of the government description to the description by block in the subdivision is, at the most, a mere matter of supererogation and reiteration, which does not create any uncertainty as to the reasonable possibility of the definite location of the land on the ground.

Furthermore, even though it should be assumed (Quinn v. Windmiller, 67 Cal. 461, 8 P. 14) that the above government section 5 contains only 640 acres, nevertheless, by a plain mathematical computation, it was shown in respondent's brief, without denial, that only 6 acres of the 40 acres in question are outside of the east half of the northeast quarter of the southwest quarter and the north half of the southeast quarter of the southwest quarter of section 5, township 11 south, range 15 east, while the balance of said 40 acres is within the above fractional portion of said government section No. 5; and, furthermore, that the whole of said 40 acres, including the said 6 acres, is definitely and certainly located in the above fractional subdivision of block 6 "of Chowchilla Ranch Subdivision No. 2." In other words, there was sufficient evidence to justify the trial court in rejecting as absurd and impossible any inference that the above 6 acres were in section 5 and in finding that there was nothing in the description in the deed or in the assessment roll or in the delinquent list, which, if taken in connection with the map and its markings, would prevent a person from locating on the ground a definite and specific 40 acres of land in block 6. And in this connection Mr. P. M. Stafford, a surveyor of 30 years' practice, stated:

> "I could make a survey of that portion of block 6 that laid within section 5 if I was confined to that description. I could make a survey of that portion of block 6 that is confined within the boundary of section 5."

In the case of Green v. Palmer, 68 Cal. App. 393, at page 400, 229 P. 876, 878, it was claimed that the description of the property in the assessment roll was ambiguous. But in that case the court said:

> "We do not believe that it is necessary in matters of this kind to argue from the point of the utmost absurdity, but even if we were to assume that anyone could have been misled by this description to the point of believing that his property was as described by respondent we would find that a portion at least of the property in suit was covered by this description and a mere reference to the assessor's block-book, or to the map of the Hougham Tract, would have enabled the investigator to have determined the true description."

Counsel in his brief refers to a map marked "Def't's Exhibit A-4," which he contends "shows a discrepancy between the block 6 referred to and section 5." But the record on appeal contains no exhibit bearing that designation, nor is there any such map brought up or properly described or authenticated. Also, the record is not clear as to the extent to which the witness was able to testify that said block 6 and section 5 were not identical, nor as to whether it was to a substantial extent, nor as to what county records the witness was relying on. Also, as a matter of fact, he did not testify that he could not locate the land in block 6.

The judgment is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

92 Cal. App. 749

ALLEE v. SHAY, Sheriff. (Civ. 3545.)

District Court of Appeal, Third District, California. June 26, 1928.

1. Fraudulent conveyances 🔑215—Minor, injured by automobile, became wrongdoer's "creditor" from time of injury, entitled to set aside wrongdoer's conveyance to defeat recovery (Civ. Code, § 3442).

Cause of action in favor of minor, injured by automobile, arose immediately at time of injury, and minor became "creditor" of wrongdoer from that time, within Civ. Code, § 3442, entitled to set aside any conveyance by wrongdoer with intent to defeat recovery on judgment based on that tort.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Creditor.]

2. Fraudulent conveyances 🔑230—Property conveyed with intent to defraud creditors remains in fraudulent grantor, subject to execution by creditor (Civ. Code, § 3442).

Title to property conveyed with intent to defraud creditors within Civ. Code, § 3442, remains in fraudulent grantor, which property creditor may seize and sell under execution to satisfy judgment.

3. Fraudulent conveyances 🔑93—Love and affection does not constitute "valuable consideration" for conveyance as respects existing creditors (Civ. Code, § 3442).

Conveyance purporting to be made for love and affection, though good as between the parties, does not constitute in law a valuable consideration so as to take it out of effect of Civ. Code, § 3442, providing that any transfer or incumbrance of property, made without valuable consideration by party while insolvent, or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Valuable Consideration.]

4. **Fraudulent conveyances 🔑300(1)—Evidence held to establish that transfer of property was made without consideration to defeat recovery by plaintiff in personal injury action (Civ. Code, § 3442).**

Evidence *held* to establish that transfer of property by defendant in personal injury action to his niece was made without consideration and for purpose of defeating recovery by injured plaintiff in such action, under Civ. Code, § 3442, relating to fraudulent conveyances.

5. **Fraudulent conveyances 🔑64(1)—Intent is immaterial, where transfer without consideration renders grantor unable to respond to creditors' claims (Civ. Code, § 3442).**

Under Civ. Code, § 3442, relating to fraudulent conveyances, grantor's intent is wholly immaterial if his voluntary conveyance places him in a position where he is unable to respond to claims of creditors.

6. **Fraudulent conveyances 🔑58—That some property was retained for short time after gift held not to relieve transfer from charge of being fraudulent (Civ. Code, § 3442).**

That defendant in personal injury action retained some property for a short time after having made voluntary gifts to niece did not relieve transfer from charge of being fraudulent as respects injured plaintiff in such action, within Civ. Code, § 3442, where property retained was insufficient to satisfy judgment recovered in such action; whether sufficient property has been retained being determined by results.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Edna L. Allee against W. A. Shay, as Sheriff of the County of San Bernardino, to enjoin the sale by the Sheriff under execution of certain realty. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for appellant.

Pollock & Mitchell, of Ontario, for respondent.

PLUMMER, J. This cause is before us on an appeal taken by the defendant from a judgment entered in favor of the plaintiff, perpetually enjoining and restraining the defendant as sheriff of the county of San Bernardino from selling certain real property situate in said county under and by virtue of an execution issued out of the superior court in and for the county of Los Angeles in an action wherein Lee E. West, a minor, by his guardian ad litem, Lillian Moran, was plaintiff, and J. H. Kienzle was defendant.

The record shows the following facts: On January 4, 1925, Lee E. West, a minor, was seriously injured by being struck by an automobile driven by J. H. Kienzle, the accident occurring in the county of Los Angeles. On or about October 1, 1925, said minor, through his guardian, obtained a judgment against said Kienzle for the sum of $5,777.80. This judgment is unsatisfied, save and except that $376.17 has been collected thereon, leaving a balance due at the time of the trial of this action of the sum of $5,401.63.

At the time of the injury suffered by Lee E. West through the operation of the automobile driven by Kienzle, the latter was the owner of certain real property in controversy in this action, of the value of between $6,000 and $7,000. This property was free of any incumbrances. The plaintiff in this action, Edna L. Allee, claims the property in controversy by virtue of a deed of gift from said Kienzle, executed and delivered to her on or about January 14, 1925. For approximately 8 years prior to the conveyance, Kienzle and Mrs. Allee (who was a niece of Kienzle), and her husband, lived together upon the property; Kienzle furnishing a home, which was an 8-room house, and Mrs. Allee doing the housework. After the accident on January 4, Kienzle returned to the home occupied by himself and the Allees at about 10 o'clock in the evening. Upon returning home, Kienzle informed the Allees that he had been involved in an accident, and that a boy had been apparently quite seriously injured. Kienzle asked Mrs. Allee if the premium on his $10,000 liability insurance had been paid. Mrs. Allee looked up the policy and informed Kienzle that it had not been paid. The next day, January 5, Mrs. Allee paid the premium on the insurance and reported the accident. On the 6th of January, Kienzle went to Imperial Valley and did not return for several days. During the absence of Kienzle, J. W. Moran, the stepfather of Lee E. West, went to the Kienzle residence and inquired for him of the Allees, and had a talk with Mr. Allee about the boy's injury. Kienzle returned home about January 10, and Mr. Allee informed him that Mr. Moran had been there to see him about the accident, and that Mr. Moran considered it was Kienzle's fault, and that the boy was in a hospital in a serious condition, and that they were making a claim against Kienzle, and that Kienzle had run away because he knew that he was at fault. Moran also left his address, requesting that Kienzle communicate with him. The payment of the premium by Mrs. Allele upon the insurance policy referred to, not having been made within the time allowed by the terms of the policy, the company refused to renew the policy, and conveyed this information to Keinzle prior to the execution of the deed referred to. On January 14, 1925, Kienzle conveyed the property in controversy by deed of gift to the plaintiff in this action; the deed, so far as pertinent here, being in the following words and figures, to wit:

"Know all men by these presents, that John H. Kienzle, a widower, of Upland, California, in consideration of $10.00 and love and affection, the receipt whereof is hereby acknowledged, grants to Edna L. Allee, a married woman, by this deed of gift, of Upland, California, all that real property situate in the city of Upland, county of San Bernardino, state of California, bounded and described as follows:" (Here follows description of the property.)

That at the same time, Kienzle transferred to his niece a 1922 Studebaker sedan worth about $600. No consideration was paid for this transfer.

During the month of October, 1925, Kienzle converted a $2,000 mortgage into cash, withdrew $600 from the Building & Loan Association and $1,900 from a savings account, aggregating the sum of $4,500, and gave the same to a nephew named William Kahrig. At the time of this gift, Kienzle was not indebted to Kahrig in any sum whatever. Upon receiving the money, Kahrig immediately sent it to Kienzle's brother in the state of Kansas. After making these gifts, Kienzle had property left of the value of $700—if we adopt the highest figures. Kienzle testified that he could not pay the judgment obtained by West, that he did not intend to pay it, and also that he would not. Kienzle further testified that he made the deed to his niece to save the expense of probating his estate, although at the time he knew that if he died leaving personal property it would be necessary to have the same probated. Kienzle also testified that his reason for making the gift was that his niece had always been kind to him, and he thought that she should have it. Both the plaintiff, Edna L. Allee, and Kienzle testified that at the time of the execution and delivery of the deed, Kienzle was not indebted to his niece, Edna L. Allee, in any sum whatever. It was stipulated during the trial that the plaintiff in the case of West against Kienzle had used every reasonable effort to collect the judgment, without avail, and that Kienzle did not have any property in the state of California subject to execution unless it be the real estate involved in this action. On November 16, 1925, the execution hereinbefore referred to was levied upon the property conveyed by Kienzle to his niece, whereupon his niece, the plaintiff, brought this action for an injunction, and had judgment as prayed for.

The complaint alleges that the said Edna L. Allee is the owner of lot 8 in block 6 of Magnolia, as per plat recorded in Book 9 of Maps, page 15, records of the county of San Bernardino; that the defendant, as the sheriff of San Bernardino, has levied upon said property by virtue of an execution issued in the case of Lee E. West, a minor, against J. H. Kienzle, and will, unless restrained by the court, proceed to sell the same. The answer denies the ownership of the plaintiff, sets forth that the conveyance referred to was made voluntarily and to hinder, delay, and defraud creditors, that no consideration was paid therefor, and also sets forth the facts showing the judgment obtained by Lee E. West against J. H. Kienzle, and its remaining unsatisfied, and also that J. H. Kienzle was in fact the owner of the property described in plaintiff's complaint. The court made the following findings:

"(1) That all of the allegations contained in plaintiff's complaint are true.

"(2) That it is not true that J. H. Kienzle is the owner in fee of the property described in plaintiff's complaint.

"(3) That it is not true that J. H. Kienzle conveyed or attempted to convey said property to Edna L. Allee without any consideration.

"(4) That it is not true that plaintiff will not suffer any damages by reason of said sale attempted to be made by said defendant.

"(5) That it is not true that the said J. H. Kienzle made a conveyance of said property described in plaintiff's complaint to said Edna L. Allee with the intention or for the purpose of defrauding Lee E. West or defeating the execution of any judgment.

"(6) That it is not true that said Edna L. Allee conspired with said J. H. Kienzle to accept said conveyance for the purpose of defrauding said J. H. Kienzle's creditors.

"(7) That it is not true that the conveyance of said property, made by said J. H. Kienzle to said Edna L. Allee, was or is fraudulent or void, and it is not true that said Edna L. Allee has no right or title or interest in or to said property."

The appellant challenges these findings as unsupported by the evidence.

Before setting forth any testimony relevant to the issue presented, it will clarify the situation to state that the record shows that, after the transfer by Kienzle to his niece of the real estate and automobile, he still had in his possession property of the value of $5,200—taking his own statement. This sum is $577.80 less than the judgment obtained against him by Lee E. West on account of injuries suffered at his hands on January 4, 1925.

Edna L. Allee, the plaintiff in this action, testified that she and her husband lived with Kienzle, and had lived with him in the residence on lot 8 in block 6 of Magnolia in Upland about 8 years; that Kienzle executed and delivered a deed to her, to said property, as a deed of gift; that she did not pay anything for the conveyance; that the $10 mentioned therein was not paid; that the first knowledge she had of the deed was when it was given to her; that she did not see the deed until after it had been recorded; that it was given to her on account of love and affection; that she knew that Mr. Kienzle had been involved in an automobile accident on January 4, 1925, prior to the execution of the deed; that she learned of the accident by talking it over with Mr. Kienzle on the evening that it occurred; that her husband was present at the time; that she did not know who the boy was that had been injured; that Kienzle told her he had had an accident, that a couple of boys on a motorcycle had run into him; that before this time Kienzle told her he was going to give her the property; that Kienzle had given her the automobile at the time he bought it; that the registration certificate conveying the automobile to her was made at the time of the execution of the deed. This is shown by the following questions and answers:

"Q. You think it was in January. Was it before or after the transfer of the property that has been referred to? A. It was about the same time. Q. Now, at that time, did you pay him any money for the automobile? A. I did not. Q. And he was not indebted to you in any way, was he? A. No."

The witness then testified as to the mortgage, the money in the savings bank and building and loan association to which we have referred, and to her knowledge that it was given by Kienzle to his nephew, Kahrig. The plaintiff, in direct relation to the conveyance, testified as follows:

"Q. Now, will you tell the court just what was said, so the court may know what the situation was? A. Well, he has evidently appreciated what I have done for him. Q. What did he say? A. And he told me that he has. He said that many times. He said that he did not know what he would do if it was not for me. And how happy that I had made him, and how I had helped him in a lot of little troubles—loneliness for his wife—and that he did not think he could ever repay me for what I had done for him. He said that—oh, I don't remember how many times. Q. Now, with reference to this lot, what did he say he was going to do with that? A. He did not say exactly, that is, to come right out and say, 'this house will be yours,' although he left that impression. Q. What did he say to you when he delivered you the deed? Did you know from anything that was said what that deed was or what place it was—whether this house or some other house? A. Well, I will say that I was surprised, and still I felt that I really should have it; and I thanked him, and he, of course, was glad for me to get it; and I think that I told him, as well as I remember, that he never need worry, that he would always have a home there with me, because he had given it to me, and that I never would turn him out, and that we would live just like we had always lived, and be as happy, and continue as we had."

J. H. Kienzle, the grantor named in the conveyance in question, testified that his niece, Mrs. Allee, and her husband, had been living with him 7 or 8 years in the house situate on lot 8 in block 6, and upon direct examination further testified:

"Q. At that time, the date the deed was made, did you know of any liability against you in favor of anybody? A. No, sir. Q. Were you indebted to Lee E. West at that time? A. No, sir. Q. On January 4, you had an accident, an automobile accident, with Lee E. West, had you not? A. Yes. Q. When you made the deed, was it with any intent or purpose on your part to avoid any payment of any sum of money to him, or to anybody else? A. No, sir; none whatever. Q. You knew the facts of the accident? You knew how it had happened? A. Yes, sir. Q. Had there been any claim for damages made against you by Mr. West or anybody else on his behalf, on the 14th day of January, 1925, the day that you transferred this property to your niece? A. No, sir; none whatever."

That J. H. Kienzle did know that a claim was being made against him, and that he would be held liable for the injury to the boy, is made manifest by the following excerpt taken from his testimony, given upon cross-examination:

"Q. Isn't it a fact that after you got back Mr. Allee told you that Mr. Moran, Mr. West's father, had been to see him regarding the accident? A. Yes, sir. Q. And you knew that Moran had been out there making a claim, did you not? A. I didn't know what he was there for; I had no conversation with him; and Mr. Allee told me that Mr. Moran had been there, that he would—Q. He had been there regarding the accident? A. Yes, sir. Q. And that was immediately after you got back from this hunting trip? A. No; that was while I was gone. Q. But you found that out—A. I found it out after I got back. Q. And that was within one week after the accident? A. Yes, sir. Q. And before you made the deed? A. Before I made the deed. Q. Yes. A. Yes. Q. Now, didn't Mr. Allee tell you what Mr. Moran said? A. Yes. He made several mistakes, I think. He said that I was driving a Buick car, a red Buick; and Mr. Allee corrected him and said, 'There is the car right here; this is the car.' And the man that he had with him, he says, 'John, you have got this balled up.' Whoever John was, I don't know. And he said I had run over the boy. Q. Then you knew that he felt as though that had been quite a serious injury? A. Well, he told Mr. Allee that I ran over his boy, and that I was to blame, and that I ran away because I knew I was at fault. Q. And what else did Mr. Allee tell you that Mr. Moran had said? A. Well, nothing much more than that. Q. Did he tell you that this boy was in the hospital? A. Yes, sir. Q. Did he tell you that his leg had been broken? A. Yes; he told Mr. Allee that his leg was broken. Q. What else did he tell you? A. Well, that is about all. Q. Well, now, didn't you believe from that that he would possibly make a claim for damages against you? A. I never thought of such a thing, because I did not consider myself to blame at all. Q. Well, you knew, nevertheless, that the people considered that you were at fault, from what Mr. Allee had told you that Mr. Moran had said? A. Well, you could take it for that; yes. Q. And you knew that those people considered that it was your fault? A. They claim it was. Q. And all of that occurred before you made this deed, did it not? A. Yes, sir."

In relation to the transfer of the automobile, Kienzle testified as follows:

"Q. You think it was in January. Was it before or after the transfer of this property that has been referred to? A. It was about the same time. Q. About the same time? A. Yes, sir. Q. Now, after making this gift of this house and lot and the $4,500 worth of property, what did you have left? A. My little business was all. Q. Your little business in Upland? A. Little business in Upland. Q. What is the value of that business? A. Total, perhaps $600. Q. And that includes your tools, does it? A. Yes; and a small amount of material."

In another place this witness testified that the value of this property was $700, and in our calculations, hereinbefore set forth, we have accepted the highest figures. Kienzle also testified that Mrs. Allee paid him no consideration for the conveyance, not even the $10, and that he was not indebted to her in any sum. That Mrs. Allee had been kind to him, etc. With reference to the payment of the West judgment, the testimony of Kienzle is as follows:

> "Q. Now, isn't it a fact, Mr. Kienzle, that you stated you did not intend to pay this judgment in the case of West against Kienzle? A. I have not anything to pay it with; no. Q. And isn't it a fact that you said that you did not intend to pay it? A. I said I would not. Q. Isn't it a fact that you said that it would not be paid in your lifetime? A. I said that I could not pay it; I couldn't pay it in my lifetime. Q. That you could or couldn't pay it? A. That I couldn't. Q. Now, you stated that you transferred this property to Mrs. Allee to save probate expenses and attorney's fees? A. Yes, sir. Q. And you knew that there would be probate expenses and attorney's fees on the mortgage, did you not? A. Yes. Q. And also on the money in bank and the loan association? A. Yes, sir."

The transcript discloses a somewhat lengthy examination of the witnesses Allee and Kienzle, but there is nothing contained therein which changes the force and effect of what we have set forth herein. Does this testimony support the findings of the trial court, or does it not irresistibly lead to findings directly opposite thereto? The answer is found in the application of the last clause of section 3442 of the Civil Code, which reads:

> "Provided, however, that any transfer or incumbrance of property made or given voluntarily, or without a valuable consideration, by a a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors."

[1, 2] On January 4, 1925, at the instant the automobile driven by Kienzle injured the minor, Lee E. West, a cause of action arose in favor of West against Kienzle, and a claim for damages then and there instantly arose, of which claim J. H. Kienzle then and there had immediate notice. We make this statement upon the authority of Cioli v. Kenourgios, 59 Cal. App. 690, 211 P. 838, and the case of Chalmers v. Sheehy, 132 Cal. 459, 64 P. 709, 84 Am. St. Rep. 62. In the latter case, the opinion quotes from Freeman on Executions, as follows:

> "That one having a claim for a tort is a creditor before the commencement of an action thereon, as well as after, and, as such creditor, is, upon recovering judgment, entitled to avoid a fraudulent transfer antedating the commencement of his action." Freeman on Executions (4th Ed.) § 137a.

A number of other cases are then cited in Chalmers v. Sheehy, supra, to the effect that a person having a cause of action on account of tort is a creditor of the wrongdoer before judgment is obtained, and is entitled to set aside any conveyance made with the intent and purpose of defeating recovery upon any judgment based upon the tort. To the same effect is the language of this court in Benson v. Harriman, 55 Cal. App. 483, 204 P. 255. That the minor, Lee E. West, has pursued, and was at the time of the beginning of this action pursuing, the proper remedy to secure satisfaction of his judgment against Kienzle is clearly established by the following authorities: Ohio Electric Car Co. v. Duffet, 48 Cal. App. 674, 192 P. 298, where it was held that the title to property conveyed with intent to defraud creditors remains in the fraudulent grantor, which the creditor may seize, etc. See, also, 12 Cal. Juris. p. 1029, where the three remedies open to a creditor are pointed out, one of which is by way of sale, under execution, of real property fraudulently conveyed.

[3] None of the findings of the trial court is to the effect that the conveyance from Kienzle to Allee was made for a valuable consideration. Finding No. 3 simply is that it is not true that J. H. Kienzle conveyed, or attempted to convey, said property to Edna L. Allee without any consideration. This is not a finding that it was made for a valuable consideration. There is a distinction between a good and a valuable consideration, and where, as in this case, the conveyance purports to be made for love and affection, it is universally held that, while such a conveyance may be good as between the parties, it does not constitute in law a valuable consideration so as to take it out of the statute of frauds.

[4] The following facts stand out undisputed in the testimony: That on the 4th day of January, 1925, Kienzle was the owner in fee of the real property involved in this action; that he was the owner of an automobile of the value of about $600; that he had other personal property of the value of $5,200; that on the 4th day of January, 1925, the automobile, while being driven by Kienzle, struck and injured Lee E. West, a minor; that shortly thereafter and prior to any conveyance of his property, Kienzle learned that West had been seriously injured; that upon returning home, on the evening of January 4, Kienzle immediately informed his niece of the accident, and asked her if the premium on his liability policy had been paid; that an attempt was made the next day to pay the premium on the policy, but that the policy had already lapsed; that, prior to the con-

veyance, Kienzle knew, not only that West had been injured, but that he (Kienzle) was held responsible therefor; that the conveyance of the real estate and automobile to his niece, the plaintiff in this action, was purely voluntary, without any valuable consideration whatever; that, after making the gifts referred to, and conveying the real estate and automobile to the plaintiff herein, Kienzle did not have sufficient property remaining to meet the claim held against him by the minor, Lee E. West, on account of the tort set forth herein; that a few months after making the gifts referred to herein, and shortly following the entry of judgment in favor of the minor, Lee E. West, Kienzle gave away money to the extent of $4,500, and this money was immediately sent beyond the jurisdiction of California courts; that, after making the gift of the real estate and automobile to the plaintiff herein, Kienzle was at all times insolvent and unable to meet the amount of the claim found against him by the judgment entered in favor of the minor, Lee E. West; that Kienzle's own statement is and was to the effect that he could not pay West's judgment, and also that he would not pay the same. The testimony heretofore set forth also shows that Kienzle's grantee, the plaintiff in this action, was aware of all the circumstances disclosed by the record and summarized herein.

That these acts are all indicia of fraud is fully established. Benson v. Harriman, 55 Cal. App. 483, 204 P. 255; Cioli v. Kenourgios, 59 Cal. App. 690, 211 P. 838; Mump on Fraudulent Conveyances, p. 33, § 47, also page 36, § 50; 27 Cal. Juris. p. 488; Daugherty v. Daugherty, 104 Cal. 221, 37 P. 889; Bull v. Bray, 89 Cal. 286, 26 P. 873, 13 L. R. A. 576. If the question of intent were decisive of this case, we think it is evident that the findings of the trial court could not be sustained. This is indicated by the reasoning of the court in the case of Bull v. Bray, supra, and the language of the court in the case of Benson v. Harriman, supra, and Tobias v. Adams (Cal. Sup.) 258 P. 588. In the case of Benson v. Harriman the defendant had testified that he had no fraudulent intent. This court thus spoke of such testimony:

> "Quite naturally, the defendant * * * denied that he had any intention of defrauding the plaintiff, and he even went so far as to claim that he was able and willing to pay the plaintiff what he owed him. But his actions speak louder than his words and his declared willingness to pay could avail nothing in the face of the determined efforts that were required to collect the judgment."

In the case at bar, Kienzle declared his unwillingness and his inability to pay; the inability being created by his own acts. In the case of Tobias v. Adams, supra, the Supreme Court thus speaks of the testimony of one stating that he entertained no fraudulent intent after conveying all his property in such a manner as if valid, to place it beyond the reach of creditors:

> "We are much inclined to agree with appellant. For, if a man keeps his bank account in the name of another admittedly to prevent his creditor from reaching it by legal process, and then takes his entire estate, and either puts it in his wife's name or deposits it in the name of his secretary, knowing that the judgments are in existence, his mere ipse dixit that it is not to defraud his creditor would hardly create a bona fide conflict in the testimony. 'While a finding will not be disturbed on appeal if there is a substantial conflict in the evidence from which it springs, "the evidence, in order to raise a conflict, must be such as to present a fair and reasonable ground for a difference of opinion."' "—citing authorities.

In the case of Knox v. Blanckenburg, 28 Cal. App. 298, 152 P. 59, this court expressed its views as to the weight of such testimony in the following words:

> "According to the defendant's * * * own testimony, he transferred all his property, both real and personal, to his wife, without receiving any consideration therefor and when in debt to his brother and others, thus making himself impotent, however willing, to pay any of his debts, removed all his property from the reach of his creditors and put it beyond their power, if the transfer is to stand, to enforce payment. The inevitable result of this act on the part of the defendant * * * was to hinder and delay his creditors in the enforcement of their just claims. His own bare statement, unsupported by any facts, that in giving the property to his wife he did not intend to hinder or delay his brother in collecting his debt, cannot overcome the presumption that he intended the inevitable consequences of his willful and intentional acts."

When Kienzle made the voluntary conveyance of his real estate and automobile to Edna L. Allee, coincident with the conveyance, he rendered himself unable to respond to the claims of Lee E. West, who became a creditor of Kienzle immediately upon the commission by Kienzle of the tort referred to herein on the 4th day of January, 1925.

[5] Thus far we have considered this cause in the light of the provisions of section 3442 of the Civil Code other than as contained in the concluding proviso, relating to the transfer of property made without a valuable consideration while one is insolvent or in contemplation of insolvency. Since this proviso was added to the section by the Legislature in 1895, the intent of the grantor is wholly immaterial if his voluntary conveyance places him in a position where he is unable to respond to the claims of his creditors. In the case of Hemenway v. Thaxter, 150 Cal. 737, 90 P. 116, the Supreme Court thus speaks of the proviso:

> "That the conveyance, if voluntary, was in fraud, * * * scarcely requires argument. Section 3442 of the Civil Code provides that 'any transfer * * * made or given voluntarily, or without valuable consideration, by a party while

insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors.' Hemenway admits that by this conveyance he divested himself of all property liable to execution; that he became thereby, and has ever since remained, insolvent. The consequence of this conveyance being, then, to render Hemenway insolvent, he will be presumed to have intended its natural consequence, from which follows an intent to become insolvent, or contemplated insolvency, in the language of the act."

In 12 Cal. Juris. 1019, § 60, after referring to section 3442 of the Civil Code as it read prior to 1895, the rule applicable to this case is thus stated:

> "The amendment of 1895 completely changed this rule (as to intent). By express provision a voluntary conveyance made by an insolvent or by one in contemplation of insolvency, is now conclusively presumed to be fraudulent as to existing creditors. The insolvency of the voluntary grantor is conclusive of fraudulent intent, and no other facts can control, influence or overcome this presumption. The question of actual intent is immaterial."

In the case of Hanscome, etc., v. Ainger, 71 Cal. App. 735, 236 P. 325, this court speaking through Mr. Justice Hart, in considering section 3439 and the proviso in section 3442 of the Civil Code, speaks, first, of the intent necessary when the grantor is not insolvent, and, then, when the grantor is insolvent, thus disposes of the question of intent:

> "On the other hand, if as said paragraph of the complaint also avers, the conveyance was made by D. N. Ainger voluntarily or without a valuable consideration, while said Ainger was insolvent or in contemplation of insolvency, his 'intent is immaterial and the transfer, regardless of the actual intent, is void as to his creditors'"—citing Atkinson v. Western Development Co., 170 Cal. 503, 150 P. 360, and the case of Benson v. Harriman, 55 Cal. App. 483, 204 P. 255, also decided by this court.

In Lefrooth v. Prentice, 259 P. 947, the Supreme Court of this state having before it the proviso added to section 3442 of the Civil Code, where a voluntary conveyance had been made, states the law in these words, "Under such a showing the fraudulent intent on the part of the grantee of such transfer is immaterial" (citing a number of authorities), and concludes with these words:

> "If these conditions, to wit, a grant made without consideration by a person insolvent or in contemplation of insolvency, are present, the intent of the grantor is immaterial and the transfer, regardless of the actual intent, is void as to creditors."

To the same effect is the case of Southwick v. Moore, 61 Cal. App. 585, 215 P. 704, where the insolvency was created by the act of making the voluntary conveyance.

[6] The fact that Kienzle retained some property for a short while after having made the gifts to his niece does not relieve the transfer from the charge of being fraudulent. In 27 Corpus Juris. p. 550, § 250, we find a pertinent statement of the law supported by numerous authorities. It is there stated:

> "The presumption of fraud, as against existing creditors, raised by a voluntary conveyance by the debtor of his property, becomes conclusive where there is no evidence that he retained sufficient property to satisfy his creditors, and the fact that there was no actual fraudulent intent on the part of either party to the transfer does not in any way affect the operation of the rule. In order that a voluntary conveyance may be upheld as against existing creditors, it is essential that the property retained by the debtor should be clearly and amply sufficient to satisfy all his existing debts. The test for determining the validity of a voluntary conveyance * * * is whether sufficient property remains to pay the grantor's debts, and to satisfy this test, the property must be actually sufficient and not apparently so."

The text further shows that whether sufficient property has been retained must be determined by results. The result in the case at bar conclusively establishes the insufficiency of the remaining estate of Kienzle to satisfy the West judgment after the voluntary conveyances made to his niece, even though we do not consider the subsequent acts of Kienzle in sending all of his available cash, through the intermediary of his nephew, to his brother in the state of Kansas.

The respondent cites the cases of Bank of Willows v. Small, 144 Cal. 709, 78 P. 263, and Marple v. Jackson, 184 Cal. 411, 193 P. 940, and the part of section 3442 of the Civil Code, exclusive of the proviso, in support of the judgment herein. These cases are not authority here by reason of dissimilarity of facts. In the Bank of Willows Case, it was held that, before the plaintiff could complain of the deed in question, it was necessary to show that its claim could not be collected. In the instant case, it is admitted that Kienzle has nothing out of which the West judgment may be realized, and the facts show that, after the conveyances referred to, he had insufficient assets to meet the judgment. In the case of Marple v. Jackson, the deed involved was executed and delivered some 10 years preceding the creation of the indebtedness. In the case at bar, the indebtedness existed, even though the amount was unascertained, prior to the time of the execution of any of the conveyances. What we have before said disposes of the respondent's reliance upon the intent portion of section 3442, Civil Code.

In view of the authorities cited and the facts set forth herein, it must be found and held that J. H. Kienzle, in making the voluntary conveyances to his niece, Edna L. Allee, the plaintiff in this action, rendered himself unable to respond to the claims of Lee E. West, a minor; that such conveyances were made in contemplation of insolvency, and that the said J. H. Kienzle intended to place all his property beyond the reach of execution; that the conveyance of the real property referred to in this action is void as against the claims of Lee E. West; that the trial court's finding to the contrary is not supported by the evidence, but is contrary thereto; that the conclusions of law drawn by the court upon its findings are erroneous; that the evidence in this case is without conflict upon all the material points involved in this action, and cannot truthfully be changed; and that proper findings may be drawn therefrom and a correct judgment entered, and this cause terminated without further litigation, by this court exercising the authority conferred by the recent constitutional amendment empowering an appellate court so to do, and also in accordance with the provisions of section 956a of the Code of Civil Procedure (St. 1927, p. 583) where trial by jury is not a matter of right, or where trial by jury has been waived.

It is hereby ordered that the findings, conclusions of law and judgment of the trial court be, and the same are hereby, set aside, and the following findings, conclusions of law, and judgment substituted therefor:

Findings of Fact.

(1) That all the allegations contained in the defendant's answer are true and correct.

(2) That, as against the judgment in favor of Lee E. West, a minor, against J. H. Kienzle, the said J. H. Kienzle is the owner in fee of all the property described in plaintiff's complaint.

(3) That on or about the 14th day of January, 1925, the said J. H. Kienzle, by deed of gift, without any valuable consideration whatever, conveyed to his niece, Edna L. Allee, the plaintiff in this action, the real estate described in plaintiff's complaint, and at about the same time, without any consideration, conveyed to her a certain Studebaker automobile.

(4) That, after said conveyance, the said Kienzle was not possessed of sufficient property to meet the indebtedness owing by him to the said Lee E. West, a minor.

(5) That the indebtedness to Lee E. West, a minor, accrued and became fixed against the estate and property of J. H. Kienzle immediately upon the injury inflicted upon the person of Lee E. West, by the automobile owned and driven by J. H. Kienzle on the 4th day of January, 1925.

(6) That, in pursuance of an intent to prevent a recovery by Lee E. West of any damages by reason of the tort committed by the said J. H. Kienzle, the said J. H. Kienzle divested himself of the real estate referred to in plaintiff's complaint, the automobile mentioned in the testimony, and the $4,500 in cash, which latter sum has been sent to the state of Kansas and beyond the jurisdiction of California courts.

Conclusions of Law.

From the foregoing findings of fact, the following conclusions of law are drawn:

That the conveyance by J. H. Kienzle to Edna L. Allee, of the real estate mentioned in plaintiff's complaint, on the 14th day of January, 1925, was and is fraudulent and void, and creates no title in the said Edna L. Allee, as against the unsatisfied judgment now held by Lee E. West, a minor against the said J. H. Kienzle.

That Lee E. West is entitled to have the property mentioned sold under execution issued in said action, and the plaintiff is not entitled to an injunction restraining the sheriff of the county of San Bernardino from making sale of said property under said execution, or any execution that may be issued upon said judgment.

Judgment.

And it is further ordered that following the words, "found between the parties," the judgment be, and is hereby, corrected to read as follows:

It is hereby adjudged that the plaintiff has no title to the premises involved herein as against the claim of Lee E. West, a minor, based upon his judgment against J. H. Kienzle.

That the conveyance made by J. H. Kienzle to lot 8 in block 6, of Magnolia, as per plat recorded in Book 9 of Maps, p. 15, records of the county of San Bernardino, state of California, was and is fraudulent and void as against the claim of Lee E. West, a minor, and the plaintiff herein has no title or right to said property as against the claim of the said Lee E. West.

That the defendant, as the sheriff of the county of San Bernardino, has a legal right, and may properly proceed to sell the property referred to under an execution issued upon the judgment in favor of the said Lee E. West, against the said J. H. Kienzle, referred to in this action.

And it is further adjudged that the plaintiff take nothing by reason of this action, and that the defendant have and recover his costs and disbursements incurred herein.

We concur: FINCH, P. J.; HART, J.

92 Cal. App. 653

In re MILLSAP. (Civ. 5182.)

District Court of Appeal, Second District, Division 1, California. June 21, 1928.

1. Attorney and client 🔑57—Bar association held not entitled to dismissal of appeal on motion notwithstanding transcript was filed late.

In disbarment proceedings, where no reporter's transcript was filed, but defendant did file duly certified clerk's transcript, which contained judgment roll, together with notice of appeal and notice demanding transcript of testimony, *held* that, on record so made, bar association was not entitled to dismissal of appeal on motion, since defendant may have relied on error shown by clerk's transcript.

2. Attorney and client 🔑57—On appeal under alternative method in disbarment proceeding, court could not order that exhibits need not be copied into reporter's transcript, but that clerk of superior court file originals (Code Civ. Proc. § 953a).

In disbarment proceedings, where appeal was taken under so-called alternative method, provided by Code Civ. Proc. § 953a, appellate court was without authority to order that certain exhibits need not be copied into reporter's transcript, and that clerk of superior court be directed to produce and file original exhibits to be used at hearing of appeal.

In the matter of the proceedings for disbarment of Homer C. Millsap. Judgment of disbarment, and the respondent appealed. Motion by the Bar Association for an order to dismiss the appeal, and motion by the respondent for an order relieving him from default on appeal. Denied and dismissed.

L. E. Dadmun, of Los Angeles, for appellant Millsap.

Ovila N. Normandin, Kenyon F. Lee, and W. I. Gilbert, all of Los Angeles, for respondent Los Angeles Bar Ass'n.

CONREY, P. J. [1] Pursuant to notice, respondent bar association presented its motion that the appeal be dismissed on the ground that appellant had failed to file transcript on appeal within the time provided by law. It is true that no reporter's transcript has been filed, but appellant did, on the 21st day of August, 1925, file a duly certified clerk's transcript, which contains the judgment roll, together with the notice of appeal and notice demanding a transcript of the testimony. On a record so made, respondent is not entitled to a dismissal of the appeal, since it may be that appellant relies upon some error shown by the clerk's transcript. Locke Paddon v. Locke Paddon, 194 Cal. 73, 77, 227 P. 715.

[2] It further appears, however, that at or near the time of filing said clerk's transcript appellant presented to this court a petition for an order that certain exhibits need not be copied into the reporter's transcript, and that the clerk of the superior court be directed to produce and file herein said original exhibits, to be used at the hearing of the appeal. That application was denied, for reasons set forth in an opinion of the court. In re Millsap, 75 Cal. App. 25, 241 P. 920. Our attention has been drawn to the fact that, upon a somewhat similar showing of facts in relation to extensive and bulky exhibits, the Supreme Court recently, in a case appealed to that court, directed that those exhibits need not be included in the transcript on appeal, and that the original exhibits be transmitted to the Supreme Court, "When the transcript on appeal shall have been filed." Glassell v. City of Los Angeles, L. A. No. 10367, 270 P. ——. However, it was the opinion of this court that, in an appeal taken under the so-called "alternative method" provided by section 953a of the Code of Civil Procedure, this Court was without authority to make the requested order. As we are not informed of the reasons which may have guided the Supreme Court in making an order which assumes the existence of such authority in the Supreme Court, we do not at present deem it advisable to modify our own views, which were set forth, as above stated, in this case.

The motion of appellant for relief from default was made informally in open court, and upon waiver of notice to respondent. This motion is directed to the fact that, since the order of October 31, 1925, denying appellant's application to which we have referred, no further transcript has been filed, and no brief has been filed on behalf of appellant. Appellant during that period of time, by prolonged inaction, has abandoned, or at least has neglected, his appeal. We think that there has been no sufficient showing of excuse for such delay in further prosecution of his appeal. If appellant was of the opinion that this court's order denying his application was erroneous, and if he was advised that there was authority in law for the omission of exhibits, or of any part of the evidence, in a reporter's transcript prepared under section 953a of the Code of Civil Procedure, he might have proceeded in an attempt to obtain in the superior court a certification of the reporter's transcript without those exhibits. In his affidavit filed on the 21st day of August, 1925, appellant stated that the reporter's transcript had been prepared, consisting of about 500 pages, but not containing said exhibits. He does not now claim that he has made any effort to have the transcript, which thus had been prepared, certified either by the reporter or the trial judge. Technically, however, no default has yet been taken by means of any order or adverse proceedings against appellant on account of such delay, and it is unnecessary to pass upon the merits of his motion.

The motion to dismiss the appeal is denied. The motion of appellant for relief from his assumed default is dismissed. It is directed that counsel for appellant be notified to appear before this court at its session on the fourth Monday of July, 1928, to show cause why the appeal should not be dismissed for failure to prosecute the same, and particularly for failure to file any brief, as required by the rules of court.

I concur: YORK, J.

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92 Cal. App. 646

In re WEYMANN. (Application No. 5189.) ★

District Court of Appeal, Second District, Division 1, California. June 21, 1928.

Hearing Denied by Supreme Court Aug. 20, 1928.

1. Attorney and client ⚷1—State Bar Act held to repeal statute under which District Courts of Appeal admitted attorneys to practice (St. 1927, p. 38; Code Civ. Proc. § 279).

The State Bar Act (St. 1927, p. 38), giving the Supreme Court jurisdiction to admit attorneys and counselors to practice, impliedly repeals Code Civ. Proc. § 279, under which District Courts of Appeal exercised a like function.

2. Attorney and client ⚷1—Right to exercise vocation of attorney is one which Legislature may bestow or may empower judicial department to bestow on fitting terms.

The right or privilege of exercising the vocation of attorney and counselor at law is a right or privilege which the Legislature may bestow or may empower the judicial department of the state government to bestow upon such terms as are deemed consistent with the nature and purpose of the right or privilege.

3. Statutes ⚷158, 167(1)—Repeals by implication are not favored, but will prevail where later statute is revisory of entire matter and designed as substitute for earlier statute.

Repeals by implication are not favored; but, when it is apparent that a later statute is revisory of the entire matter of an earlier one and designed as a substitute for it, the later will prevail.

4. Statutes ⚷114(1)—State Bar Act, divesting District Courts of Appeal of jurisdiction to admit to practice, held not to involve more than one subject expressed in its title (Const. art. 4, § 24).

State Bar Act (St. 1927, p. 38), entitled "An act to create a public corporation to be known as 'The State Bar of California,' * * * to regulate the practice of law, * * *" in so far as it operates to divest the District Courts of Appeal of jurisdiction to admit attorneys and counselors to practice, *held* not violative of Const. art. 4, § 24, requiring that every act shall embrace but one subject which shall be expressed in its title.

5. Statutes ⚷109—Courts may look to history of particular legislation in determining whether title of act sufficiently embraces its subject-matter (Const. art. 4, § 24).

In determining whether the subject-matter embraced within the body of a legislative act is sufficiently referred to in its title (Const. art. 4, § 24), court is entitled to look to the history of the particular legislation to which the act in question relates.

Application by August Weymann for admission to practice as an attorney and counselor at law. Application dismissed.

August Weymann, in pro. per.

R. H. Purdue, of Los Angeles, for respondent Los Angeles Bar Association.

CONREY, P. J. On the 5th day of January, 1927, petitioner filed his application for admission to practice law in this state, the application being based upon a certificate showing his admission to practice law in the state of New York. On the 7th day of November, 1927, the state board of bar examiners filed its report recommending that the application be denied, solely on the ground of insufficient practice for three years within the period of seven years immediately preceding the filing of his application. Code Civ. Proc. § 279. On the 28th day of May, 1928, pursuant to notice, the applicant presented his motion that he be admitted to practice notwithstanding said adverse recommendation.

It will not be necessary to pass upon the sufficiency of the evidence offered by the applicant to show that he had in fact practiced law for the necessary period of time as claimed by him if, as contended by respondent, this court is now without authority to grant an application of this kind.

The Legislature at its session of the year 1927 adopted the statute known as the "State Bar Act" (Stats. 1927, p. 38, Deering's 1927 Supp. to Gen. Laws, Act 591). Prior to the organization of the State Bar of California in accordance with the provisions of that act, the subject of admission to the practice of law in this state, including the procedure therefor, was governed by the provisions of the Code of Civil Procedure. Under sections 276 and 277, the applicant was required to apply for admission to the District Court of Appeal of the appellate district in which he resided, and the admission to practice was made by order of that court. The conditions on which attorneys might be admitted who previously had been admitted to practice law in the highest court of a sister state were defined in Code of Civil Procedure, § 279. Pursuant to the provisions of the State Bar Act, organization of the State Bar of California was completed on the 18th day of November, 1927.

The State Bar Act is entitled "An act to

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

create a public corporation to be known as 'The state bar of California,' to provide for its organization, government, membership and powers, to regulate the practice of law, and to provide penalties for violations of said act." The act by its terms creates the corporation, and provides that its first members "shall be all persons now entitled to practice law in this state." It is further provided in section 7:

> "After the organization of the state bar, as herein provided, all persons who are admitted to practice in accordance with the provisions of this act shall become by that fact members of the state bar."

Section 24 reads as follows:

> "*Admission to the Bar.*—With the approval of the Supreme Court, and subject to the provisions of this act, the board shall have power to fix and determine the qualifications for admission to practice law in this state, and to constitute and appoint a committee of not more than seven members with power to examine applicants and recommend to the Supreme Court for admission to practice law those who fulfill the requirements. With the approval of the Supreme Court the board shall have power to fix and collect fees to be paid by applicants for admission to practice, which fees shall be paid into the treasury of the state bar; provided, however, that until otherwise fixed and determined, the requirements for admission to practice under this act shall be the same as those now prescribed by the Supreme Court for admission to practice in this state and shall be enforced as the same now are enforced through the state board of bar examiners."

[1] It is contended by the applicant herein that the State Bar Act does not divest the District Courts of Appeal of the jurisdiction conferred by section 279 of the Code of Civil Procedure to admit attorneys from other states to practice. He points out that there is no express repeal of said section 279; and he contends that the State Bar Act and chapter 1, title, 5, part I, of the Code of Civil Procedure are statutes in pari materia and are to be construed together and both given force and effect as far as possible, and that even if section 24 of the State Bar Act be held to vest jurisdiction in the Supreme Court to admit attorneys and counselors to practice, it does not ipso facto divest the District Courts of Appeal of the jurisdiction they formerly had. It is said by the applicant in his brief that the provisions of the Code of Civil Procedure embody a complete and comprehensive scheme for establishing the legal status of attorneys at law, defining generally the prerequisites for admission, and granting authority to the courts, or to such agencies as the courts by authority of the Legislature may create for that purpose, to carry those provisions into effect. With this statement as to the nature of those provisions we agree; but the same statement is equally applicable to the State Bar Act. The fact that this later legislation has for its object the substitution of a complete and comprehensive scheme in the place of the former provisions constitutes the principal ground upon which we base our opinion that the enactment of the State Bar Act is in itself an implied repeal of all of the provisions of the Code of Civil Procedure which provided for the admission of attorneys by the District Courts of Appeal.

[2, 3] The right or privilege of exercising the vocation of attorney and counselor at law is a right or privilege which the Legislature has the power to bestow, or to empower the judicial department of the state government to bestow, upon such terms as are deemed consistent with the nature and purpose of the right or privilege to be exercised. In re Collins, 188 Cal. 701, 704, 206 P. 990, 32 A. L. R. 1062; Matter of Mock, 146 Cal. 378, 80 P. 64.

It being thus established that the subject-matter under consideration is entirely within legislative control, it only remains to consider whether or not the later statute has in fact repealed the Code provisions relating to that same subject-matter although there are no express words of repeal.

> "While it is true that repeals by implication are not favored, whenever it becomes apparent that a later statute is revisory of the entire matter of an earlier statute, and is designed as a substitute for it, the later statute will prevail, and the earlier statute will be held to have been superseded, even though there be found no inconsistencies or repugnancies between the two." Mack v. Jastro, 126 Cal. 130, 132, 58 P. 372, 373; Suydam v. Los Angeles Ry. Co., 27 Cal. App. 157, 161, 149 P. 55, 57; 23 Cal. Jur. p. 702; McGranahan v. Police Court, 56 Cal. App. 372, 374, 205 P. 98.

We are of the opinion that in accordance with the principles stated in the foregoing decisions the entire subject of admission of attorneys and counselors to the practice of law in this state is now governed in accordance with the provisions of the State Bar Act, and that the District Courts of Appeal are without authority at this time to make orders of admission to the practice of law in this state.

[4] The foregoing conclusion has been reached upon the presumption that the State Bar Act is not an act in any respect violative of the provisions of the Constitution of the state. It is contended by the applicant here that in so far as the State Bar Act may purport to divest the District Courts of Appeal of jurisdiction to admit attorneys and counselors it is unconstitutional and void; and particularly that the statute is violative of the constitutional provision that every act shall embrace but one subject, which subject shall be expressed in its title. Const., art. 4, § 24. The applicant claims that the subject expressed in the State Bar Act is not logically germane to the subject of divesting the District Courts of Appeal of jurisdiction to admit attorneys and counselors to practice. We have quoted in full the title of the State

Bar Act. The applicant contends that the phrase "to regulate the practice of law," as contained in said title, should be construed as meaning "to regulate the practice of lawyers," and not to include the admission of persons to the practice of law or the limitation of the authority of the courts in relation to the admission of attorneys to practice. We are of the opinion that the quoted phrase is sufficiently comprehensive in itself to include the admission of attorneys to practice; and further, that when taken in connection with the preceding words of the title all doubt is removed. The subject of the act as a whole is of such unity, and so completely interrelated in all of its parts that it constitutes but "one subject," within the meaning of those words as used in the Constitution.

> "It is now well settled that the constitutional provision requiring the subject of the act to be expressed in its title must be liberally construed, and that all that is required to be contained therein in order to meet the constitutional requirement is a reasonably intelligent reference to the subject to which the legislation of the act is to be addressed. It is not necessary that it should 'embrace an abstract or catalogue of its contents.'" Estate of McPhee, 154 Cal. 385, 389, 97 P. 878, 880.

See. also, Matter of Schuler, 167 Cal. 282, 293, 139 P. 685, Ann. Cas. 1915C, 706, applying to the Motor Vehicle Act (St. 1923, p. 517) and its title the "broad interpretation" given by the Supreme Court to said section of the Constitution. In Matter of Maginnis, 162 Cal. 200, 203, 121 P. 723, 725, the Supreme Court said:

> "The particular requirement that acts should contain but a single subject, which should be expressed in the title, was, no doubt, intended to guard against the inclusion in a single or general act of various disconnected provisions—a practice which might well prevent the consideration upon its own merits of legislation on each of the various subjects embraced in the bill. Thus, the constitution of New Jersey prefixes to a similar provision a recital that its purpose is 'to avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other.' (See Cooley on Constitutional Limitations, 7th Ed., p. 203.) All of these limitations are to receive 'a reasonable, and not a narrow construction.' (Abeel v. Clark, 84 Cal. 226, 24 Pac. 383; Ex parte Liddell, 93 Cal. 633, 29 Pac. 251.) The requirement that an act shall not contain more than one subject does not mean that a number of specific provisions, all designed to aid in the accomplishment of a single purpose, may not be united in one act. * * * In Ex parte Kohler, 74 Cal. 38, 41, 15 Pac. 436, [437] it was said: 'However numerous the provisions of an act may be, if they can be fairly considered as falling within the subject-matter of legislation, or as proper methods for the attainment of the end sought by the act, there is no conflict with the constitutional provision.'"

Again:

> "Where the body of an act embraces provisions which are germane to the general subject stated in its title, the title will be held sufficient to comprehend all of the provisions of the act itself; and where the title suggests to the mind the field of legislation which the text of the act includes, the title will not be held misleading or insufficient, or the act restricted in its operation." People v. Jordan, 172 Cal. 391, 394, 156 P. 451, 453.

Again:

> "The provisions of the various Constitutions relating to the subject-matter and titles of acts should be construed liberally to uphold proper legislation, all parts of which are reasonably germane on the one hand, and to prevent trickery on the other hand. The restrictions requiring the subject of an act to be expressed in its title should be reasonably construed, considering substance rather than form, to require the expression in the title of the general object but not the details or incidents, or means of effecting the object sought, and to include the subject and not the purpose of the act and the reasons which brought about the enactment of it by the legislature." McClure v. Riley, 198 Cal. 23, 26, 243 P. 429, 430.

[5] In the foregoing case of McClure v. Riley this rule of liberal construction was applied in relation to the title of an act appropriating money for the completion of construction, etc., of state buildings in the city of Sacramento. The court pointed out that, in determining whether the subject-matter embraced within the body of a legislative act is sufficiently referred to in its title, in conformity with the foregoing rule of interpretation, the court was entitled to look to the history of the particular legislation to which the act in question, when read as a whole, relates. If in like manner we look to the history of the particular legislation to which the State Bar Act relates, the result of that historical view strongly tends to support the conclusion that the State Bar Act, both as indicated in its title and more fully embraced in the body of the act, was intended to legislate concerning the entire subject indicated, covering and including the method of admission of attorneys and counselors to the practice of law in this state.

In accordance with the foregoing opinion, the application of petitioner is dismissed, without prejudice and solely upon the ground that this court is without authority to act on the merits of the application.

We concur: HOUSER, J.; YORK, J.

93 Cal. App. 21

MOODY v. JUDAH BOAS FINANCE CORPORATION et al. (Civ. 6077.) *

District Court of Appeal, First District, Division 1, California. June 28, 1928.

Hearing Denied by Supreme Court Aug. 27, 1928.

1. Principal and agent 🔑173(3)—Evidence held to sustain court's conclusion that owner ratified contract with dealer to pay for automobile in merchandise.

In claim and delivery for possession of automobile taken by defendant owner on plaintiff's default in payment of purchase-money installment, evidence *held* sufficient to sustain court's conclusion that owner ratified, accepted, and received and applied payments under, contract with dealer for payment in merchandise, instead of cash as provided by separate contract assigned to owner by dealer, with full knowledge of terms and conditions of merchandise contract, and hence was bound thereby.

2. Appeal and error 🔑1011(1)—Conflicting evidence on fact issue must be resolved in favor of trial court's decision.

Conflicting evidence as to whether automobile purchaser, contracting with dealer to pay in merchandise, agreed to abide by separate cash contract as between himself and owner to which dealer assigned it, if owner induced dealer to apply proceeds of sale of automobile, taken in part satisfaction of initial payment under merchandise contract, as part payment on cash contract, must be resolved in favor of trial court's decision to contrary.

3. Principal and agent 🔑164(1), 175(1)—Principal may ratify agent's unauthorized act, and is then bound as if originally authorizing.

When agent, acting under specific authorization, exceeds his authority in performance of lawful act, which principal could have authorized, principal may ratify such act and is then equally bound as if original authority had been ample or act performed by him in person.

4. Principal and agent 🔑175(2)—Owner ratifying and accepting benefits under contract with dealer to pay for automobile in merchandise is bound thereby (Civ. Code, § 1589).

Under Civ. Code, § 1589, finance corporation ratifying and accepting benefits under contract between dealer and purchaser of automobile owned by it for payment of purchase-money installments in merchandise, instead of cash as provided by separate contract assigned to corporation by dealer, is bound by merchandise contract, though dealer had no authority to sell automobile except for cash payments.

5. Principal and agent 🔑195—Specific finding that owner ratified contract with dealer to pay for automobile in merchandise was not essential to valid judgment.

Where dealer's authority as agent of finance corporation to sell automobile for merchandise was not made an issue by pleadings in claim and delivery by purchaser, on whose default in payment of cash installment under contract assigned by dealer to such corporation it took possession, a specific finding on question of ratification of merchandise contract was not essential to validity of judgment for plaintiff.

6. Trial 🔑396(3)—No finding as to automobile purchaser's oral agreement to abide by cash contract was necessary, where defendant pleaded only such contract in purchaser's action for possession.

Where finance corporation, sued for possession of automobile taken from plaintiff on default in payment of cash purchase-money installment, pleaded only cash contract assigned to it by dealer, no finding was necessary on question of asserted oral agreement by plaintiff to abide by terms of such contract, instead of separate contract for payment in merchandise, if dealer was induced to apply proceeds of sale of automobile, accepted in part satisfaction of initial payment, as payment on cash contract.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by E. A. Moody against the Judah Boas Finance Corporation and another. Judgment for plaintiff, and defendants appeal. Affirmed.

A. L. Weil, Forrest A. Cobb, and Harris F. Shaw, all of San Francisco, for appellants.

L. V. Starr and C. H. Patterson, both of Oakland, for respondent.

PER CURIAM. This is an action in claim and delivery, involving the possession of an automobile. Judgment was entered for plaintiff, and defendants have taken separate appeals, which are presented in one record. Briefs supporting the appeal have been submitted by the defendant finance corporation alone, however, and therefore, for convenience, it will be hereinafter referred to as appellant.

The automobile in question belonged to appellant, who consigned it to the defendant Danker, an automobile dealer in Stockton, to sell. On November 14, 1924, Danker sold and delivered the same to respondent under a conditional sales contract of which appellant subsequently became the assignee. Thereafter and on March 3, 1925, appellant took possession of said automobile, claiming that the monthly installment which fell due the preceding month had not been paid. The next day this action was commenced, pursuant to which the automobile was seized by the sheriff.

The first disputed question arises over the terms of the agreement under which the sale to respondent was made. With respect thereto the evidence shows that the transaction between Danker and respondent resulted in the execution of two separate documents bearing the same date, November 14, 1924, but evidently executed on different days. Each provided for an initial payment of $595 and

★Hearing denied by Supreme Court.

monthly installments of $96 each; but so far as we are here concerned the essential difference between the two was that under the terms of one all payments were required to be made in cash, and in the other it was agreed that in satisfaction of the initial payment Danker would accept respondent's Ford automobile at a stipulated value of $500 and merchandise of the value of $95; that the succeeding monthly installments should be paid to Danker in merchandise; and that Danker would assume payment of the cash installments, the exact language of the provision being:

> "Mr. Moody (the respondent) agrees to furnish Mdse. at distributors price, 50% dsct. to cover the amt. of monthly payment. Payment of contract assumed by L. A. Danker."

[1, 2] The foregoing documents, when considered in the light of the circumstances under which they were executed, established beyond question that as between respondent and Danker the so-called merchandise agreement was controlling; but appellant alleged in its counterclaim, and contended at the trial, as on this appeal, that it was not bound by such agreement and that its rights must be measured by the terms of the cash contract, which alone it claims to have accepted. The trial court determined otherwise, however, and after a review of the entire evidence we are of the opinion that it is legally sufficient to sustain the trial court's decision. The evidence supporting this conclusion is, in part, as follows: Respondent was a dealer in automobile polish, and he informed Danker in the beginning that he could purchase the car only by being allowed to make the payments in merchandise. This proposition was acceptable to Danker, but he told respondent that appellant was the owner of the car and that in order to complete the sale it would be necessary to obtain from respondent a regular form of cash contract, because without it he would be unable to discount the merchandise contract with appellant; whereupon the two documents were signed, and in accordance with the terms of the merchandise agreement respondent delivered to Danker his automobile, and polish of the value of $95, in liquidation of the initial payment, and took possession of appellant's car. Immediately upon doing so, however, and on November 17, 1924, respondent, accompanied by a business associate named Mrs. Cummings, called on Mr. Boas, president of the appellant corporation, at his office in San Francisco, and in the presence of a Mr. Theobold, who represented the agency handling this particular make of automobile, fully informed Boas of the nature of the trade he had made with Danker and of the execution of the two contracts. Boas at first declined to consider acceptance of the merchandise contract and informed respondent that unless he was willing to stand on the cash contract alone he would be required to return the automobile. But later another conference was held between the same parties, the purport of which is in dispute. Boas and Theobold claim that respondent agreed that as between himself and appellant he would abide by the cash contract provided Boas induced Danker to apply as part payment on the cash contract the proceeds received by Danker from the sale of respondent's automobile. Respondent and Mrs. Cummings testified to the contrary, however, claiming that the proposition mentioned was not made by respondent, but was advanced by Boas and that respondent expressly refused to accede to it or to do anything else other than as required by the merchandise contract. Under the established rule, we must, of course, resolve the conflict in favor of the trial court's decision. However, as a result of this conference Theobold went to Stockton, accompanied by respondent and Mrs. Cummings, and induced Danker to turn over to appellant the sum of $350 representing the sale price of respondent's automobile. Thereafter and on November 24, 1924, appellant accepted the assignment of the cash contract and immediately credited Danker's account with $1,300; and after applying $21 of the $350 to the payment of a back interest account due from Danker, appellant opened a special account with Danker and respondent and credited the same with the remaining $329. Subsequently and on November 28, 1924, respondent mailed a copy of the merchandise contract to appellant accompanied by a letter stating in part:

> "My contract with Mr. Danker, as you know, specifies that he is to assume all payments on said Moon Sedan and therefore you will have to look to Mr. L. A. Danker for any and all payments that are or may become due."

Appellant replied in substance that it would refuse to recognize any equities between respondent and Danker and would insist on compliance with the terms of the cash contract. Two subsequent monthly payments were made to appellant, one in December, 1924, and the other in January, 1925; each payment being made by check drawn by Danker in favor of respondent and by the latter indorsed and sent to appellant.

As indicated, the foregoing evidence is legally sufficient in our opinion to sustain the conclusion that after having full knowledge of the terms and conditions of the merchandise contract appellant ratified and accepted the same, and that thereafter it received payments thereunder and applied the same on its books in a manner indicative of and entirely consistent with such ratification. Consequently, as the trial court held, appellant was bound thereby.

[3, 4] Appellant makes the further contention that in any event Danker had no authority to sell said automobile except for cash payments, and that the attempted sale thereof

under the merchandise contract was therefore in excess of his authority and consequently not binding on appellant. It is well settled, however, that whenever an agent acting under a specific authorization has exceeded his authority in the performance of a lawful act, which the principal could have authorized, the principal may thereafter ratify such unauthorized act, and when so ratified it acts retrospectively and the principal is equally bound as he would have been had the original authority been ample, or had he originally performed the act in person (Market Street Ry. Co. v. Hellman, 109 Cal. 571, 42 P. 225); and, furthermore, as declared by section 1589 of the Civil Code, a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to have been known, to the person accepting. As already shown, the evidence in the present case is legally sufficient to support the inference that appellant ratified the merchandise contract and accepted benefits thereunder. Therefore the legal rule contended for by appellant is inapplicable.

[5] A specific finding upon the question of ratification was not essential to the validity of the judgment, as appellant claims, because the matter of Danker's authority as agent was not made an issue by the pleadings; appellant having chosen to stand or fall on the question of the existence of the cash contract and a negative finding was made thereon.

[6] Appellant further contends that it was necessary for the trial court to make a finding upon the question of the asserted oral agreement which Boas and Theobold claim respondent made to abide by the terms of the cash agreement in the event that Danker was induced to apply as payment thereon the proceeds derived by him from the sale of respondent's automobile. We think such finding was not necessary for the reason that appellant pleaded only the cash contract, the allegations of paragraph 2 of the counterclaim being that respondent agreed to purchase said automobile pursuant to the terms of a written contract, a copy of which was annexed to the counterclaim and designated "Exhibit A," which was the cash contract. The ultimate fact to be determined, therefore, was whether or not that contract was controlling, and the trial court found thereon:

> "That the allegations of paragraph 2 thereof are not and each of them is not true, and that the said automobile was delivered to plaintiff under a written modification of said defendant's Exhibit A," etc.

If therefore appellant relied on any other contract with reference to which a finding was desired, it should have pleaded the same in the beginning or by amendment.

Finding no error in the record, the judgment is affirmed.

CALIFORNIA DELTA FARMS, INC., v. CHINESE AMERICAN FARMS, Inc.*

(Sac. 4148.)

Supreme Court of California. July 6, 1928.
Rehearing Granted Aug. 6, 1928.

1. Conspiracy 🔑28—Intentional acts to carry out contract to convey land to corporation, majority of whose stockholders were aliens ineligible to citizenship, constituted "conspiracy" (Alien Land Act 1920, § 10, as amended by St. 1923, p. 1020, § 9).

Intentional acts of two parties in concert after December 9, 1920, to carry out provisions of contract for conveyance of agricultural land to corporation majority of whose stock was beneficially owned by persons ineligible to citizenship, with knowledge of the alienage, constituted "conspiracy," in violation of Alien Land Act 1920 (St. 1921, p. lxxxiii) § 10, as amended by St. 1923, p. 1020, § 9.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

2. Conspiracy 🔑24—Act lawful if done by one person may be unlawful if done or attempted by several.

An act may be lawful if done by one person and unlawful if done or attempted by a concert of action on the part of two or more persons.

3. Conspiracy 🔑37—Successful fruition of conspiracy does not bar prosecution for conspiracy itself.

The successful fruition of a conspiracy is no bar to a prosecution for the conspiracy itself.

4. Contracts 🔑107—Contract founded on act penalized by statute is void.

When a statute pronounces a penalty for an act, a contract founded on such act is void, though the statute does not pronounce it void nor expressly prohibit it.

5. Aliens 🔑10—Transfer knowingly violating Alien Land Act is invalid as between parties (Alien Land Act 1920, § 10, as amended by St. 1923, p. 1020, § 9).

Transfer made knowingly in violation of Alien Land Law effective Dec. 9, 1920 (St. 1921, p. lxxxiii) § 10, as amended by St. 1923, p. 1020, § 9, is invalid whether vendor was cognizant of extent of alienage in corporate purchaser, and statute renders illegal consideration underlying executory provisions of such contract, as against vendor's contention that alien would get a defeasible title and that defect therein could not be raised between the parties but only by the state.

6. Aliens 🔑10—Corporation prevented from completing land purchase contract because of alienage of majority of its stockholders held entitled to accounting and lien for payments on price (Alien Land Law 1920, § 10, as amended by St. 1923, p. 1020, § 9).

Where contract for transfer of land to corporation failed because majority of beneficial owners of corporation's stock were aliens ineligible to citizenship under Alien Land Law 1920 (St. 1921, p. lxxxiii) § 10, as amended by St. 1923, p. 1020, § 9, vendee was entitled to accounting in equity as of December 9, 1920, the effective date of statute and lien on property for amount found due it for its payments on purchase price less proper set offs, since contract when made and until December 9, 1920, was valid as against every one other than the state.

7. Vendor and purchaser 🔑54—Vendee's full equitable title matures only on full payment of purchase price.

Equitable doctrine that vendee under land contract is owner of property applies only to payments made on purchase price, and full, equitable title matures only on full payment of price.

8. Aliens 🔑10—Statute authorizing alien ineligible to citizenship to acquire title to realty to satisfy lien thereon held not to authorize completion of existing land contract to alien purchaser (Alien Land Act, § 7, as amended).

Provision of Alien Land Act (St. 1921, p. lxxxiii) § 7, as amended (Deering's Gen. Laws 1923, p. 1, Act 261, § 7) that act shall not apply to realty acquired in enforcement or satisfaction of any lien existing upon "or interest in such property" so long as realty so acquired remains property of alien acquiring it in such manner, and in limiting time for which land so acquired may be held to two years, *held* to constitute an exemption of real property acquired in satisfaction of any lien on such property or on any interest therein, and did not permit completion of executory contract to purchase on theory that alien purchaser, ineligible to citizenship, had equitable interest.

9. Vendor and purchaser 🔑335—Vendee in default not entitled to lien may have judgment for purchase money paid if consideration has failed without his fault (Civ. Code, § 3050).

Under Civ. Code, § 3050, vendee, though not entitled to lien for purchase money, may, even when in default, have judgment for purchase money paid if consideration for contract has without his fault failed.

In Bank.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by California Delta Farms, Inc., against Chinese American Farms, Inc., which filed cross-complaint. From the judgment, defendant appeals. Reversed, with directions.

See, also, 255 P. 1097, and 268 P. 1055.

A. B. Bianchi, Manson & Allan, Albert H. Elliot, and Bianchi & Hyman, all of San Francisco, for appellant.

Nutter, Hancock & Rutherford and A. P. Hayne, all of Stockton, for respondent.

PRESTON, J. The able briefs on file in this cause cover a wide range of subjects, but we will consider only a few of them, as we have been led to the conclusion that the appeal is controlled by the provisions of the Alien Land Law, which became effective December 9, 1920 (Stats. 1921, p. lxxxiii), and

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★For opinion on rehearing, see 278 P. 227.

particularly by section 10 thereof, which reads as follows:

> "If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars or both."

This provision was broadened to cover any violation of the act by an amendment passed in 1923 (Stats. 1923, p. 1020).

The complaint in this action sets up a contract of sale and purchase, dated August 1, 1919, between plaintiff and one C. C. Wing, a native-born citizen of Chinese descent, covering 3437.58 acres of agricultural land, situate in San Joaquin county. Said contract provided that the total purchase price should be $893,770.80, $50,000 of which was paid upon execution thereof, and the balance of $651,000 was to be paid in yearly installments terminating January 1, 1928. The final balance of the purchase price remaining due on said date, to wit, $291,770.20, was to be paid by the assumption and discharge of an assessment made by Delta Farms Reclamation District 2030, amounting to $325,436, then outstanding as a lien upon said land, upon which reclamation bonds, bearing 6 per cent. interest, had been authorized and would be payable in approximately equal amounts annually from 1928 to 1938, inclusive.

It is further pleaded that all payments called for by said contract were made up to January 1, 1922, on which date there became due and payable $51,563.70, a like sum on January 1, 1923, and a like sum on January 1, 1924; that the total of said sums, plus interest on contract and other items due thereunder, less payments amounting in the aggregate to $151,649.63, made thereon, left a balance due of $231.263.42; that plaintiff had demanded repeatedly from said defendant payment of the said installments due on the purchase price, together with interest, assessments and taxes, and, after waiting more than 30 days, declared the rights of said defendant under said contract forfeited. The prayer is that said contract be declared no longer binding upon plaintiff, that said defendant be directed to deliver same up for cancellation, and that possession of said premises be ordered surrendered to plaintiff. The complaint was filed September 15, 1924.

Defendant, in a second amended answer and cross-complaint, admitted said default in payments, but set up, as an alleged waiver of plaintiff's right to claim a forfeiture under the contract, certain acts and conduct of plaintiff. The pleading alleges: That said C. C. Wing, an American-born Chinese, was acting on behalf of a corporation, to be thereafter organized, and which was later organized and became the defendant herein; that the $50,000 paid upon said contract prior to the formation of said corporation was more than 80 per cent. advanced by Chinese aliens, which fact plaintiff well knew, and that after said corporation was formed and transfer of said contract made thereto, although more than 50 per cent. of the issued and outstanding capital stock thereof stood of record in the name of native Chinese, eligible to citizenship, nevertheless at all of said times more than 50 per cent. of said stock so issued, to wit, 80 per cent. thereof, was actually, equitably and beneficially owned by aliens ineligible to citizenship, and this situation continued throughout the time covered by said contract. Further: "That the Alien Property Law of 1913, hereinabove particularly referred to, was changed and a new alien land law passed by initiative proceedings approved by the electors of the state of California November 2, 1920, Statutes of 1921, p. lxxxiii, in effect December, 1920, and which said Alien Land Law of 1920 was amended in 1923 by act of the Legislature of the state of California, and that from and after the time of the effective date of the Alien Land Law of 1920 the contract and agreement herein referred to as Exhibit A became impossible of performance; that the agreements, understandings, plan, and scheme of the plaintiff and defendant corporations to effect a transfer of the real property mentioned in said agreement became and were and now are in violation of the terms and provisions of said Alien Land Law of 1920 and 1923"; that by reason of said statute respondent was not able to carry out said agreement to convey or transfer merchantable or any title to or interest in the land the subject of the contract; that the agreement had become void in that the consideration therefor had wholly failed; that the terms of said agreement had become impossible of performance on the part of either party; that the objects and purposes of the agreement had become unlawful, and this without fault on the part of appellant.

It was further pleaded that at the time of the commencement of this action, appellant had paid to respondent under said contract the sum of $466,702.26, which sum, with interest thereon, appellant was entitled to have returned to it; that appellant had enjoyed the possession and benefits of said real property during all the times mentioned in the complaint and was ready, able, and willing and offered (and alleged that it had theretofore offered, also) to return possession of said real property to respondent, together with all benefits and profits which had accrued to it, together with interest at 7 per cent. from the dates when same was received and to restore plaintiff to its original position and status and to do all things in equity the court might determine to be meet and equitable to restore respondent to its original position, provided respondent pay to appellant the sum of $244,135.99, together with interest at 7 per cent. per annum, said sum representing the total amount of payments made by appellant on account of said contract, together with the value of improvements made upon said property, after deducting therefrom the proceeds, income, revenues, and every other receipt or money accruing to appellant from said possession and farming operations upon said property.

The prayer of the cross-complaint was that it be decreed, determined and adjudged that there had been a total failure of consideration in connection with said agreement; that the same had become impossible of performance by the parties; that said agreement be declared of no force and effect in law or equity; and that the purposes and objects thereof had become and were unlawful and that said agreement was for that reason void; and that said court determine the respective rights of the parties thereto after a full accounting and that equity in the premises be done; that plaintiff have and be restored to possession of said real property upon payment to defendant of the sum of $244,135.99, or such other sum, of greater or lesser amount, based upon a full accounting between the parties.

Plaintiff filed an answer denying the allegations of the cross-complaint, claiming, among other things, that it was without any knowledge or information whatsoever relative to the alleged participation of ineligible aliens in the transaction and their ownership of stock of defendant; that it was innocent of any intention to violate the provisions of the Alien Land Law; that defendant was an insolvent corporation, without funds or assets other than its pretended interest in said real property, and praying that the prayer of its complaint be granted.

From the findings and admissions of the pleadings, the following pertinent facts appear: (1) That the majority of the stock of defendant corporation has at all times herein been beneficially owned by Chinese aliens, hence by persons ineligible to citizenship in the United States (numerically the stockholders being about 1000, with 95 per cent. aliens, all Chinese); (2) that on December 9, 1920, when said Alien Land Law came into effect, there had been paid to plaintiff on account of said contract the sum of $297,557.21; (3) that up to and including January 1, 1922, there was no dereliction whatever on the part of defendant in making the payments called for by said contracts of sale and purchase; (4) that between January 1, 1922, and the time of commencement of this action, there had accrued upon said contract, and was then due and owing as a balance, the sum of $236,186.11; (5) that defendant went into possession of said property on January 1, 1920, and remained in possession thereof until the rendition of judgment herein on May 29, 1926; (6) that said property, and the whole thereof, is agricultural land and was during all times herein cultivated by said defendant and its lessees and sublessees as agricultural land; (7) that when said Alien Land Law of 1920 went into effect no particular attention was paid thereto by either party, but defendant, acting in apparent good faith in all other respects, proceeded until January 1, 1922, to carry out literally the terms of said contract, and apparently used its best efforts to continue to comply with said contract, but partially failed, as above noted; (8) that plaintiff in this action likewise gave no heed to the enactment of said statute, the court finding that it had no actual knowledge of the exact alien ownership of said stock, but the court also found that defendant corporation was organized for the purpose of taking over said contract and that it was known to plaintiff that ineligible aliens would be the owners, to some extent at least, of said stock and that 80 per cent. of the first payment on said contract was made by persons who were ineligible aliens and that during the whole period between the date of said contract and the commencement of this action, aliens, ineligible to citizenship, were owners and holders of at least part of the stock of said corporation.

The question for solution is the effect of said section 10 of the Alien Land Act of December 9, 1920, upon the contract here involved. The validity of this section of the act has been upheld. In re Akado, 188 Cal. 739, 207 P. 245. Criminal prosecutions have been carried on under it. People v. Cockrill, 62 Cal. App. 22, 216 P. 78; In re Okahara, 191 Cal. 353, 216 P. 614. Prosecution of the seller and buyer under a general conspiracy statute occurred in Washington. State v. McGonigle, 144 Wash. 252, 258 P. 16.

[1-3] The acts of the parties intentionally done with knowledge of the alienage of defendant and in concert to carry out the provisions of this contract were after December 9, 1920, a clear violation of this statute, so clear that it occurs to us that extended discussion is unnecessary. It is true the statute does not punish criminally the substantive act of making or receiving the transfer of title, but it is an accepted holding that an act may be lawful if done by one person and unlawful if done or attempted by a concert of action on the part of two or more persons. In re Akado, supra; 5 R. C. L. § 9, p. 1070. It is also true that the successful fruition of a conspiracy is no bar to a prosecution for the conspiracy itself. The completion of this contract would form conclusive proof of a conspiracy under the act if plaintiff possessed knowledge of the extent of the ownership of defendant's stock by ineligible aliens.

[4] We then come to the application of the well-known doctrine that, "Where a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void, nor expressly prohibit it." Berka v. Woodward, 125

Cal. 119, 127, 57 P. 777, 780 (45 L. R. A. 420, 73 Am. St. Rep. 31); Smith v. Bach, 183 Cal. 259, 262, 191 P. 14; Wallace v. Zinman, 200 Cal. 585, 588, 254 P. 946.

[5] But counsel for respondent contend that this rule is here inapplicable, stating their views as follows:

> "Even if it were true that a criminal conspiracy was consummated by conveying title to an alien, yet under the 1920 law the alien would get a defeasible title and the defect of the title still could not be raised between the parties."

This contention really forms the foundation upon which respondent rests its claims. In other words, it declares the existence of an exception to the general rule and cites in support of this contention such cases as Suwa v. Johnson, 54 Cal. App. 119, 203 P. 414; In re Akado, supra; In re Okahara, supra; Mott v. Cline, 200 Cal. 434, 253 P. 718.

In the first-mentioned cause the lessor attempted to avoid his lease to a Japanese alien under the provisions of the Alien Land Act of 1913 (St. 1913, p. 206), declaring agricultural lands thereafter acquired by aliens ineligible to citizenship subject to escheat at the hands of the state. The court, following some of our own decisions and a score or more from other jurisdictions, said:

> "The question presented is not new and the act of 1913 discloses no intention on the part of the Legislature to provide any new rule for its determination. It has uniformly been held under statutes forbidding ownership of land by aliens that, an alien grantee takes a defeasible estate, 'free from attack by any one except the government' in a direct proceeding." Suwa v. Johnson, supra, at page 121 (203 P. 414).

It is true that some of the provisions of the 1913 act are carried into the 1920 act, but section 10, above quoted, is entirely new and is sui generis. It provides an additional deterrent, one which may reach the owner of the soil about to be conveyed to the alien. It is true that in Re Akado, supra, some unfortunate expressions are found, parenthetically intimating that this action might not change the rule announced in Suwa v. Johnson, supra, in the respect before us, but there is much other language therein found indicating that the Legislature was applying a drastic policy "to prevent any attempts to create relations between such aliens and other persons whereby the title to land would be taken by any other person and the use thereof would be enjoyed by the alien" In re Y. Akado, supra, pp. 742, 743 (207 P. 246). "Furthermore, it is to the interest of the state that all persons owning land should be effectively deterred from attempting to evade or frustrate the provisions of the act forbidding the acquisition of such land by such alien, by means of colorable conveyances and unrecorded trusts." In re Y. Akado, supra, p. 742 (207 P. 246).

In Re Okahara, supra, it is said:

> "The purpose of the Alien Land Law, as is well said in O'Brien v. Webb [(D. C.) 279 F. 117] supra, 'was apparently to prevent ownership and legal interest in farming lands from passing to aliens who never could become citizens.'"

And in Mott v. Cline, supra, at page 445 (253 P. 724) it is said:

> "This question depends largely upon the legislative intent and upon whether or not the objects sought to be attained are within the police power of the state. There is no direct language upon this point, but there is general language which necessarily implies an intention to prevent an executory contract from ripening into a fee simple. * * * It is appellant's view that the option provision has been rendered void by section 10 of the act of 1920, which makes it a crime punishable as a misdemeanor or felony to conspire to effect a transfer of real property or an interest therein in violation of the law. This is the only act that is made a public offense and penalized by imprisonment or fine or by both (In re Akado, 188 Cal. 739 [207 P. 245]). The exaction imposed for all other violations of the act inhibiting transfers is that the conveyance is rendered void as to the state and the real property escheats to the state upon action brought by the Attorney General or district attorney of the county in which the violation occurs. People v. Cockrill, 268 U. S. 258 [45 S. Ct. 490, 69 L. Ed. 944]. Our statute follows the common law as to the escheat proceedings. It cannot be said that Ah Chue violated any provision of the conspiracy section."

These authorities not only do not offer comfort to respondent's position, but clearly point to the opposite conclusion. We see no room for the contention that this provision is not effective to invalidate any contract made knowingly in defiance of its terms. The object of the law was to strengthen the act of 1913 and to make effective the inhibition against allowing our agricultural lands to get either directly or indirectly into the hands of aliens ineligible to citizenship. This view is confirmed by the act of 1923 (Stats. 1923, supra), which, as above noted, extends the provision to cover conspiracies to violate any of the provisions of the act. The executory provisions of the contract before us, if knowingly acted upon, are within the condemnation of this section. The police power is used in its "highest and truest sense" in confining the ownership of the soil to persons who are and from whom may be made citizens of the republic (Mott v. Cline, supra, and other cases there cited). We therefore interpret said section of the act as an innovation upon the common law and effective to destroy and render illegal the consideration underlying the executory provisions of the contract before us.

If respondent knowingly acted with appellant in any effort to effect a transfer of the lands here involved it would be committing an offense. Appellant, which is little less than an aggregation of ineligibles, and the stockholders and agents thereof, would after December 9, 1920, certainly be consiping to violate said section if it pursued its efforts to obtain title to the lands, and this is true whether the seller was or was not cognizant of the extent of the alienage in the corporate ownership.

[6] Appellant invokes the rule announced in Montgomery v. Meyerstein, 186 Cal. 459, 199 P. 800 and 195 Cal. 37, 231 P. 730, to the effect that if a contract fails for any reason not due to the default of the vendee he may recover from the vendor in an accounting the amount paid on the purchase price less proper credits and set-offs. And under this head it demands an accounting in equity as of December 9, 1920, and a lien on the property for the amount found due it. This, we hold, it is entitled to have. It has already appeared that it was in possession of the lands from January 1, 1920, to the date of the judgment, May 29, 1926. It also appears that subsequent to the effective date of said act it has paid large sums of money to respondent amounting to some $151,649.63. While appellant is certainly entitled to no affirmative advantage growing out of anything occurring subsequent to December 9, 1920, and while it was proceeding in violation of the statute, still we see no reason resting in law or equity to deny it the rights accruing to any other person or corporation up to said date. And this embraces the right to employ any remedies the law affords to eligible persons to secure those rights. Under the universal doctrine announced in Suwa v. Johnson, supra, and Mott v. Cline, supra, and elsewhere, the contract when made was not void but valid and binding as against everyone other than the sovereign state, which condition obtained until December 9, 1920. Appellant could have legally assigned, prior to said date, its rights under said contract to an eligible person. Mott v. Cline, supra. The provisions of section 7 of said Alien Land Act are in part as follows:

> "* * * The provisions of this section and of sections two and three of this act shall not apply to any real property hereafter acquired in the enforcement or in satisfaction of any lien now existing upon or interest in such property so long as such real property so acquired shall remain the property of the alien, company, association or corporation acquiring the same in such manner. No alien, company, association or corporation mentioned in section two or section three hereof shall hold for a longer period than two years the possession of any agricultural land acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt." Deering's Gen. Laws 1923, p. 1, Act 261, § 7, p. 82.

[7, 8] Under this section the act itself allows appellant to secure to itself the proceeds of an accounting in equity as to all lawful matters pertaining to said transaction, including the assertion of a lien upon the property for the amount found due, and this carries the right to continue in possession of the property until same is satisfied. But respondent not only denies consolation to appellant from the provision of the act last above quoted but advances a construction thereof which will allow such contracts as we have before us to ripen into full title without penalties, civil or criminal, of said statute. The contention is that in equity the vendee under a contract of purchase is the owner of the property; hence the exemption of "the interest in such real property" is effective to allow the completion of title. We can give this contention no weight.

The equitable doctrine above referred to is sometimes applied, but only to the payments made on the purchase price; the full equitable title matures only upon the full payment of such price. Montgomery v. Meyerstein, supra. This doctrine would not allow the completion of the contracts before us, as about one-third only of the purchase price had been paid on the effective date of the act. Moreover, this equitable doctrine has often been held inapplicable in the construction of statutes conferring or withholding rights in real property. Belieu v. Powers, 54 Cal. App. 244, 201 P. 620; Allen v. Wilson, 178 Cal. 674, 174 P. 661. But the whole contention of respondent is based upon a misconstruction of the language of this proviso. For we construe the meaning to be as though it read as follows: An exemption for "real property acquired in satisfaction of any lien upon such property or upon any interest therein." This construction would allow the foreclosure of mortgages and other liens held by the alien, and in so doing would concede to him the right to acquire the property if necessary with the restriction that he must dispose of same within two years after so acquiring it. Still again this question is settled contrary to respondent's contention by the holding in Mott v. Cline, supra, where it is stated that there is general language which necessarily implies an intention to prevent an "executory contract from ripening into a fee simple." It is also stated "it was the purpose of the act to cut off instanter the right to thereafter acquire the fee." It is true that the executory contract there under consideration was a lease with an option to purchase. Nevertheless, it was an executory contract based upon a valuable consideration and every reason for applying the doctrine to that contract exists with respect to the contract before us.

It may be that respondent is not in pari delicto with appellant as to matters occurring subsequent to December 9, 1920. If this indeed be true, an accounting as to such matters may be had to ascertain if the value of the use and occupation of this property by appellant is greater than the payments and benefits received from it and, if so, respondent would be entitled to have such excess credited on its obligation to appellant arising out of payments made and other legal benefits received from it that are properly referable to said contract and antedate December 9, 1920.

[9] The question of rescission and the rules governing this subject are not, strictly speaking, involved here, as the rights of the parties are not determined by these rules. Civil Code, § 3050, governs the situation and provides as follows:

> "One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration." Montgomery v. Meyerstein, supra.

Although not entitled to the lien, the vendee may, even when in default, have judgment for the purchase money paid if the consideration for the contract has, without his fault, failed. Merrill v. Merrill, 103 Cal. 287, 35 P. 768, 37 P. 392; Wilson v. Smith, 69 Cal. App. 211, 213, 230 P. 963; Haile v. Smith, 113 Cal. 656, 664, 45 P. 872.

It is likewise unnecessary to extend this discussion by a consideration of the claim that appellant has estopped itself to resist a forfeiture under the contract by its subsequent conduct. The rule we have invoked is one of public policy which is not controlled by the subsequent conduct of the parties. To give ear to this plea would be to admit life in a contract during the period we have declared it to be illegal for it to operate.

The judgment is reversed, with directions to the court below to proceed in said cause in a manner not inconsistent with the holding herein made.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; RICHARDS, J.

CALIFORNIA DELTA FARMS, Inc. (a Corporation), Plaintiff and Cross-Defendant, Respondent, v. CHINESE AMERICAN FARMS, Inc. (a Corporation), Defendant and Cross-Complainant, Appellant. (Sac. 3987.) ★

Supreme Court of California. July 6, 1928.

Rehearing Granted Aug. 6, 1928.

In Bank.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

See, also, 255 P. 1097.

A. B. Bianchi, Manson & Allan, Albert H. Elliot, and Bianchi & Hyman, all of San Francisco, for appellant.

Nutter, Hancock & Rutherford and A. P. Hayne, all of Stockton, for respondent.

PRESTON, J. Appellant correctly states the question presented on this appeal as follows: "This is an appeal taken from an order denying the motion of appellant to set aside and vacate the judgment, and for the entry of another and different judgment on the findings made, upon the ground that the conclusions of law were incorrect, erroneous, and not consistent with or supported by the findings of fact."

The appeal is ruled by the case of California Delta Farms, Inc., v. Chinese American Farms, Inc. (Sac. No. 4148) 268 P. 1050, this day decided, to which reference is hereby made. This is true because the facts upon which the determination in that case was made appear from the findings of fact. This motion being based upon the same findings, the conclusion reached must of necessity be the same. It is unnecessary to order or give another judgment as the reversal in the main cause will necessitate a consideration by the court below of some issues made by the answer and cross-complaint which could not be fully disposed of under the findings of fact as made.

The order is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; RICHARDS, J.

204 Cal. 466

In re DAY'S ESTATE.

WHALEN et al. v. GRATTAN et al.

(S. F. 12915.)

Supreme Court of California. July 3, 1928.

1. Appeal and error 🔑797(3)—Appeal will not be dismissed for lack of record, on motion made before expiration of time for filing record after dismissal of proceedings to obtain transcript (Supreme Court Rule 2; Code Civ. Proc. § 953a).

Where period prescribed by Supreme Court Rule 2 for filing record had not expired when motion to dismiss appeal was noticed and made, and appellants had expressed intention of seasonably filing transcript constituting judgment roll and kept their time open by stipulation and order for such purpose, after dismissal of proceedings to obtain transcript under Code Civ. Proc. § 953a, appeal will not be dismissed for lack of a record.

2. Appeal and error 🔑345(1)—Timely proceeding for new trial extends time for appeal from judgment in proceeding to determine heirship (Code Civ. Proc. §§ 939, 1664).

Under Code Civ. Proc. § 939, as amended in 1915 (St. 1915, p. 205) timely institution of new trial proceedings under section 1664, extends time for appeal from judgment in proceeding under latter section to determine heirship.

In Bank.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Action by Bridget Whalen and others against Martha A. Grattan and others to determine heirship to the estate of Towena Violetta Day, deceased. Judgment for plain-

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★For opinion on rehearing, see 278 P. 232.

tiffs, and defendants appeal. On motion to dismiss the appeal. Motion denied.

Geo. K. Ford, J. Carfraie Birnie, and Johnson & Bourquin, all of San Francisco, for appellants.

True Van Sickle and D. C. De Golia, both of Oakland, and Albert L. Johnson, of San Francisco, for respondents.

WASTE, C. J. Respondents move to dismiss the appeal. The judgment appealed from was entered on October 19, 1927, in a proceeding brought under section 1664 of the Code of Civil Procedure to determine heirship. A motion for new trial interposed by the defendants was denied December 16, 1927, and on December 24 the defendants filed their notice of appeal, together with a notice and request to the clerk for the preparation of a transcript. On March 1, 1928, on motion of the respondents, an order was made and entered by the trial court dismissing the proceedings to obtain a transcript under section 953a of the Code of Civil Procedure. In support of the present motion to dismiss, the respondents urge that the appeal is without a record to support it, and that it was not taken within the time required by law.

[1] The first ground of the motion is without merit, and the appeal will not be dismissed for the asserted lack of a record. At the time the motion was noticed and made here (April 3, 1928), the forty-day period (after March 1) prescribed by rule 2 of this court, within which a record must be filed, had not expired. The motion, as to the ground first mentioned, is premature. Moreover, the appellants have expressed their intention of seasonably filing a transcript constituting the judgment roll, and for that purpose have kept their time open by stipulation and order.

[2] As to the second ground of the motion, the respondents contend that an appeal from a judgment in a proceeding under section 1664 of the Code of Civil Procedure must be taken within sixty days after the entry thereof, and this despite the institution of new trial proceedings. In other words, it is urged that, while new trial proceedings are expressly authorized by the provisions of the section, such proceedings do not, as is ordinarily the rule, serve to extend the time for appeal from the judgment. So far as is pertinent here, the section reads:

> "Such parties are allowed twenty days after the service of the complaint, as aforesaid, within which to plead thereto, and thereafter such proceedings shall be had upon such complaint as in this Code provided in case of an ordinary civil action; and the issues of law and of fact arising in the proceeding shall be disposed of in like manner as issues of law and fact are herein provided to be disposed of in civil actions, with a like right to a motion for a new trial and appeal to the Supreme Court; and the provisions in this Code contained regulating the mode of procedure for the trial of civil actions, the motion for a new trial of civil actions, statements on motion for a new trial, bills of exception, and statements on appeal, as also in regard to undertakings on appeal, and the mode of taking and perfecting appeals, and the time within which such appeals shall be taken, shall be applicable thereto; provided, however, that all appeals herein must be taken within sixty days from the date of the entry of the judgment or the order complained of."

It is upon the last clause of the foregoing quotation that respondents base their contention. Section 1664, supra, was enacted prior to the 1915 amendment of section 939 of the Code of Civil Procedure providing that, if proceedings for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such proceedings, or other termination in that court of the proceedings on such motion. Section 1714 of the Code of Civil Procedure declares that—

> "The provisions of part two of this code [of which section 939 is a constituent part], relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title. * * *"

Sections 1664 and 1714 form parts of the same title. It therefore becomes necessary to determine whether the provisions of section 939 are so inconsistent with those of section 1664 as to render the former inapplicable to proceedings instituted under the latter.

Section 1715 of the Code of Civil Procedure governs appeals in probate and guardianship proceedings generally, and is equally as definite as section 1664 as to the time within which such appeals may be prosecuted. It provides:

> "The appeal may be taken at any time after the order, decree, or judgment is made or rendered, but not later than sixty days after the same is entered in the minute book of the court as provided in section 1704."

Despite this very explicit language requiring the prosecution of an appeal within sixty days after entry of judgment in a proceeding governed by the provisions of section 1715, this court has held that, under the provisions of section 939, the institution of new trial proceedings served to extend the time within which an appeal had to be taken from an order admitting a will to probate. Estate of Seiler, 174 Cal. 498, 164 P. 401. The matter came on before the court on a motion to dismiss an appeal from an order admitting a will to probate, on the ground that the appeal was not taken within the time allowed by law. It was not taken within sixty days after the date of the entry of the order, as required by section 1715, but was taken within thirty days after a motion for a new trial duly made was determined. The court said, in that case that it was "of the opinion that the provision of section 939 of the Code of Civil Procedure, as amended in 1915 (Stats. 1915, p. 205), providing that if proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining the motion for a new trial, or other termination in the trial court of the proceedings upon such motion, is applicable in the matter of an appeal from an order admitting a will to probate, and for that reason the motion to dismiss the appeal [was] denied."

If it can with propriety be held that new trial proceedings served to extend the time of appeal from an order admitting a will to probate, it can equally as well be held in the instant case that the timely institution of new trial proceedings had the effect of extending the time for appeal from the judgment entered in this proceeding. Moreover, if new trial proceedings are applicable to causes finding their inception in the provisions of section 1664, supra, and that they are applicable cannot be questioned, it is but reasonable to hold that such proceedings serve to extend the time of appeal in conformity with the provisions of section 939, supra. The correctness of this assumption is fortified if it be kept in mind that the provision of section 939, providing for appeals within thirty days after termination of new trial proceedings, was added in the year 1915, long subsequent to the enactment of section 1664.

The motion to dismiss is denied.

We concur: RICHARDS, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.

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204 Cal. 496

KELLY v. SMITH et al. (MIDDLECOFF, Intervener). (Sac. 4046.)

Supreme Court of California. July 12, 1928.

1. Attorney and client 🔑190(4)—Intervention of plaintiff's discharged attorney in suit to quiet title after defendant defaulted and lien claimant agreed on compromise held premature.

Where plaintiff, holder of tax title suing to quiet title to realty, employed attorney under written agreement providing that, when plaintiff was declared by judgment or compromise to be owner of the property, he should have his money invested back, and the overplus of land should be equally divided between plaintiff and attorney, and during first trial defendant defaulted, and thereafter plaintiff discharged attorney, *held*, that attorney's intervention by complaint claiming undivided one-half of said lots, filed, after the only lien claimant and plaintiff had agreed on compromise of said action, and compromise judgment was entered quieting plaintiff's title, was properly dismissed as premature.

2. Attorney and client 🔑134(2)—Attorney for plaintiff suing to quiet title could not, by his wrongful discharge, be divested of any interest in realty given by employment contract, regardless of plaintiff's insolvency.

If attorney for plaintiff, suing to quiet title, was given any interest in realty involved by his agreement of employment, he could not be divested thereof by his wrongful discharge, but plaintiff would hold whatever property he recovered in trust for his attorney to extent of attorney's interest, which would not be subject to claims of plaintiff's general creditors, and plaintiff's insolvency would therefore not affect attorney's right to recover his interest or to intervene.

3. Attorney and client 🔑190(4)—Right of attorney to intervene in client's action should be limited to actions in which attorney is given specific present interest in subject-matter of litigation.

Cases in which attorney is authorized to intervene, in action instituted by him in behalf of his client, for purpose of settling dispute with client as to fees for services rendered in the same action, should be limited to those actions wherein, by contract of employment, attorney is given a specific present interest in the subject-matter of the action which might be jeopardized by client's discharge of attorney and employment of others to prosecute the action.

4. Parties 🔑42—No intervention is permissible after judgment (Code Civ. Proc. § 387).

Under Code Civ. Proc. § 387, no intervention is permissible after judgment.

Department 1.

Appeal from Superior Court, Tulare County; K. Van Zante, Judge.

Action by J. J. Kelly against M. N. Smith and others, in which W. W. Middlecoff intervenes. From an adverse judgment, intervener appeals. Affirmed.

Feemster & Cleary, of Visalia, and Joe E. Greene, of Dinuba, for appellant.

Fred G. Kline and D. E. Perkins, both of Visalia, and Chas. N. Sears, of Bakersfield, for respondent.

CURTIS, J. Plaintiff instituted this action against the defendants to quiet his title to seven lots in the city of Tulare. Plaintiff held a tax title to said lots and employed intervener, who is an attorney at law, to act as his attorney in the prosecution of this action under a written agreement that "Middlecoff will render the necessary legal services to determine the title to said lands, and in cases where Kelly is declared by judgment or by compromise to be the owner, then said Kelly shall have his money invested back, and the overplus of the land shall be divided equally between them." The original owners of the land, three of the defendants, although regularly served with process, made no appearance in the action, and their default for failure to answer the complaint was duly entered. The Federal Construction Company, also made a defendant, appeared in said action by answer, and claimed a lien upon said lots. Upon the issues thus framed a trial was had, and resulted in a judgment in favor of the Federal Construction Company and against plaintiff. A new trial, however, was thereafter granted by the trial court, and the case was set for trial the second time. In all these proceedings the intervener acted as plaintiff's attorney. When the action came on for trial the second time, the intervener appeared ready and willing to proceed with the trial as plaintiff's attorney, but the plaintiff without just cause discharged the intervener, and employed other counsel to conduct the litigation. Immediately thereafter, and with consent of court, the intervener filed a complaint in intervention in this action, and claimed to be the owner of an undivided one-half of said lots. His complaint in intervention was subsequently dismissed, and immediately thereafter the plaintiff and defendant Federal Construction Company announced in open court that they had agreed upon a compromise of said action, and, in pursuance thereof, a compromise judgment was, on May 4, 1925, entered in favor of plaintiff, quieting his title to said lots, and that intervener take nothing by his complaint in intervention. Pursuant to said compromise agreement, Kelly conveyed to the Federal Construction Company four of said lots. Thereafter, upon the motion of the intervener, a new trial was granted, and the case was again set for trial on September 22, 1926, on which day intervener appeared and filed a supplemental complaint in intervention, setting up the compromise agreement between the plaintiff and defendant Federal Construction Company, in which supplemental complaint he asked to have it decreed that he was the owner of an undivided one-half of the three lots which, it is claimed by the intervener, plaintiff acquired in the compromise agreement with the defendant Federal Construction Company. The trial court denied the intervener any relief, and rendered judgment against him for costs, on the ground that plaintiff's title to said lots had not been quieted or his interest therein determined, either by judgment or compromise, at the time of the filing of intervener's supplemental complaint in intervention.

[1] We think the determination of the trial court in holding that the intervener's entry in said action was premature is correct. By his agreement with the plaintiff he was not entitled to any interest in any of the lots involved in the action until "Kelly is declared by judgment or by compromise to be the owner," and then only after "Kelly shall have his money invested back, and the overplus of the land shall be divided equally between them." Kelly, the plaintiff, received no title to any of the lots by compromise, for the reason that no compromise was made by any person holding the legal title. The compromise was made with the Federal Construction Company, who at best held only a lien against the lots. It could give Kelly no title, and did not purport to. All it did was to relinquish its lien against three of the lots in Kelly's favor. Neither Kelly nor the construction company would become the owner of all or any of the lots as contemplated by the agreement whereby intervener was employed by the plaintiff until the entry of the decree of court quieting plaintiff's title. While such a decree was entered on May 4, 1925, which was before the filing of intervener's supplemental complaint, yet this decree was, at the instigation of the intervener, set aside by the trial court, and, at the time of the filing of said supplemental complaint, no decree had been entered quieting Kelly's title, which was then in force. As no judgment had been entered which was in force at the time intervener filed his supplemental complaint, Kelly had not up to that time been "declared by judgment" to be the owner of any of the lots involved. It is perfectly clear, therefore, that the intervener was, at the time of his attempted intervention in said action, entitled to no relief against any person connected with the action regarding the property in controversy.

[2] The court found that the plaintiff was, at the time the intervener filed his original complaint in intervention, and at all times subsequent thereto, insolvent and unable to pay his debts, and a money judgment against him would be worthless and without value. Intervener contends that insolvency is often an important circumstance in prompting a court of equity to grant relief where he would otherwise be relegated to an action of law. Conceding this to be the rule, it can have no weight in determining any question involved in this action. If the intervener has been given any interest in the real property by his agreement of employment, he cannot be divested of this interest by a wrongful discharge from said employment. The plaintiff under such circumstances would hold whatever real property he recovered in said action, in so far as the interest of the intervener therein is concerned, in trust for the intervener, and it would not be subject to the claims of plaintiff's general creditors. Hoffman v. Vallejo, 45 Cal. 564; Luco v. De Toro, 91 Cal. 405, 18 P. 866, 27 P. 1082. Therefore the solvency or insolvency of the plaintiff would not affect the right of the intervener in a proper action to recover whatever interest he is given in the lots in question. This proceeding, however, cannot be instituted under the contract between plaintiff and the intervener, at least before plaintiff has be-

come the owner of said lots, and, as we have already shown, he was not such owner at any time when the intervener filed either his original or supplemental complaint herein.

Intervener contends that, having entered the default of the defendants, who were the owners of the legal title to said lots, Kelly, the plaintiff, became entitled to a judgment quieting his title thereto. Unquestionably this is true. It is just as true, we think, that until the judgment had been entered Kelly had not been "declared by judgment" to be the owner of the legal title to said lots.

[3, 4] We think the cases are and should be very rare when an attorney is authorized to intervene in an action instituted by him in behalf of his client for the purpose of settling a dispute between him and his client as to his attorney's fee for services rendered in the same action. They should be limited at least to those actions wherein, by virtue of the contract of employment between the attorney and client, the former is given a specific present interest in the subject-matter of the action, which interest might be jeopardized by the client's discharge of his original attorney and the employment of other attorneys to prosecute the action. Usually in cases where the attorney is given a present interest in the subject-matter of the action, it has been held that the attorney has a contract coupled with an interest, in which case the client would be powerless to discharge him. Todd v. Superior Court of San Francisco, 181 Cal. 406, 184 P. 684, 7 A. L. R. 938; Gage v. Atwater, 136 Cal. 170, 68 P. 581. A case like the present one, however, where the attorney is given no present interest in the subject-matter of the suit, but only an interest in the overplus of the land recovered, after the plaintiff has been repaid the money invested by him therein, presents no proper case, at least before recovery of judgment, for the interposition of a complaint in intervention by the attorney against his client. Of course, after recovery of judgment, no intervention is permissible, as in all cases it must be made before trial. Code Civ. Proc. § 387.

Judgment affirmed.

We concur: PRESTON, J.; TYLER, Justice pro tem.

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92 Cal. App. 785

PEOPLE v. BULLOCK. (Cr. 1037.)

District Court of Appeal, Third District, California. June 27, 1928.

Embezzlement 🔑44(1)—Evidence held insufficient to sustain conviction for embezzlement (Pen. Code, § 506).

Evidence in prosecution for embezzlement, under Pen. Code, § 506, showing that checks claimed to have been embezzled were delivered to defendant as advances on contract, *held* insufficient to sustain conviction.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

W. B. Bullock was convicted of embezzlement, and he appeals. Reversed.

A. H. Ludeman, of Red Bluff, and R. Probasco, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The appellant was convicted upon an information based upon section 506 of the Penal Code, and appeals from the judgment based thereon, and also from the order of the court denying his motion for a new trial.

The information upon which the defendant was arraigned contained three counts. A verdict of not guilty was rendered upon counts I and II, and a verdict of guilty upon count III, which reads as follows:

> "That said W. B. Bullock, on or about the 17th day of September, at and in the county of Tehama, state of California, and prior to the filing of this information, he then and there being a contractor employed by Jerry Myers and Alice P. Myers to construct and remodel a certain dwelling house there situate, was then and there intrusted with, and there was paid to him by said Jerry Myers and Alice P. Myers, the sum of $250 in lawful money of the United States, for the payment of materialmen and laborers, for work performed and material furnished in the performance of his said contract for the construction and remodeling of the said dwelling house; and that the said defendant, after being intrusted with the said sum of money as aforesaid, did thereafter, on or about the 14th day of October, 1927, willfully, unlawfully, fraudulently, and feloniously, appropriate and convert to his own use and embezzle the said sum of $250 paid to him as aforesaid.
>
> "Contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California."

The record shows that on or about the 8th day of September, 1927, the appellant entered into a building agreement with one Alice P. Myers for the rebuilding and remodeling of a small dwelling house in the town of Corning, county of Tehama; that, for and in consideration of the sum of $2,500 to be paid therefor, the appellant agreed to furnish all the material and supply all the work and labor to be performed thereon, at his own proper cost and expense. The contract provided for progressive payments.

Upon this appeal it is urged that every legal question involved herein was passed upon and decided in favor of the appellant in the case of People v. Holder, 53 Cal. App. 45, 199 P. 832.

The testimony set forth in the transcript bears out this contention, and shows that the property alleged to have been embezzled was paid to the defendant under and by virtue of the building contract entered into between the defendant and said Myers, and that the money received by him was not received in trust, but as and for his own money under the contract. The testimony of Mrs. Myers, in so far as it relates to count III, is as follows:

"Q. (By Mr. Pugh, District Attorney): Now, in connection with the delivery of the check of October 18th for $250, state whether Mr. Bullock at that time, at the time of the request for you to advance any checks, did he give you some sort of a slip of paper or a piece of paper with certain names on it? A. He gave me a paper. Q. A paper? A. Yes, sir; pay roll. Q. Now, the paper that I just handed to you he gave to you when? A. Before I gave him the $250; he said he wanted to pay the men. Q. He said this statement was a statement of what he owed the men? A. Yes, sir. Q. Well, what did you tell him, if you told him anything? A. I told him I would have Mr. Myers write him a check so he could pay the men. Q. And Mr. Myers, was he there at that time? A. No; he was not there. I told him when he came home and I told Mr. Bullock I would have him write a check. Q. Well, then, did you deliver that check which was written by Mr. Myers, that evening? Did you deliver it that evening or the next morning? A. I think it was the next morning. Q. Where was Mr. Bullock when you gave him the third check? A. He came to my house. Q. Was there any conversation at that time there between—was there any conversation that you recall between yourself and Mr. Bullock? A. Yes; he said he would give me a deed to Mr. Zubro's lot as security for the last check that I handed him. Q. Now, the last check, the last check is the $250, dated October 12, 1927? A. Yes, sir; so when he told me that, I asked where it was, and he said it was down town, he would have to go and get it; and I never saw him any more. Q. You say he was going to get Mr. Zubro's deed for you? A. Yes; he was going to give me the deed as security to the last $250 check that I gave him. Q. That is Mr. Bullock told you that he had a deed coming from Mr. Zubro for this lot or did have a deed from him? A. Yes. Q. And he was going to deliver to you that deed? A. Yes; he was going to let me have it to hold as security for the last $250 check that I gave him."

And upon cross-examination the witness further testified:

"Q. And then he came to you and asked for an advance on this contract, did he? A. Then he asked me for $1,000, the next time. He said he wanted to pay the men their wages. Q. You were advancing him that money on the contract? A. Yes, sir. Q. Now, isn't it true, with reference to all of the three checks, these checks, that on each occasion he said he would like to have an advance of money on the contract? A. Yes; and he wanted to finish the work; and we, of course, wanted to keep it going, and were anxious to have the house finished so we could have the house, and I gave him the money so he could get it finished soon."

The testimony of J. V. Myers, who drew the checks in question, shows that he had no conversation with the defendant in relation to the $250 check mentioned in the third count, but that he did have a conversation with the defendant as to two former checks which is directly in line with that of Mrs. Myers that the money was all advanced upon the contract, as shown by the following questions and answers:

"Q. When Mr. Bullock came to you about getting the advances on the contract and getting the money to work with, etc., what did he say to you when he asked you for this first $300 check? A. He asked me if I was willing to advance any money, that he might pay his carpenters, and for the material, and keep the building going on steady, and I said sure I would. Q. Now, what did he say when you gave him the $1,000 check? A. He asked me if I could advance him a pretty good amount of money, and I asked him why, and he said he would like to have about $1,000, and I said, 'Fine; I am glad to help you out to help the building get along faster.' Q. What did he say he wanted to do? A. He said he wanted to get some machinery so he could progress faster on the job; also I think he had some men he wanted to pay off there is what he told me. Q. That is, he wanted some money to work on, some surplus money, is that it? A. I don't know as to that. Yes; I think he did; he wanted something to work on."

This witness, who drew the check involved in this appeal, had no conversation with the defendant in relation thereto.

This testimony shows very clearly that the checks delivered to the appellant were delivered to him as advances upon the contract, and became his property, and were not received by the defendant in any trust capacity. It thus appears that no case is made out against the defendant under section 506 of the Penal Code as it stands "shorn of its unconstitutional provisions," as held in the case of People v. Holder, supra.

The opinion in the case of People v. Holder, supra, is so full and complete in its presentation, reasoning, and conclusions upon all the questions presented to us in this case, and which are identical with the questions considered in that case, that nothing more can be added to what is there stated, and it would be only a useless effort on our part to prolong this opinion by following the reasoning therein, and coming to the same conclusion.

Upon the authority of the case of People v. Holder, supra, the order and judgment appealed from herein are reversed.

We concur: FINCH, P. J.; HART, J.

93 Cal. App. 1

WALTERS v. EVICK et al.

BLANE v. SAME.

(Civ. 3454.)

District Court of Appeal, Third District, California. June 27, 1928.

1. Appeal and error 🔑930(1)—In determining on appeal sufficiency of evidence to support verdicts for defendants, defendants' evidence on matter in question must be accepted as true.

In determining, on appeal, question of sufficiency of evidence to support verdicts for defendants, latter's testimony on matter in question must be accepted as true, since it is assumed jury so accepted it.

2. Automobiles 🔑244(53)—In actions by pedestrians for injuries when struck by automobile after leaving street car, evidence of contributory negligence held to support verdicts for defendant.

In actions by pedestrians for damages for personal injuries sustained when struck by defendant's automobile after they had alighted from street car and were attempting to cross street, evidence of plaintiff's contributory negligence *held* sufficient to support verdicts for defendant.

3. Witnesses 🔑275(2)—Defendant's counsel could cross-examine plaintiffs regarding reasons for amending complaints if he believed amendments were made with plaintiff's knowledge that amendments were not based on truth.

Defendant's counsel was within legal rights in questioning plaintiffs on cross-examination regarding reasons for amending complaints, if in good faith he believed that amendments were inspired or made with knowledge by plaintiffs that amendments were not based on truth.

4. Appeal and error 🔑1060(4)—Misconduct of defendant's counsel, in reviving scandal involving attack on personal character of plaintiff's counsel, held not to result in miscarriage of justice, where verdict was sustained by plaintiff's evidence.

In action by pedestrians for personal injuries caused by automobile, misconduct of defendant's counsel in reviving before jury a scandal involving an attack on personal character of plaintiff's counsel, in measure invited by plaintiff's counsel, *held* not to result in miscarriage of justice, in view of fact that testimony of plaintiffs and of certain other of their witnesses would stand as sufficient support to verdicts for defendants.

5. Appeal and error 🔑699(4)—Complaint that instructions were erroneous cannot be reviewed, where record does not show who requested instructions.

Complaint that certain instructions contained erroneous statements of law cannot be reviewed, where record did not show by whose request instructions were given; presumption in such case being that they were given at request of appellants' counsel.

6. Trial 🔑253(4)—Instruction to effect that, if motorist was negligent, pedestrians could recover, held properly refused as disregarding question of contributory negligence.

In action by pedestrians for injuries caused by automobile, instruction to effect that, if motorist was guilty of negligence in operating car at time of accident, then plaintiffs would be entitled to recover, *held* properly refused, since it failed to take into consideration fact that plaintiffs could not recover, if they were guilty of contributory negligence.

7. Automobiles 🔑246(6)—Instruction based on inapplicable statute relating to automobiles passing street cars held properly refused (State Vehicle Act, § 134).

In action by pedestrians struck by automobile coming from opposite direction to that of street car, after they had alighted from street car and were attempting to cross street from rear of street car, instructions based on State Vehicle Act (St. 1923, p. 553), § 134, relating to vehicles traveling in same direction as street car, which was inapplicable to facts, *held* properly refused.

8. Automobiles 🔑164(2)—Statute relating to vehicles passing street cars applies only to vehicles traveling in same direction as street car (State Vehicle Act, § 134).

State Vehicle Act (St. 1923, p. 553), § 134, relating to vehicles passing railroad, interurban or street car while passengers are alighting, applies only to vehicles traveling in same direction in which street cars, etc., are traveling, and not to vehicles traveling in opposite direction.

Appeals from Superior Court, San Joaquin County; George F. Buck, Judge.

Actions for damages for personal injuries by George Walters and by Lottie Blane against E. M. Evick and E. M. Evick, doing business under the fictitious name of the Yellow Cab Company. The cases were consolidated and tried together. From a judgment for defendants, plaintiffs separately appeal. Affirmed in both cases.

A. H. Carpenter, of Stockton, for appellants.

Cooley & Gallagher, of San Francisco, for respondents.

HART, Acting P. J. These are actions for damages for personal injuries alleged to have been sustained by the respective plaintiffs and appellants through the negligence of the defendants. The injuries to the two plaintiffs occurred at the same time under precisely the same circumstances and from the same alleged cause. At the opening of the trial, it was expressly stipulated by and between the respective parties that, inasmuch as the witnesses and the testimony would be the same, the two cases be consolidated and tried together before the same jury, and the court made an order in accordance with said stipulation.

The jury, by whom the cases were tried, found in favor of the defendants and against the plaintiffs, and, upon the verdict thus arrived at and returned, judgment was entered awarding the defendants the costs and disbursements incurred and made in each of the actions. The plaintiffs separately appeal from the judgment so entered, and support the same by a record made up in accord with the provisions of the so-called alternative method.

The points urged for a reversal are: Insufficiency of the evidence to support the verdicts, alleged misconduct on the part of counsel for the defendants during the course of the trial, which, it is claimed, prejudiced the jury against the plaintiffs, and error in giving and refusing to give certain instructions, the rejected instructions being proposed by the plaintiffs.

The defendant, as the complaint and the evidence show, was, at the time the plaintiffs received the injuries complained of herein, and had been for some time prior thereto, maintaining and conducting in the city of Stockton a taxicab service for hire.

[1, 2] The injuries for which plaintiffs by their respective actions are suing for compensatory relief were caused by their being struck, knocked to the ground, and dragged a considerable distance on and over the street in the city of Stockton on which the accident occurred by a taxicab of the defendant operated at the time by one Charles Johnson, an employee of the former. It appears that in the early evening or late afternoon of February 22, 1925, the plaintiffs attended, in the company of each other, a moving picture show at one of the theaters in the city just named; that they left the theater together a few minutes after 8 o'clock p. m. of the day named, and, the night being "stormy" and dark—a heavy rain falling at the time—they boarded a street car traveling east on Main street, in said city, their destination being a candy store, where the plaintiff Blane was then and had been employed for about nine years, and which store was located in the center of the block, on the north side of said street, between Grant and Aurora streets; that, as the car was approaching the point of location of the candy store, Miss Blane directed the motorman to stop the car so that she and her escort (plaintiff Walters) could leave the car; that, upon reaching a point a little east of, and a short distance from, the candy store, the motorman stopped the car; that the plaintiffs thereupon, from the front end thereof, stepped therefrom to the pavement, and, Walters holding Miss Blane by the left arm, walked or ran to and around the rear end of the car, and thence in the direction of the sidewalk on the north side of the street; that, on reaching the northwest corner of the car, they halted for a second, looked to the east to see if any vehicle was approaching from the east, and, almost simultaneously with that act and their observance at the same time of the flash of the headlights of the taxicab traveling toward them, they were struck by the cab, with the general result as above stated, inflicting upon the persons of both plaintiffs severe injuries.

The complaints, with the usual particularity, describe the circumstances leading to and attending the accident as they are above briefly stated, and likewise describe the physical injuries which the respective plaintiffs sustained by reason thereof. The answers specifically deny the material facts alleged in the complaints, and also, by way of a special defense, charge that the accident and its consequences were the direct result of the plaintiffs' own negligence; that is, that they were themselves guilty of negligence which contributed proximately to the accident and the personal injuries received by them as a result thereof.

A careful reading of the testimony can leave no room for a reasonable doubt that the verdicts are afforded abundant support by the evidence. The plaintiffs introduced as a witness in their behalf Charles Johnson, who, as above stated, was operating the cab at the time of the accident, and who testified that the "weather was bad that night" (referring to the time of the mishap); it was raining very hard, and the streets were very slippery; that about 8:33 that evening (February 22, 1925) he was driving the cab "west on Main street, in Stockton," having a few minutes previously been at and started from the Stockton station of the Southern Pacific Company, said street running directly west from said station into the "heart" or business center of said city; that he "was running with two wheels of the cab just about in the middle of the west-bound track (that is, the north street car track), and the other two just half way over the car track on the right-hand side of the car track." In other words, as he later explained, the cab was at the time "straddling" the north or right-hand rail of the north street car track, so that the two left-hand wheels of the cab, so Johnson in effect stated, were about half way between the two rails of the north or "west-bound" street car track. Being asked how he was able to describe the position of the cab as he was driving it along said track, the witness stated:

> "I am positive that I was in that position, because that is about the only position you can drive on Main street at that time of the evening. It is a narrow street, and there are always machines, more or less, parked along the curb. If I get over any further the other way I would be getting too close to the (street) car going in the other direction."

Proceeding, on direct examination by plaintiffs' counsel, the witness testified that he was traveling "about 15 miles an hour"; that he observed the street car going east in "about the middle way of the block; it was moving slowly—just a little"; that he did not observe whether it was "just starting"; that he did not see the plaintiffs, or either of them, before the accident. He stated that the headlights on the cab "were lit"; that they (the headlights) would and did, on the occasion of the accident, reflect the distance usual with headlights of the average machine—"probably about 25 feet"; that he was able to see further ahead of him by the aid of the headlights than 25 feet, for the reason that, while "the lights first hit the road about 25 feet, from there they scatter out," so that one "can generally see quite a distance further"; that "on that particular night I could see at least for two blocks." He stated that the first "I saw of the people (plaintiffs) was when they ran out from behind the street car in front of the car (the cab). * * * I was just past the end of the street car when they came out from behind it. * * * I will say that I was about 2½ or 3 feet from the street car, which was on my left" (at the time the collision occurred). The witness stated that the instant he saw the plaintiffs step in front of the cab he tried to stop the cab; that it was not an easy matter to stop the cab, because of the slippery condition of the street; that, when he realized that he had struck the plaintiffs, he succeeded in stopping the cab after it had gone about 20 feet; that he stopped it (giving his opinion) at a point "practically straight in the direction I was going"; that, if he turned towards the curb at all, in trying to stop the cab, it was only "a few inches." The witness testified that the point where he stopped the cab was about 15 feet beyond and west of the candy store. He said that when the cab was stopped Miss Blane's body "was just behind one of the front wheels, kind of diagonal across the front of the machine and behind the front wheel," or, in other words, "back of the front axle." The witness stated that plaintiff Walters, after the cab was stopped, was lying in the street a distance of about 10 feet in front of the cab; that, after lying on the street a very few minutes, he arose to his feet and "staggered" about some, being in a dazed condition produced by his injuries. He appeared to be "groggy," as the witness expressed it, meaning, as the witness explained, that he (Walters) was in a more or less semiconscious condition of mind. Miss Blane, so Johnson testified, was taken from underneath the cab by several of the persons that had gathered at the scene of the accident, they having lifted the cab from her body and removed her from the position under the cab into which her body had been thrown by the impact. Miss Blane was carried into the candy store referred to above, from which, a few minutes later, both she and Walters were taken to the city emergency hospital and there given treatment.

T. E. Seaich, a merchant by occupation, testifying for the defendant, stated that on the night or evening the accident occurred, and at the time of the happening thereof, he was riding in his automobile and driving the same on Main street, in Stockton, immediately back or west of the street car concerned herein, and, going in the same direction; that, in other words, he was following said street car; that the street car stopped "about the middle of the block between Grant and Aurora streets; that, upon the stopping of the street car, he saw the plaintiffs leave the car and proceed towards the rear end of the car, "and run across the street right in front of the cab"; that, before the accident happened, he saw the taxicab traveling west, and, according to his opinion, at the rate of between 12 and 15 miles an hour. The witness said that he first observed the taxicab when it was about 10 feet from where the impact occurred; that the plaintiffs, on reaching the northwest corner of the street car, hesitated an instant, and that it was then that they were struck by the cab; that as soon as the accident happened he drove his car to, and parked it at, the north curbing of Main street, at a distance approximately of 25 feet east of the candy store; that the taxicab was stopped from 35 to 50 feet west of where he parked his car; that the point in the street car track where the plaintiffs were struck by the cab was "right alongside" the candy store. On cross-examination, the witness said that in following the street car he was driving at a rate of speed of about 12 or 15 miles an hour—that he was driving "in low"; that he stopped when the street car stopped; that he had driven an automobile long enough to be able to give a fair judgment as to the rate of speed at which an automobile is being driven. He further testified:

> "I threw out the gear with my foot and started to stop as soon as I seen them (plaintiffs) run out in front of the cab; as soon as I seen them run out behind the car, in front of the cab, I started to stop. I expected them to be hit as soon as I seen them run out."

The witness stated that by saying that plaintiffs "hesitated" when they reached the northwest corner of the street car he did not mean to say that they "stopped," but thereby meant to say that they (plaintiffs) "slowed up" a little; that they did not stop moving; that, when he first observed the plaintiffs, Walters was holding the arm of Miss Blane; and that their movement in going towards the rear end of the street car was "just a dog trot." He further said that, although the night was dark and a heavy rain was then falling, he could then, nevertheless, see a distance of 20 or 30 feet ahead of him as well as he could at any time.

E. M. Evick, one of the defendants, testified that on the night of the accident, at the emergency hospital in the city of Stockton, the plaintiff Walters, in a conversation with the witness, stated to the latter that the accident occurred through his (Walters' fault). Evick, on cross-examination, stated that at the time of said conversation Walters did not seem to be seriously hurt—he did not complain of any internal injury or of symptoms indicating such injury—and that mentally he appeared to be sound or not in any degree affected.

The above brief recital, in substance, of the testimony of the operator of the cab at the time of the accident and the testimony presented by the defense very clearly confirms the declaration made at the outset of this opinion that the verdicts stand upon a strong evidentiary foundation. From that testimony the jury, believing it to be true, as presumptively they did, were justified in concluding, as impliedly they did conclude, that the plaintiffs stepped from the car to the pavement; that they thereupon, with Walters holding Miss Blane's left arm, proceeded hurriedly—if not running, walking faster than the usual gait—to the rear end of the car, and likewise started to cross the north railroad track, but, instantly observing the taxicab within a few feet of them, indeed, so near that neither they nor the driver of the cab could have done anything or adopted any course which would or could have averted a collision, they hesitated, or diminished the gait at which they went from the front to the rear end of the street car, and, having already stepped into the path of the cab, were, while still moving, practically at the same instant of time struck by the front end of that vehicle. That the finding of these facts, with the further fact that the night was dark and the rain falling heavily, and also the fact that the street car stopped in the center of the block—an unusual place for street cars to stop to discharge passengers—amounted to a finding of contributory negligence on the part of the plaintiffs, negligence without which the accident would not have occurred, is not a debatable proposition. And, when we turn to the testimony of the plaintiffs themselves, as well as the testimony of some of their witnesses, we find, upon a careful analysis thereof and its like comparison with that of the operator of the cab and defendants' witness, Seaich, that, substantially, it tends to support, rather than to negative, the theory of the defense that the plaintiffs were each guilty of negligence which proximately caused or contributed to the accident and its consequences. In the first place, it is to be remarked that it is very clear, from weather conditions, that the plaintiffs were bent on getting into the candy store, and thus sheltering themselves from the storm, as hastily as possible.

Walters testified that Miss Blane, just before the street car reached the center of the street, or, what was the same thing, just before the car reached the point of location of the candy store, spoke to the motorman of the car. Walters did not, so he declared, hear the remark made to the motorman by Miss Blane, but it transpired that almost immediately after the latter spoke to the motorman the car was stopped in the middle or center of the street, and the plaintiffs there permitted to leave the car. The jury were legally authorized to find, in the determination of the probative effect of the evidence, and all the various circumstances thereby disclosed, conspicuously significant among which was the fact that she was employed at the candy store, that Miss Blane directed or requested the motorman to stop the car, for the convenience of herself and her companion, near where said store was located. Again, neither Walters nor Miss Blane had an umbrella with them at the time, nor, as she stated, was she wearing a hat on that occasion. The circumstances here adverted to added singularly strong support to the theory of the defendants that the plaintiffs, being more or less overwhelmed with anxiety to get into the candy store as hastily as possible, proceeded, on leaving the car, with considerable alacrity to the rear end of the street car, on reaching which they likewise proceeded to cross the north or "west-bound" street car track to the sidewalk in front or within a few feet of the entrance to the candy store. Moreover, the circumstances thus adverted to are more or less supported by the testimony of the plaintiffs' witness, Sharpstein, who stated that he witnessed the accident from an oil station situated about a block distant from the point at which the impact occurred, and that he had a "faint recollection" (the trial having taken place over a year after the accident) that the street car stopped in the center of the block, and that he saw the two passengers leave the car and run across, or attempt to cross, the street, when they were struck by the cab. Shown a written statement, signed by him a very short time after the happening of the accident, in which he stated that the street car was stopped in the middle of the block, and that he saw two persons leave the car and run across, or attempt to cross, the street, he was asked by counsel for the defendant whether his recollection was good at the time he made and subscribed his name to the statement, to which he replied in the affirmative, and further declared that the said statement contained a truthful narrative of the circumstances of the accident as he saw it. Furthermore, C. R. Smith, a witness for the plaintiffs, testified that the street car stopped almost directly opposite the candy store; that is, in the center of the block between

Grant and Aurora streets. As to the point in the street at which the street car stopped, Miss Blane herself stated that, when the car stopped, the rear end of the same was about on a line with the easterly boundary line of the candy store building, although it should be stated she elsewhere in her testimony declared that the street car had passed the candy store by about 20 feet before it stopped. And Walters testified that the point where the street car stopped was about 5 or 6 feet east of the easterly line of the candy store building.

It is true that the plaintiffs each denied that they ran from the front to the northwest corner of the street car, and also denied stepping in the space between the north and south rails of the "west-bound" track. Miss Blane testified that she walked at a "natural gait" to the rear end of the street car, and that, when she and Walters reached a point a little over 3 feet from the northwest corner of said car, and were in the space between the two tracks, that is, between the north rail of the south track and the south rail of the north track, they paused or stood still and looked east to see if any vehicle was approaching or traveling west. It was at this time, she stated, that she and Walters were struck by the cab; Walters then being a trifle behind or back of her. It is also true that the testimony of both the plaintiffs is widely different from that of Johnson and Seaich with respect to the distance the cab proceeded over the street from the time the collision occurred. The former testified that they were drawn or "dragged" by the cab for a distance of from 50 to 75 feet. The testimony of Johnson, operator of the cab (and, as seen, introduced by plaintiffs as their witness) and that of Seaich (defendants' witness) substantially harmonize (as shown above) to the effect that the distance the cab proceeded before it was stopped after striking the plaintiffs was about 20 or 25 feet; and, of course, the testimony of the latter as to that matter must be accepted by this court as involving the truth, since, as is to be assumed, the jury so accepted it. As to the rate of speed at which the cab was traveling when the accident occurred, it can hardly be said that a conflict in the evidence of a substantial character arose or exists, since, as already shown, Johnson and Seaich were in a better condition of mind to express an approximately correct opinion as to the rate of speed at which the cab was being operated before and at the time of the accident than was either of the plaintiffs. The latter, as seen—or at least the jury were warranted in so finding—were struck almost simultaneously with their appearance beyond the northwest corner of the street car. The suddenness of the perilous situation by which the plaintiffs were thus beset, and the necessarily coincident perturbation of mind of the average person so circumstanced, would hardly justify acceptance of the proposition that they could have estimated, with a satisfactory degree of accuracy, the speed at which the cab was traveling before or at the time the accident occurred. Walters said that he judged, from the speed with which he was shoved along the street by the cab for the distance of the first foot from the point in the street where they were struck, that the cab was being driven at the rate of from 30 to 35 miles an hour. This testimony was probably given by the jury little, if any, weight upon the question of the rate of speed at which Johnson was then operating the car. And his (Walters') is the only testimony which in any way contradicts, or purports to contradict, the testimony of the witnesses Johnson and Seaich with regard to the rate of speed at which the cab was traveling before or at the time the plaintiffs were struck down. But it is not necessary further to review the testimony analytically or otherwise. It is perfectly clear that the jury were warranted in finding that the plaintiffs stepped directly in front of the cab immediately upon their passing around the northwest corner of the street car. The position of Miss Blane's body under the cab—directly under the front axle and crank case of the cab—and the position of Walters' body as it was dragged along the north track of the street car, and the parts of their bodies injured, plainly indicate that they stepped in the pathway of the cab. All these matters were, of course, for the jury's determination, yet, as to the position of the plaintiffs with reference to the cab at the moment they were hit, the undisputed physical facts themselves clearly show that, when struck, they were directly in the pathway of the cab. But it may here well be suggested that, even if, in point of fact, the driver of the cab, at the time of the accident, was driving on or over the two north tracks instead of straddling the north rail of said track, as he testified, and as the jury impliedly found, and it was also true that the street car stopped at or near the intersection of Grant and Aurora streets, instead of the center of the block between those streets, as a number of the witnesses, including several introduced by plaintiffs, testified, and that in so doing he was guilty of negligence, in the absence of which the accident would not have occurred, it would also still be true that the admitted act of plaintiffs in going to the rear of the street car, and attempting to cross the street, beyond the established foot crossing, before the street car had passed on, and thus a clear open view of the street to the east afforded them, was one of negligence which manifestly contributed as a proximate cause to their injuries, for which, therefore, they would not be entitled to compensatory relief.

[3, 4] The misconduct assigned against the attorney for the defendants arose under the

following circumstances: Each of the complaints as originally framed and filed alleged that the street car stopped at the west line of the intersection of Main and Aurora streets—east, by practically half a block, from the location of the candy store—and that "as plaintiff stepped to the ground at the *rear* end of the street car, he (and 'she') was struck with great force and violence and felled to the ground, and drawn *thirty-five* feet along said Main street," etc. At the beginning of the trial counsel for plaintiffs asked for, and was by the court given, leave to amend the complaints by substituting for the word "thirty-five" the word "seventy-five," and also by substituting for the word "rear" the word "front." As so amended, each of the complaints in the respect here considered reads as follows: That "as plaintiff stepped to the ground at the *front* end of said street car, he (and 'she') was struck with great force and violence and felled to the ground, and drawn *seventy-five* feet along said Main street," etc. Cross-examining the plaintiffs, counsel for the defendant asked each whether the indicated amendments of the complaints were suggested by counsel for plaintiffs. Each plaintiff denied that such was the fact, but the question so asked caused a bitter controversy between the respective counsel. The attorney for the plaintiffs, in objecting to the question, declared that thus it was unjustifiably insinuated that the plaintiffs were guilty of perjury, and he (counsel) was guilty of suborning perjury. The attorney for defendants, addressing plaintiffs' attorney, in effect retorted with the statement that he (counsel for defendants) was not the first one that had accused plaintiffs' counsel of subornation of perjury. Later, and in the course of the cross-examination of Miss Blane, counsel for the defendants asked the witness if she had not, on direct examination, at first stated that she and Walters were a little over 3 feet from the northwest corner of the street car when they paused to look and see whether a vehicle of any kind was approaching from the east, and then changed said statement in response to a suggestive question by her attorney so that she was then made to say that they were 3 feet from the north rail of the north track at the time referred to. This question brought an objection from the attorney for plaintiffs (not stating the grounds) and the following remarks:

> "That is insulting to me; that is insulting to the witness, and it is done for the purpose of prejudicing this plaintiff before the jury, and not only that, but it states a falsehood."

To those remarks counsel for defendants replied:

> "It comes within—even for a man of counsel's stamp, to accuse anybody of falsehood, who is a suborner of perjury—" (here the judge interrupted by saying that there was no objection before the court for the court to rule on).

In the same connection counsel for the defendants asked Miss Blane a question predicated upon the assumption that she, on direct examination, had testified that the point where she and Walters stopped after passing around the rear end of the street car was "3 feet from the northwest corner of the street car." Plaintiffs' counsel, in objecting to the question, declared:

> "He (counsel for defendants) is trying to falsify this witness' testimony."

Counsel for defendants answered:

> "No jury ever found that I falsified any witness' testimony as they did you."

In the course of his argument to the jury, counsel for plaintiffs, among other things, said:

> "At the opening of this case I asked the court if it would permit me to make some modifications of the complaint. * * * I drew that complaint some months ago. * * * I drew it, as I supposed, in accordance with the facts of the case * * * as they were presented to me. I had no intention, ladies and gentlemen of the jury, to put into that complaint anything that was false or untrue. I never read that complaint after the time that I drew it until a day or two before this case was called in this court. I read it to the plaintiff who sits there, and he called my attention to the fact that—" (here counsel for the defendants objected to the recital by counsel for plaintiffs of any conversation he might have had with his clients "which was not in testimony").

After some further remarks by counsel for plaintiffs, the court interrupted him, saying:

> "If you attempt to go outside of the record, of course that opens the door, to some extent, for a reply on the other side,"

—to which counsel for plaintiffs replied:

> "If the court please, I welcome it. If there is anything that the gentleman can say that would tend to show that I intended to urge one single thing before this jury that was false or untrue, let him do it. I challenge him to do it,"

—whereupon the attorney for the defendants retorted: "I accept it." In addressing the jury, on the close of the opening argument by counsel for the plaintiffs, counsel for defendants introduced his argument by stating that, having been challenged by his antagonist to point to any occasion when the latter had been charged with "having done anything to stretch the imagination of any witness' testimony," he would call attention to the fact that counsel for the plaintiffs had once been accused and convicted "in this very county," of the crime of subornation of perjury. Here defendants' counsel was interrupted by plaintiffs' counsel as follows: "There is no objection whatever to that statement, only I would like to have him tell the result, if he wants to." Mr. Gallagher, the counsel for defendants: "I will read the decision," referring to the opinion of the Supreme Court reversing the judgment of conviction against counsel for plaintiffs in said case. Counsel for plaintiffs: "I am asking for the conclusion." Mr. Gallagher: "I will read the decision, if you want." Counsel for plaintiffs: "All right, go ahead." Thereupon counsel for defendants proceeded to, and did, read the entire decision of the Supreme Court. The reading of the decision having been concluded by Mr. Gallagher, counsel for plaintiffs in effect asked the former to state to the jury what the final disposition of the case was after the reversal, and, no response by Mr. Gallagher to that request having been essayed, the counsel for plaintiffs denounced the former in bitter terms; but, in his closing argument to the jury, explained that, a short time after the remittitur in the subornation of perjury case was received by the clerk of the San Joaquin county superior court, the indictment therein was dismissed on the motion of the district attorney of said county, counsel further stating that, on the dismissal of said indictment, the district attorney who prosecuted the case declared to him (counsel for plaintiffs) that there never existed any real grounds for the institution of the criminal action, and that he (the district attorney) very much regretted that he had permitted the prosecution of the case.

Of course, counsel for the defendants was within his legal rights when questioning, on cross-examination, Miss Blane and Walters regarding the reasons for amending the complaints, if, in good faith, he believed that said amendments were inspired or made with knowledge by the plaintiffs that the amendments were not based upon the real truth of the matter to which they related. An attorney can always lay the foundation for the impeachment of a witness against his client, even if the impeachment questions be pregnant with accusation of crime against the witness or a party to the action. But, in this instance, while the conduct of counsel for the defendants in reviving before the jury a scandal involving an attack upon the personal character of counsel for the plaintiffs which had long been relegated to a forgotten past was highly improper, and, indeed, reprehensible, yet the record shows that the attack was in no small measure invited by counsel for the plaintiffs himself, not alone in the challenge he issued to counsel for the defendants, but also in that he charged the latter with attempting by cross-examination to make Miss Blane falsify her testimony, and further charged that the basic foundation of a certain question propounded by defendants' counsel to that plaintiff involved the statement of a falsehood. But the whole matter was grossly improper, and so far removed from any pertinency to the case or its issues, and so far in contravention of the decorum which should uniformly be maintained in courts of justice, that it should have been stopped by the court at the very inception thereof. If the verdicts were resting upon a narrow evidentiary margin, we would be compelled to send the cases back for a retrial for the misconduct assigned and as above explained. But, eliminating from consideration the testimony of Seaich, testifying for the defense, and the admission by Walters to defendant Evick (denied by Walters, it is true) that they (plaintiffs) were to blame for the accident, the testimony of the plaintiffs and of Johnson and certain other of their witnesses would stand as a sufficient support to the verdicts. In fact, considering all the testimony together or as a whole, it is plainly manifest that no other verdicts than those returned could have justly been reported by the jury. It is therefore perfectly clear that no miscarriage of justice resulted from the misconduct referred to.

[5-8] The complaint that certain instructions embraced within the court's charge to the jury contained erroneous statements of the law cannot be reviewed, for the reason that it is not shown by the record by whose request said instructions were given—whether at the request of the plaintiffs or of the defendant; the presumption in such case being "that they were given at the request of the" appellants' counsel. Gray v. Eschen, 125 Cal. 1, 5, 57 P. 664; Sutter Butte Canal Co. v. Am. Rice & Alfalfa Co., 182 Cal. 549, 553, 554, 189 P. 277; Bognuda v. Pearson, 71 Cal. App. 105, 234 P. 857; Finkelstein v. Cosgrove (Cal. App.) 256 P. 608; Murray v. Kunde (Cal. App.) 267 P. 158. The reason of this rule is lucidly explained in Gray v. Eschen, supra. We have, however, read the court's charge, and thus have found that it covered every principle of law applicable to the issues. The disallowance of certain instructions proposed by the defendants and rejected by the court, upon the question of negligence, did not constitute error. They failed to take into consideration the proposition that, even if the evidence was such as to show that the driver of the cab was negligent in such driving, the plaintiffs could not recover if the evidence also showed that they themselves were guilty of negligence which contributed proximately or directly to the injuries they received. Said instructions merely stated that, if the operator of the car was guilty of negligence in operating it at the time of the accident, then the plaintiffs would be entitled to recover. Among the instructions, however, proposed by the plaintiffs and disallowed by the court was one based upon and in the language of the following provision of section 134 of the State Vehicle Act (Stats. 1923, p. 553 et seq.):

"In passing any railroad, interurban or street car while passengers are alighting from or boarding the same, vehicles shall be operated or driven on the right-hand side of such cars and at a rate of speed not exceeding ten miles an hour and no portion thereof or of any load thereon shall come within six feet of the running board or steps of such cars, and shall at all times be operated with due care and caution so that the safety of such passengers shall be assured."

It is plainly apparent from its very language that section 134 of the Vehicle Act, upon which the instruction referred to was based, has application entirely to vehicles traveling in the same direction in which such street car is traveling, and not to vehicles traveling in the opposite direction to that in which such car is going. Manifestly, the instruction was wholly inapplicable to the facts of the present case.

The judgment in the case of George Walters v. E. M. Evick and E. M. Evick, etc., is hereby affirmed, and the judgment in the case of Lottie Blane v. E. M. Evick and E. M. Evick, etc., is hereby affirmed.

We concur: BARTLETT, Justice pro tem.; PLUMMER, J.

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93 Cal. App. 56

SEVERANCE v. BALL, County Treasurer.
(Civ. 3603.)

District Court of Appeal, Third District, California. June 29, 1928.

1. Officers 🔑100(1)—Claims of persons employed to perform duties required of county surveyor are not allowable, because indirectly increasing surveyor's salary (Pol. Code, § 4214, and section 4267a, as added by St. 1927, p. 1122; Const. art. 11, § 9).

Allowance to third parties by board of county supervisors of labor claims for work required to be performed by county surveyor under Pol. Code, § 4214 and § 4267a, as added by St. 1927, p. 1122, is improper as indirectly increasing surveyor's salary, in violation of Const. art. 11, § 9, which provides compensation of county officers should not be increased during time of office.

2. Officers 🔑100(1)—Claims presented by county surveyor's assistants for taking levels, services as transitman, and levelman on field survey work held not allowable, because increasing surveyor's compensation; "surveyor" (Pol. Code, § 4214, and section 4267a, as added by St. 1927, p. 1122; Const. art. 11, § 9).

Claims presented to county supervisors for services rendered by assistants of county surveyor in taking levels, for services as transitman, and for hiring levelman on field survey work, *held* not properly allowable because coming within definition of duties of county surveyor required to be performed by him under Pol. Code, § 4214, and section 4267a, as added by St. 1927, p. 1122, since allowance of claims to assistants would indirectly increase surveyor's compensation during term, in violation of Const. art. 11, § 9, "surveyor" being one who makes surveys, determines area of portion of earth's surface, length and direction of boundary lines, and contour of surface.

3. Evidence 🔑19—Court takes judicial notice that surveyors must have chainmen and rodmen with them, and that carrying chain or holding rod is not "surveying."

Court takes judicial knowledge that surveyor in field must ordinarily have with him chainmen and rodmen, and that carrying chain or holding pole or rod, though necessary to performance of surveyor's duties, is not surveying.

4. Officers 🔑100(1)—Allowance of claims of county surveyor's assistants as chainmen and for typing specifications held not to increase surveyor's compensation during term (Pol. Code, § 4214 and section 4267a, as added by St. 1927, p. 1122; Const. 11, § 9).

Claims presented to county supervisors for work as chainmen and for typing specifications by assistants to county surveyor *held* properly allowable, as not constituting part of duties of county surveyor under Pol. Code, § 4214 and § 4267a, as added by St. 1927, p. 1122, and allowance of such claims would therefore not indirectly increase surveyor's compensation while in office, in violation of Const. art. 11, § 9.

5. Officers 🔑100(1)—Allowance of claim of chainmen for measuring rods of road for county map held not to increase surveyor's compensation (Pol. Code, § 4214, and section 2655a, as added by St. 1927, p. 1682, and section 4267a, as added by St. 1927, p. 1122; Const. art. 11, § 9).

Claim for services as chainmen in measuring rods of road for county map under Pol. Code, § 2655a, as added by St. 1927, p. 1682, *held* not to involve any part of duties of county surveyor under Pol. Code, § 4214, and section 4267a, as added by St. 1927, p. 1122 and claim was therefore properly allowable, as not increasing surveyor's salary while in office, in violation of Const. art. 11, § 9.

Application by S. Severance, Jr., for writ of mandate to be directed to S. E. Ball, as Treasurer of Glenn County, to pay certain claims. Writ granted as to some claims and denied as to others.

H. W. McGowan, of Willows, for petitioner.
Guy L. Louderback, Dist. Atty., of Willows, for respondent.

PLUMMER, J. This matter is before us upon the application of the petitioner praying that a writ of mandate be issued directed to the respondent as treasurer of the county of Glenn to pay certain claims allowed by the board of supervisors of said county. Omitting Exhibit A, which is not properly before us, the claims involved in this proceeding are as follows: Exhibit B—claim of A. A. Millsaps, for the sum of $5 for labor as levelman on county roads in Glenn county; Exhibit

C—claim of S. Severance, Jr., for the sum of $5 for one day's labor as rodman in taking levels, elevations, and setting grade stakes, etc., in the construction of the Wood street road; Exhibit D—claim of August J. Hoever in the sum of $10 as transitman running levels on Villa street in West Willows, in said county; Exhibit E—claim of Bayard Knock, county surveyor of Glenn county, $5 for expense in hiring levelmen on field work survey; Exhibit F—demand of Thomas Myers, work for county surveyor taking yardage on Culver road, 2 days' work as chainman at $5 per day; Exhibit G—claim of Heloise Dahlgren for $10 for typing specifications of four corners on Princeton road; Exhibit H—claim of A. A. Millsaps for the sum of $80 for services as chainman, measuring rods for map of county, 16 days' work at $5 per day (all of the claims, except those of the petitioner, being assigned to him).

The respondent refused to pay the claims on the ground that they were not proper charges against the county, and constituted items of expense for labor that should have been performed or paid for by the county surveyor of Glenn county.

Section 4214 of the Political Code provides that—

> "The surveyor must be a licensed land surveyor of the state, and must make any survey that may be required by order of the court or of the board of supervisors," etc.

Section 4267a of the Political Code, as added by St. 1927, p. 1122, which applies to the county of Glenn, provides that on and after December 31, 1927, the surveyor of the county of Glenn shall be paid, in equal monthly installments, a salary of $2,700 per annum for all work performed for the county, and, in addition thereto, he shall receive his actual traveling and other necessary expenses incurred by him while engaged in work in the field for the county.

Section 9 of article 11 of the state Constitution specifies:

> "That the compensation of any City, County, town or municipal officer shall not be increased after his election or during his term of office," etc.

[1] While there is no express provision in any section of the Political Code requiring the board of supervisors to direct the performance of any particular work by the county surveyor, the question is presented in this case whether in employing or paying persons for doing work that comes within the purview of what is contemplated as a surveyor's duty does not indirectly do what the board of supervisors would be prohibited from directly doing, to wit, increase the compensation of the county surveyor. The section of the Political Code fixing the compensation of the surveyor of the county of Glenn specifies that it shall be compensation for all work performed for the county. In addition to this compensation, however, he is allowed his traveling expenses and other necessary expenses incurred by him while engaged in work in the field for the county. Section 4214 of the Political Code refers to the qualifications of a surveyor, to wit: "He must be a licensed land surveyor of the state." Webster's International Dictionary defines "surveying" as follows: "The operation of finding and delineating the contour, dimensions, position, etc., as of any part of the earth's surface, whether land or water; * * * also, a measured plan and description of any portion of country, or of a road or line through it"; and "surveying," as "the act or occupation of making surveys; that branch of applied mathematics which teaches the art of determining the area of any portion of the earth's surface; the lengths and directions of the boundary lines; the contour of the surface," etc. A surveyor necessarily would be one who ascertains these facts or performs the duties necessary to their ascertainment.

Whenever a board of supervisors employ or approve the claim of any one who has been employed either by themselves or by the county surveyor of the county of Glenn to do the work which the law contemplates that the surveyor of that county should perform, then and in that case the same principle is involved as where an attempt is made to pay a deputy or an officer where the law does not provide for the employment of such a deputy, but casts the duty of performance upon the principal officer. It has been frequently held that the compensation of an officer cannot be increased by the method of allowing compensation to deputies or assistants. Sarter v. Siskiyou County, 42 Cal. App. 530, 183 P. 852; Welsh v. Bramlett, 98 Cal. 219, 33 P. 66; Humboldt County v. Stern, 136 Cal. 63, 68 P. 324; Humiston v. Shaffer, 145 Cal. 195, 78 P. 651. Other cases might be cited, but these are sufficient to illustrate the rule applicable here.

We do not deem it necessary to take up and consider at length the general powers of boards of supervisors as presented by counsel for the petitioner, for the simple reason that the general powers of boards of supervisors to make employments must be exercised in the light of constitutional provisions prohibiting the increase of the compensation of county officers either directly or indirectly. If an officer of the county is paid to perform certain work, it is his duty to perform such services, and the board of supervisors, under the constitutional provision prohibiting the increase of an officer's salary by way of relieving an officer either of doing the work himself or bearing the expense of hiring assistants, possesses no power to employ or approve the claim of any one whose employment results in the acts prohibited.

[2] With these premises laid down, we have only to consider the legality of the claims as

they appear upon their face. Exhibits B, D, and E, upon their face, show that they are for services that should have been rendered by the county surveyor of Glenn county. They are for services which come within the definition of the duties of a surveyor, which we have set forth herein, to wit: Taking levels, services as a transitman, which is a part of the services of a surveyor in taking levels, and of hiring a levelman on field survey work, which is explicitly within the definition of the duties incumbent to be performed by the county surveyor. All of such work involved the taking of dimensions, positions, measuring the plans, description, or length of any particular portion of the earth's surface, running lines upon roads, contour lines of the surface, etc. Thus the claim of A. A. Millsaps for $5 as a levelman, the claim of August J. Hoever for services as a transitman, and the claim of Bayard Knock for expense in hiring a levelman on field survey work, must be held invalid.

[3-5] The section of the Political Code fixing the salary of the surveyor of the county of Glenn allows him actual traveling expenses and other necessary expenses incurred by him while engaged in work in the field for the county. Common experience, of which we must take judicial knowledge, teaches that a surveyor in the field must ordinarily, in order to perform his duties as a surveyor, have with him men, in common parlance denominated "chainmen" and "rodmen." We know that carrying a chain, while necessary to surveying, is not surveying. We know that holding a pole or a rod, while necessary to the performance of his duties by a surveyor, is not surveying. Thus the claim of Thos. Myers for two days' work as chainman appears upon its face to be a legal charge, and, having been approved by the board of supervisors as a necessary expense, should have been paid. Exhibit G, being the claim of Heloise Dahlgren for typing specifications, not showing upon its face that it is for work which should have been performed by the county surveyor, and having been approved by the board of supervisors as a proper county charge, must be so held. The claim of A. A. Millsaps for services as a chainman, for sixteen days at $5 per day, aggregating $80, stands upon an entirely different basis from any of the other claims assigned to the petitioner.

Section 2655a of the Political Code, as added by the act of the Legislature of 1927 (Stats. 1927, p. 1682), reads:

> "The board of supervisors shall make and keep on file a road mileage record, and keep the same corrected to date showing every road in the respective road districts of the county, upon which county funds are expended for construction or maintenance, and may determine such mileage by automobile speedometer. Each supervisor shall keep an account of the actual work done in his district and the cost per mile thereof, except in a county in which the road work is in charge of a road engineer or highway engineer or in a county governed by a county charter," etc.

This work is no part of the duties of a county surveyor. The board of supervisors might have had the mileage measured in a different manner, but that does not prevent the board of supervisors from adopting the method pursued in the instant case. It therefore follows that the claim of A. A. Millsaps is a legal charge against the county.

As a conclusion from the foregoing, the petitioner is entitled to a writ of mandate directing the payment of the claim of S. Severance, Jr., for one day's labor as a rodman, in the sum of $5, the claim of Thos. Myers for two days' work as chainman, in the sum of $10; the claim of Heloise Dahlgren for typing work, in the sum of $10; and the claim of A. A. Millsaps for measuring county roads, in the sum of $80. As to the other claims the petitioner is not entitled to a writ.

Let a writ of mandate issue for the payment of the claims herein found legal.

We concur: FINCH, P. J.; HART, J.

93 Cal. App. 77

PEOPLE v. GARRETT. (Cr. 1662.)

District Court of Appeal, Second District. Division 2, California. July 5, 1928.

1. Criminal law ⚷369(6)—Refusing to strike witnesses' nonresponsive testimony on cross-examination indicating defendant's guilt of other offenses held error.

In prosecution for unlawful sale of intoxicating liquors, refusing to strike nonresponsive testimony of witness for prosecution on cross-examination indicating that defendant had sold liquor at other times was error.

2. Criminal law ⚷775(3)—Refusal of instruction on proof necessary to establish alibi held error under evidence.

Refusal to give instruction that if evidence was sufficient to create reasonable doubt whether defendant was present at place where crime charged was alleged to have been committed or at some other place where he could not have committed it, then jury should acquit defendant, *held* error in liquor prosecution, where evidence of alibi was given.

3. Criminal law ⚷823(6)—Prejudice resulting from instruction to scrutinize alibi evidence held not removed by general instruction to acquit if not convinced of guilt beyond reasonable doubt.

In liquor prosecution, where evidence tending to show alibi was introduced and correct instruction on alibi refused, prejudice resulting from instruction that evidence of alibi should be scrutinized with care and jury should avoid being imposed upon by fabricated evidence *held* not removed by general instruction to effect that jury must be convinced of guilt of defendant beyond reasonable doubt.

4. Criminal law ⚷1186(4)—Prejudice resulting from instruction warning jury against alibi required reversal of conviction (Const. art. 6, § 4½).

In liquor prosecution, where evidence of alibi was introduced and correct instruction on alibi refused but instruction given specially warning jury against defense of alibi, *held* that record did not warrant upholding conviction appealed from under Const. art. 6, § 4½, providing judgment should not be reversed for harmless error.

5. Criminal law ⚷795(3), 1172(1)—Instructing that sale of liquor constituted "high misdemeanor" as termed in information held error though not prejudicial.

In prosecution for unlawful sale of liquor, where offense charged was improperly designated as crime of high misdemeanor, court should not have enlarged on mistake by using same designation in its instruction, there being no such offense though error was not prejudicial, where offense was otherwise correctly described in information.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, High Crimes and Misdemeanors.]

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

James Garrett was convicted for unlawful sale of intoxicating liquors, and he appeals. Reversed.

George W. Rochester, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

CRAIG, J. The defendant appeals from a judgment of conviction and an order denying a motion for new trial. He was charged by information with the unlawful sale of intoxicating liquor, the offense being also designated as "the crime of high misdemeanor." A number of alleged errors of the trial court are assigned as grounds for reversal. From the view we take of some of them it will be unnecessary to consider others.

[1] During the trial the witness Matthews, called by the prosecution, and while under cross-examination, was asked, reference being made to the defendant: "You have seen him at other times, have you?" The witness answered: "Yes, I have been out there before and bought liquor from him." Defendant's counsel moved to strike the answer as not responsive, and the court denied the motion, saying: "You brought it out on cross-examination." Of course, the question did not call for that part of the answer which indicated that the defendant had been guilty of other offenses of the same character as the one for which he was on trial. All of the answer except the word "Yes" should have been stricken out, and the denial of the motion was error.

[2] The following instruction was offered by the defendant, and refused:

> "I further instruct you that if this evidence, which is for the purpose of establishing an alibi, is sufficient in your minds to create a reasonable doubt whether defendant was present at the place where the crime charged is alleged to have been committed, or at some other place where he could not have committed it, then you should give defendant the benefit of such doubt and acquit him."

This instruction was a proper one, and contained a correct statement of the law. People v. Winters, 125 Cal. 325, 57 P. 1067. It should have been given, for where evidence tending to prove an alibi is given the defendant is entitled to a specific instruction dealing with that issue. People v. Wong Loung, 159 Cal. 520, 114 P. 829; People v. Visconti, 31 Cal. App. 169, 160 P. 410. No element of such an instruction could be of greater importance than that which would inform the jury as to the degree of proof required of the defendant to support his claim of alibi. If he is entitled to a special instruction upon any point, it is upon this one. The effect of the error in refusing to give an instruction of the same im-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

port as that offered is clearly made more deleterious by the court having, by another instruction, warned the jury against the danger of alibi evidence being fabricated, using the following language:

> "The court instructs you that evidence to establish an alibi, like any other evidence, may be open to special observation; persons may perhaps fabricate such evidence with greater hopes of success, or less fear of punishment, than most other kinds of evidence, and honest witnesses may often mistake dates and periods of time, identity of persons seen, and other things about which they have testified, and such evidence should be scrutinized with care, and the jury should avoid being imposed upon by a fabricated defense."

The giving of this instruction is also assigned as error. It is true that in a number of cases where an instruction similar to the one in question was given convictions were upheld. However, in no decision in this state to which our attention has been called has this form of instruction been given unqualified approval. On the contrary, it has repeatedly been the subject of adverse criticism. The reference in it to evidence of an alibi as a defense is objectionable. People v. Roberts, 122 Cal. 377, 55 P. 137; People v. Winters, supra. There is no reason why evidence tending to show that at the time of the commission of the offense the defendant was at another place than that at which it was committed so that he could not have been a party thereto should be scrutinized differently from any other proof. As was said in People v. Lattimore, 86 Cal. 403, 24 P. 1001:

> "If trial courts will cease to give this particular form of instruction, the ends of justice will be equally as well subserved, and the administration of the laws less embarrassed."

That opinion then adds:

> "But in this case, as in the Levine case, the charge of the court, taken as a whole, was so full and fair to the defendant that we cannot conceive that any injury resulted to the defendant from this unnecessary instruction in regard to the scrutinizing of the evidence given in support of the defense of alibi."

[3] In this and other decisions, where it has been said that it is undesirable to give instructions of this nature, the instructions, taken as a whole, have been full and fair and have made the law clear as to the particular issues tendered by the evidence of an alibi; but in the instant case this is not true. No other instruction was given on the subject, and the one first above quoted containing a correct statement of the law was refused. The giving of a general instruction to the effect that the jury must be convinced of the guilt of the defendant beyond a reasonable doubt to convict was not sufficient to remove the prejudice to the defendant necessarily resulting from the errors above specified. People v. Visconti, supra.

[4] The record presented does not warrant upholding the judgment appealed from under article 6, § 4½, of the Constitution. Without reciting the evidence in detail, it is sufficient to say that in addition to the testimony in support of the defendant's claim of alibi, a direct conflict was presented upon all other material points. It is not only possible, but quite probable, that had the members of the jury been informed that if the evidence tending to prove an alibi was sufficient to raise a reasonable doubt in their minds as to the guilt of the defendant they must acquit, the result might have been different and the defendant found not guilty.

[5] Of course, it is improper to designate the offense charged as a "crime of high misdemeanor." There is no grade of misdemeanors legally known as "high misdemeanors" in this state. However, in view of the fact that the offense is clearly and unambiguously charged in the information as follows: "That the said James Garrett on or about the 6th day of December, 1927, at and in the county of Orange, state of California, and before the filing of this information, did willfully and unlawfully sell, for beverage purposes, about one pint of intoxicating liquor, * * * then and there containing alcohol in excess of one-half of one per cent."—we do not deem the misnomer of its classification as prejudicially erroneous. But since the information is subject to criticism in that regard, of course, the court should not, as it did, have enlarged upon the mistake by using the same designation in its instructions.

The judgment and order appealed from are reversed.

We concur: WORKS, P. J.; THOMPSON, J.

93 Cal. App. 65

DYMENT v. BOARD OF MEDICAL EXAMINERS OF CALIFORNIA et al.

(Civ. 5216.)

District Court of Appeal, Second District, Division 1, California. July 3, 1928.

1. Physicians and surgeons 🔑11(3)—Prejudice of members of board of medical examiners does not affect jurisdiction to revoke license to practice medicine (Code Civ. Proc. § 170, subd. 4).

Bias or prejudice of any of members of board of medical examiners does not affect board's jurisdiction to revoke license to practice medicine and surgery; there being no provision in Code Civ. Proc. § 170, subd. 4, relating to judges, affecting members of boards of medical examiners.

2. Pleading 🔑214(8)—For purpose of ruling on demurrer, well-pleaded allegations are presumed to be true.

For purpose of ruling on demurrer, all well-pleaded allegations contained in complaint are presumed to be true.

3. Physicians and surgeons 🔑11(3)—On appeal from judgment sustaining demurrer in certiorari proceeding reviewing board of medical examiner's action revoking license, court was bound by allegations in petition regarding evidence introduced at hearing.

On appeal from judgment sustaining demurrer in certiorari proceeding to review order of board of medical examiners revoking petitioner's license to practice medicine, appellate court was bound by allegations contained within petition presented to lower court as to evidence introduced at hearing of charge against petitioner.

4. Physicians and surgeons 🔑11(3)—Board of medical examiners had no jurisdiction to revoke license to practice medicine, where all evidence received by board was inadmissible (St. 1913, p. 722, § 14, as amended).

Under St. 1913, p. 722, § 14, as amended, providing that, in determining whether license of medical practitioner should be revoked, board "shall hear such proper evidence as may be adduced before it," board of medical examiners was without jurisdiction to revoke license to practice medicine, where none of evidence received by board on hearing of charges was properly admissible.

5. Judgment 🔑572(2)—Judgment on sustaining of demurrer for failure to state cause of action does not bar subsequent action in which essential fact missing in first case is supplied.

Judgment, on sustaining of demurrer to complaint before board of medical examiners to revoke license to practice medicine for failure to state cause of action, did not bar subsequent action in which essential facts missing in first case were supplied.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

In a proceeding instituted before the State Board of Medical Examiners, composed of Percy T. Phillips and others, the license of Philip Dyment to practice medicine and surgery was revoked. Philip Dyment thereafter filed a petition for a writ of certiorari to review the order of revocation. From a judgment for the Board, the petitioner appeals. Reversed.

L. E. Dadmun, of Los Angeles, for appellant.

Otto J. Emme, of Los Angeles, for respondents.

HOUSER, J. In a proceeding instituted before the respondent board of medical examiners, the license of appellant to practice medicine and surgery in this state was revoked. Thereafter appellant filed in the superior court a petition for a writ of certiorari, in which it was prayed that the proceedings before said board which resulted in the order for the revocation of petitioner's license to practice medicine and surgery be reviewed, and said order annulled. The respondent board demurred to said petition, with the result that the demurrer was sustained without leave to amend the petition. Thereupon judgment was entered in favor of respondent; and it is from such judgment that this appeal is prosecuted.

[1] In substance, one of the contentions of appellant rests upon the allegation in his petition for a writ of certiorari to the effect that, because one of the members of respondent board of medical examiners was prejudiced against petitioner, and because, in the circumstances, the vote of such member was necessary in order that a legal order of revocation of the license of petitioner be made by said board, a qualified quorum of said respondent board was not present at its proceedings in said matter, and, consequently, that it was without jurisdiction in the premises. It thus appears that, as to this contention, specifically the question of whether the petition presented to the superior court stated a cause of action depended upon whether the alleged prejudice toward the accused of an essential member of the trial board amounted to his legal disqualification.

It is urged by appellant that, in the matter of determining the issues in the proceeding before the board of medical examiners, such board was necessarily acting in a quasi judicial capacity; and, consequently, that any disqualification arising from bias or prejudice which, in similar circumstances, would so affect a judge as to prevent him from acting judicially in a matter pending in the court in which he was presiding, would also act as a like disqualification when applicable to a member of a board sitting in a quasi judicial capacity.

Subdivision 4 of section 170 of the Code of Civil Procedure (amended St. 1927, p. 1403) in substance provides that no justice, judge,

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

or justice of the peace shall sit or act as such in any action or proceeding when it appears that either party to such litigation cannot have a fair and impartial trial before such judicial officer by reason of his prejudice or bias. As originally enacted, prejudice or bias of the judge before whom an action or proceeding was to be tried was not a ground for his disqualification. Beginning as early as the case of McCauley v. Weller, 12 Cal. 500, and continuing in an unbroken line of decisions through the Supreme Court of this state, as expressed in People v. Mahoney, 18 Cal. 185; People v. Williams, 24 Cal. 31; People v. Shuler, 28 Cal. 490; Hibberd v. Smith, 39 Cal. 145; Bulwer Mining Co. v. Standard Mining Co., 83 Cal. 613, 23 P. 1109; and In re Jones, 103 Cal. 397, 37 P. 385, it is held that bias or prejudice on the part of the trial judge constitutes no legal incapacity to sit on the trial of a cause. That such was the law of this state until the adoption of an amendment to section 170, Code of Civil Procedure (St. 1897, p. 287), by which bias and prejudice of a trial judge was expressly made a ground of disqualification, is attested by the statement occurring in People v. Compton, 123 Cal. 403, 412, 56 P. 44, 48, that:

> "While at civil law the bias or prejudice of a judge against a litigant was a valid ground of recusation, as it was valid ground of challenge against a juror, it was not so at common law, nor has it been so in this state until the change effected by a recent amendment to the Code."

Since before the enactment of the special statute relating thereto bias or prejudice did not constitute a valid ground of disqualification of a judicial officer, it is apparent that, in the absence of an inclusion in the statute of a provision affecting members of boards of medical examiners, any bias or prejudice of any of such members in a matter pending before such board would have no effect upon its jurisdiction. The case of Butler v. Scholefield, 54 Cal. App. 217, 201 P. 625, is decisive of the point. The authorities are there reviewed, and it is held that, although, while engaged in the prosecution of a charge against an employee of the county, its board of supervisors in a sense exercises judicial functions, strictly speaking its action is merely administrative, and that a member of the board who is biased or prejudiced, as evidenced by his activities in the matter preceding or during the hearing, is not for such reason disqualified to sit in such matter as a member of the board.

[2-4] It is next contended by appellant that, because the petition contained an allegation to the effect that the *only evidence* introduced at the hearing of the charge against petitioner was hearsay, the demurrer to the petition was improperly sustained.

In addition to the allegation to which attention has just been directed, the petition purports to set forth a substantial résumé of all the evidence adduced before the board of medical examiners on the hearing of the charge. It is a well-established rule that, for the purpose of ruling on a demurrer, all the well-pleaded allegations contained within the complaint are presumed to be true. It would serve no useful purpose to herein set forth the evidence introduced before the respondent medical board in support of the charge against petitioner herein. Suffice it to say that, assuming, as it must, that the evidence to which attention is directed by the allegations of the petition was *all* the evidence presented in substantiation of the charge, this court is convinced that, under the ordinary rules of evidence, while (assuming its substantiation) in *substance* it may have been properly admissible in evidence, nevertheless, in the *form* in which it was attempted to be introduced, it was altogether hearsay and incompetent.

Section 14 of the act regulating the examination of applicants for license to treat diseases, etc. (Stats. 1913, p. 722, and various amendments thereto), among other things, provides in effect that, in determining the issues presented in a charge wherein the object is the revocation of the license of a medical practitioner, the board "shall hear such proper evidence as may be adduced before it."

Analogously, it may be noted that, by section 77 of the Workmen's Compensation, Insurance and Safety Act as originally enacted in this state (Stats. 1913, p. 279), it was provided that the industrial accident commission should not be bound "by the technical rules of evidence." Nevertheless, it was held in the case of Englebretson v. Industrial Accident Commission, 170 Cal. 793, 151 P. 421, that the commission had no power to make an award where the only evidence in the case consisted of hearsay testimony. To the same effect is the ruling in Connolly v. Industrial Accident Commission, 173 Cal. 405, 410, 160 P. 239.

The case of Thrasher v. Board of Medical Examiners, 44 Cal. App. 26, 185 P. 1006, like the instant proceeding before this court, was an appeal from a judgment of the superior court made and entered upon a hearing of a writ of review on an order made by the board of medical examiners revoking a license to practice medicine and surgery in this state. The chief contention on the appeal related to the admissibility and the effect of hearsay evidence. The matter was thoroughly considered, especially in view of the provision of the statute that on the hearing of charges against a medical practitioner the board of medical examiners had power to "hear such proper evidence" as might be adduced before it. It was there held that an order made by such board, based solely upon hearsay evidence, was without legal support, and consequently was beyond the jurisdiction of the board. While in the later case of Minaker v.

Adams et al., as Members of the Board of Medical Examiners, 55 Cal. App. 374, 203 P. 806, the correctness of the ruling in the Thrasher Case is recognized, it is held that because, aside from the hearsay evidence introduced at the hearing before the board of medical examiners, other unobjectionable evidence was introduced which in itself was sufficient to sustain the order of the board, the error relating to the hearsay evidence was overcome, with the result that the board had jurisdiction to make the order of which complaint was made.

On this appeal this court is bound by the allegations contained within the petition presented to the lower court. As hereinbefore indicated, in the state of the record it appears that none of the evidence received by the respondent board on the hearing of the charges against the appellant was properly admissible, from which it results that said board was without jurisdiction to make its order revoking the license of appellant to practice medicine and surgery in this state.

[5] Further history of the present litigation discloses the fact that some time in the month of August, 1920, in a proceeding brought before the board of medical examiners, appellant was charged "with having been guilty of unprofessional conduct by violating section 14 of chapter 354 of the Statutes of 1913, and acts amendatory thereof, of the state of California, in that he, Philip Dyment, procured by fraud and misrepresentation a certificate to practice medicine and surgery in the state of California." After hearing thereon, the board of medical examiners adopted a resolution by which the license of appellant to practice medicine and surgery in this state was revoked. Thereafter, on appeal from a judgment in a proceeding in certiorari in the superior court by which the order of the board of medical examiners was affirmed (57 Cal. App. 260, 207 P. 409), it was held by this court, as well as by the Supreme Court in a memorandum opinion rendered on the denial of an application for hearing in that court, that the complaint before the board of medical examiners by which the appellant was charged "with having been guilty of unprofessional conduct" was insufficient to give the board jurisdiction. The judgment of the superior court was reversed, with directions to it to enter judgment annulling the order made by the board of medical examiners, and directing the board to take such further proceedings in the matter "as it might be advised. * * *" Pursuant to such last-mentioned order and direction, the superior court caused to be entered a judgment which, among other things, provided for the annulment of the order of revocation of the license of appellant, but "that the board of medical examiners may take any and such further proceeding as they may see fit. * * *" Thereupon the complaint upon which this proceeding is founded was filed, wherein it was charged that appellant was "not a fit and proper person to practice medicine and surgery in the state of California"; the specific acts and conduct of appellant leading to which statement or charge being specifically set forth. In his answer to such charge, among other things, in effect the accused pleaded "res adjudicata."

In the former proceeding between the same parties, the effect of the judgment rendered by this court (57 Cal. App. 260, 207 P. 409) is that, by reason of the fact that the complaint failed to set forth sufficient facts, the board of medical examiners was without jurisdiction to enter its order in the premises; or, in other words, that a demurrer to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action should have been sustained. By California authorities (15 Cal. Jur. p. 127), the law appears to be settled that, while a judgment upon the sustaining of a demurrer to the complaint for failure to state a cause of action is a bar to a subsequent action setting up the same facts, that effect is not produced, if in the second case an essential fact, missing in the first case, be supplied. It follows that the plea of "res adjudicata" cannot be sustained. It therefore becomes unnecessary to consider other reasons suggested as being fatal to such plea.

It is ordered that the judgment be, and it is, reversed.

We concur: CONREY, P. J.; YORK, J.

93 Cal. App. 72

RINALDO v. BOARD OF MEDICAL EXAMINERS OF CALIFORNIA et al.

(Civ. 5217.) ★

District Court of Appeal, Second District, Division 1, California. July 3, 1928.

Hearing Denied by Supreme Court Aug. 23, 1928.

Physicians and surgeons 🔑11(3) — Board of medical examiners had no jurisdiction to revoke license to practice medicine, where evidence heard by board was hearsay.

Board of medical examiners was without jurisdiction to make order revoking license to practice medicine and surgery, where all evidence introduced before board at hearing of charges was hearsay, and consequently inadmissible.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

In proceeding before the State Board of Medical Examiners, composed of Percy T. Phillips and others, the license of Eugene J. Rinaldo to practice medicine and surgery was revoked. Eugene J. Rinaldo thereafter filed a petition for writ of certiorari to review the proceedings before the board. From a judgment for the board, petitioner appeals. Reversed.

L. E. Dadmun, of Los Angeles, for appellant.

Otto J. Emme, of Los Angeles, for respondents.

HOUSER, J. This is an appeal from a judgment in favor of respondent board of medical examiners rendered on a petition for a writ of certiorari presented to the superior court for the purpose of reviewing certain proceedings before said board wherein and whereby the license of the petitioner (appellant herein) to practice medicine and surgery in this state was revoked.

With one exception, to wit, that relating to the defense of "res adjudicata," the points presented by appellant herein for a reversal of the judgment are identical with those urged in the case of Dyment v. Board of Medical Examiners (No. 5216) 268 P. 1073, this day decided by this court. The record herein discloses the fact that all the evidence introduced before the respondent board at the hearing of the charges against the accused was hearsay, and consequently inadmissible—with the legal result that the board was without jurisdiction to make the order of which complaint is made.

Relying upon the authority of the said case of Dyment v. Board of Medical Examiners, supra, it is ordered that the judgment be, and it is, reversed.

We concur: CONREY, P. J.; YORK, J.

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93 Cal. App. 17

LINDER HARDWARE CO. v. KELLEY et al.

(Civ. 3456.)

District Court of Appeal, Third District, California. June 27, 1928.

Agriculture 🔑11—Claim for hay furnished contractor and used in feeding horses employed in leveling, checking, and ditching land held not lienable (Const. art. 20, § 15; Code Civ. Proc. § 1183).

Hay supplied to contractor, and used by him in feeding horses employed in leveling, checking, and ditching land, *held* not lienable material under Const. art. 20, § 15, and Code Civ. Proc. § 1183, permitting persons furnishing materials to have lien on property for value of the materials furnished, and for the use of appliances, teams, or power.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Linder Hardware Company against Niel Kelley and C. S. Roby. Judgment for plaintiff, and defendant last named appeals. Reversed.

Russell & Heid, of Tulare, for appellant.

G. W. Zartman, of Tulare, for respondent.

HART, Acting P. J. This is an action for the foreclosure of certain alleged materialmen's liens for materials furnished defendants, which, it is alleged, were used in the work of improving certain real property. The complaint is in three counts, and thus sets forth the alleged claims of three different alleged lien claimants, to wit: W. H. Wilbur (count 1), J. M. Dye (count 2) and B. S. Gurnee (count 3). Each of said alleged lien claimants, so the complaint states, by an instrument in writing, assigned his alleged claim to the plaintiff here, "who is now the owner and holder thereof." At the trial, the alleged claim of lien of J. M. Dye was abandoned. The court found that the defendants were indebted to the plaintiff in the total sum of $448.45, representing the respective claims of the plaintiff's assignors, Wilbur and Gurnee, and by its decree adjudged that said total sum constituted "a valid lien on the premises" therein described, and further adjudged that "said premises be sold, or so much thereof as may be necessary to raise the amount due to the plaintiff from said defendants," etc. A motion for a new trial by the defendants was denied. This appeal is from the judgment.

The record shows that during the month of January, 1925, the defendant Kelley and the defendant Roby entered into a written agreement whereby Kelley agreed to level, check, and ditch for Roby 100 acres of a certain tract of land belonging to the latter, and which is situated in Tulare county. It is averred in each of the counts or causes of action set forth in the complaint that each of the alleged lien claimants, at different times

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

during the progress of the work which said Kelley had agreed to perform for said Roby, "furnished to said Neil Kelley, and which was used feeding the teams employed in doing the work done on said land under said contract * * * a certain quantity of hay at the agreed price" of ($20 per ton in the case of Wilbur, of $18 per ton in the case of Dye, and of $20 per ton in the case of Gurnee); that none of said claims has been paid; that on the 8th day of July, 1925, said Wilbur and said Dye, and on the 13th day of July, 1925, said Gurnee, each "filed in the office of the county recorder of said county of Tulare a notice of lien for the purpose of securing and perfecting a lien for the moneys due him as aforesaid, upon the lands hereinbefore described, under the provisions of chapter 2 of title 4 of the Code of Civil Procedure of the state of California, and which lien was on said day recorded in volume ——, at page ——, a copy of which lien is hereto attached," etc.

It is contended by the defendants that hay supplied to the contractor to be used and used by the latter in feeding horses or other work animals employed in the performance of any work of improvement upon the real property of the owner thereof does not constitute lienable material under the mechanics' and materialmen's lien law of this state. The contention is sound, and must be sustained. In support of this conclusion, if it needs support other than that afforded by the language itself of the provisions of the statutes enacted in pursuance of the mandate of section 15 of article 20 of our Constitution, we need go no further than the case of Arata & Peters, Inc., v. Snow Mountain Water & Power Co., recently decided by the Court of Appeal of the First Appellate District, in an opinion by Justice Nourse, and reported in 267 P. 932. We here quote from the opinion in that case the following:

> "The amended complaint alleges that the plaintiff furnished to the contractor certain articles of food consisting of fruit, vegetables, onions, beans, and potatoes, all of which 'were actually used and consumed in the construction work' on a dam which the contractor was building for the water company under written contract. The usual allegations as to the failure to pay, the filing of a lien, and the amount due the contractor from the owner followed, but these do not call for consideration on this appeal. The essential question is whether a mechanic's lien will lie under our statutes for the character of supplies alleged to have been furnished.
>
> "Section 1183, Code of Civil Procedure, permits 'mechanics, materialmen, * * * and all persons * * * furnishing materials to be used or consumed in * * * the construction * * * of any building, * * * or other structure' to have a lien upon the property 'upon which they have bestowed labor or furnished materials, for the value of such * * * materials furnished and for the value of the use of such appliances, teams or power.' Prior to the amendment of the section in 1911, it was held that the section did not authorize a lien for the wages of a cook engaged to cook meals for the employees of a contractor under a private contract (McCormick v. L. A. C. W. Co., 40 Cal. 185, 187), or for one who supplied meat to be consumed by the employees of a mine. Malone v. Big Flat G. M. Co., 76 Cal. 578, 586, 18 P. 772. The purport of the decisions is that the materials which are made lienable are those only which have entered into the construction of the structure under contract. Ensele v. Jolley, 188 Cal. 297, 300, 204 P. 1085, and cases cited. This rule has been uniformly followed in other states. Carson & Co. v. Shelton, 128 Ky. 248, 107 S. W. 793, 15 L. R. A. (N. S.) 509; Ferguson v. Despo, 8 Ind. App. 523, 34 N. E. 575, 576; Pennsylvania Co. v. Mehaffey, 75 Ohio St. 432, 80 N. E. 177, 181, 116 Am. St. Rep. 746, 9 Ann. Cas. 305; Armour & Co. v. Western Construction Co., 36 Wash. 529, 78 P. 1106, 1107; Tsutakawa v. Kumamoto, 53 Wash. 231, 101 P. 869, 871, 102 P. 766; Dudley v. Toledo, A. A. & N. M. Ry. Co., 65 Mich. 655, 32 N. W. 884, 886."

The opinion proceeds to negatively answer the argument of the appellant (the alleged lien claimant), by which it undertook to maintain that, after the decision of the cases referred to in the above quotation, the Legislature, by an amendment of section 1183 of the Code of Civil Procedure (involving the basic provisions of the mechanics' lien statutes), had "broadened the scope of the Mechanic's Lien Act so as to include all persons 'bestowing skill or other necessary services' or furnishing materials to be used 'or consumed' in the construction or alteration of any building or structure, and because the Legislature declared that the act of 1911 should be liberally construed (section 14, St. 1911, p. 1313)," and that, therefore, the cases cited in the opinion were not in point. As already in effect stated, we agree with the reasoning and the conclusion in that case. It is decisive of the instant case.

The judgment is reversed.

We concur: PLUMMER, J.; BARTLETT, Justice pro tem.

93 Cal. App. 62

PEOPLE v. TOLLI. (Cr. 1466.) ✱

District Court of Appeal. First District, Division 1, California. June 30, 1928.
Hearing Denied by Supreme Court Aug. 27, 1928.

1. **Criminal law 🔑829(3)—Refused instruction that no larceny can be committed unless there is asportation and animus furandi held sufficiently covered by instruction given.**

Defendant's refused instruction that no larceny can be committed unless there is an asportation of personal property, not the property of defendant, with an animus furandi, *held* sufficiently covered by given instruction to acquit of burglary, unless jury believed to moral certainty and beyond reasonable doubt that defendant when he entered premises intended to commit larceny.

2. **Criminal law 🔑829(3)—Refused instruction to acquit of burglary if defendant formed intent to commit larceny as he entered, held sufficiently covered by instruction given.**

Defendant's refused instruction to acquit of burglary or attempt to commit burglary, if defendant formed intent to commit larceny as he entered building, *held* sufficiently covered by given instructions to acquit, if defendant went into the building merely to investigate or look about and not with intent to steal, and to acquit unless jury believed to a moral certainty and beyond reasonable doubt that he intended to commit larceny when he entered.

3. **Criminal law 🔑814(20)—Where evidence required acquittal if defendant was not guilty of first degree burglary, court properly refused to instruct respecting lesser degree.**

Where evidence was such that defendant must have been acquitted had jury not been satisfied beyond reasonable doubt that he was guilty of first degree burglary, court properly refused instruction authorizing conviction of burglary, second degree.

4. **Criminal law 🔑833—Court's statement that instructions to be read were offered by defendant, and were to be accepted as law of case, held not prejudicial.**

Trial court's statement that certain instructions about to be read to the jury were offered by defendant, and that they were to be accepted as the law of the case and as such entitled to the jury's consideration, *held* not prejudicial.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

John Tolli was convicted of burglary in the first degree, and he appeals. Affirmed.

Ernest B. D. Spagnoli, Wm. F. Herron, and Joseph M. Trusty, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

CASHIN, J. The defendant was charged, by an information filed in the superior court of the city and county of San Francisco, with the crime of burglary. On the trial he was convicted of burglary in the first degree, and, from the judgment entered, an appeal was taken to this court.

The evidence shows that the defendant was apprehended in a hardware store in San Francisco while attempting to open a safe with an electric drill. Another safe in the same premises had been previously opened with a drill, and a money box removed therefrom, which was placed near the rear entrance to the store. It was further shown that the defendant was armed with a loaded revolver, and that the door of the storeroom had been forced, a padlock thereon broken, and the door lifted from the rolls sufficiently to effect an entrance into the building.

It is claimed that the trial court erred in giving and in its refusal to give certain instructions to the jury and that the judgment for this reason should be reversed.

[1] Appellant complains that the following instruction was refused:

> "You are instructed that no larceny can be committed unless there is an asportation—that is, a taking and carrying away of personal property not the property of the defendant—and that there must also exist an animus furandi."

The court, however, gave the following instruction, which in every particular material to the issues covered that offered by the defendant:

> "You cannot convict the defendant of burglary unless you believe to a moral certainty and beyond a reasonable doubt that the defendant when he entered the premises described in the information intended to commit larceny."

[2] The court was also asked to instruct that:

> "If the defendant formed an intent to commit larceny after he entered the premises or the building, he cannot be convicted of burglary or of an attempt to commit burglary."

This instruction was also refused, but it was likewise sufficiently covered by two instructions given by the court, which were as follows:

> "If the defendant went into the building and store in question merely to investigate or look about and not with any intent to steal, then you cannot convict the defendant of the offense charged."

And: "You cannot convict the defendant of burglary unless you believe to a moral certainty and beyond a reasonable doubt that the defendant when he entered the premises described in the information intended to commit larceny."

[3] The following instruction was also refused:

> "If you believe the evidence warrants it, you are at liberty to find the defendant guilty of an attempt to commit burglary of the second degree."

★Hearing denied by Supreme Court.

In the present case the evidence was such that the defendant must have been acquitted had the jury not been satisfied beyond a reasonable doubt that he was guilty of burglary of the first degree; and, as held in the following cases, it was proper to refuse to instruct as to a lesser offense or degree included within the offense charged where the evidence was of such a nature as to warrant, in the event that the defendant was guilty at all, only a verdict for the higher offense or degree. People v. Swist, 136 Cal. 520, 69 P. 223; People v. Rogers, 163 Cal. 476, 126 P. 143. The instruction was properly refused.

[4] Appellant further contends that the motion in arrest of judgment, based upon the claim that the information was insufficient to state a public offense, should have been granted, and assigns as error a statement by the trial court that certain instructions about to be read to the jury were offered by the defendant, that they were to be accepted as the law of the case and as such entitled to the jury's consideration. We find no merit in the first contention, nor in our opinion was the statement complained of prejudicial. People v. Wilder, 134 Cal. 182, 66 P. 228. A reading of the evidence shows that the verdict of the jury was fully supported, and the record discloses no ground for a reversal of the judgment.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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92 Cal. App. 446

BURT v. HELLMAN. (Civ. 5805.) *

District Court of Appeal, Second District, Division 1, California. July 6, 1928.

Hearing Denied by Supreme Court Aug. 6, 1928.

1. Covenants ⚷79(3)—Deed reserving right to use particular lots in tract for hotel did not give owners of other lots benefit of restrictions.

Paragraph in deed referring to fact that grantor reserved right to use or deed for use certain numbered lots in tract for hotel site did not purport to provide that all deeds issued in tract other than as to particular lots enumerated in paragraph would have any particular form or character of restriction, and did not indicate that restrictions were intended for benefit of lots in entire tract.

2. Covenants ⚷79(3)—Grantor's reservation of certain use of certain lots in tract does not grant right to every owner to enjoin such use of other property.

Reservation of right in grantor to use certain lots in certain manner does not in itself indicate that grantor is granting right to every owner of lots in tract to enjoin any use of other property in particular manner, but such reservation may be only attempt by grantor to save himself blameless from damages that might be sustained by reason of use to which grantor reserves right to put any property in tract.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

On petition for rehearing. Petition denied. For former opinion, see 268 P. 436.

Page, Nolan, Rohe & Hurt, of Los Angeles, for appellant.

Hunsaker, Britt & Cosgrove, of Los Angeles, for respondent.

PER CURIAM. In the petition for a rehearing, the statement is made that the court inadvertently overlooked a contention of petitioner which petitioner says is supported by the case of Gamble v. Fierman (Cal. App.) 255 P. 269. As a matter of fact, this court was well aware that in the deed involved in the case of Gamble v. Fierman, the following was part thereof:

> "The restrictions and conditions contained in this deed shall be covenants *running with the land*, and shall operate for the *benefit of*, and may be enforced by the *seller or the owner of any lot in said tract 'Vista Del Oro.'*"

Although the language used in this petition for a rehearing may be construed, if it is not carefully read, to contain a statement that in the deed in question in the case at bar there was some similar provision as was in the deeds in the case of Gamble v. Fierman, as a matter of fact there is in the case at bar no reference to any other lot within the tract or how it may be used, excepting only paragraph 6 of the restriction, which merely and only provides as to certain other lots in the tract:

> "Provided further that nothing herein contained shall be construed as in any manner prohibiting or preventing the party of the first part from constructing upon lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 21 of block 75 of said Beverly Hills, or of causing to be constructed thereon, or of selling said property for the purpose of having constructed thereon, a hotel, nor as prohibiting or preventing the person or persons managing and operating said hotel from dispensing liquors with meals to the bona fide guests of such hotel."

There is nothing in the language used in Gamble v. Fierman, supra, which in any way conflicts with the decision now on file herein. In the case of McBride v. Freeman, 191 Cal. 152, 215 P. 678, there was in the deed a reference to other lots in the tract and how they might be used. Among other restrictions in the deed in that case was the following:

> "Subject to following building restrictions: No offices, stores, flats, lodging or apartment or any business building of any description to be erected, kept or maintained on said property, but a residence, same when erected to cost not less than three thousand ($3,000) dollars on lots 48, 49, 50, 51, 52, 53 and south 30 feet of

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court.

lot 47; to cost not less than thirty-five hundred ($3,500) dollars on lot 44 and north 15 feet of lot 43; to cost not less than four thousand ($4,000) dollars on north 90 feet of lot 47: and all to be placed at a uniform distance of forty-two and one-half feet from front property line on Willard avenue."

There was in the complaint in the case of McBride v. Freeman an allegation that all of the lots in the tract had been sold, or were being offered for sale, in accordance with a general plan or scheme, and all subject to the restrictions and conditions, and that said restrictions were imposed and said general plan or scheme adopted for the general benefit of all lots in said tract, and that the respective lots owned by plaintiffs, and each of them, and the lots owned by defendants, and therein described, and the other lots in said tract sold and conveyed as set out, were each and all conveyed by a common grantor, to wit, by one E. L. Allen, and subject to the restrictions and conditions set out and pursuant to and in accordance with a general plan or scheme for the improvement of said tract and the several groups of lots as shown on the map referred to in the respective deeds. There was in the complaint in the case of McBride v. Freeman also an allegation that:

> "Prior to on or about February 25, 1919, plaintiffs or their respective predecessors in interest, in reliance upon said general plan or scheme as hereinbefore alleged, and in reliance upon the restrictions and conditions imposed upon and limiting the use of said lots in the said Minalita tract, and in particular those lots hereinbefore enumerated, purchased their respective lots and erected and completed the erection in each instance of a first-class private residence in compliance with said restrictions and conditions, and each of plaintiffs ever since the said date hereinbefore in paragraph III alleged, has maintained his said residence so erected and each is still maintained and occupied by plaintiffs respectively and their respective families as a private residence."

Upon the trial of that case in the superior court (as shown by the recitals in the judgment), objection was made to the introduction of any evidence in support of the complaint, which objection was sustained, and judgment was thereupon ordered in favor of the defendants. Affirming that judgment, the Supreme Court held that the complaint had failed to state a cause of action.

[1] It was considered by this court, when the main opinion was written, that paragraph 6 in the deeds in evidence (referred to in this application for a rehearing), which referred to the fact that the grantors reserved the right to either use or deed for use certain lots in the tract for a hotel site, and on which they might provide for the sale of liquor, did not in any way on its face purport to provide that all deeds issued in the tract other than as to those particular lots enumerated in such paragraph 6 would have any particular form or kind or character of restriction. We could not read into it anything of the kind. We did not say that the restrictions were identical, but merely that the dispute was *almost identical* with the disputes in the case of McBride v. Freeman and the case of Werner v. Graham, 181 Cal. 174, 183 P. 945. We considered that the nature of the dispute was best shown by the briefs and transcript in McBride v. Freeman, which were read by the writer of the opinion in this case before the opinion was prepared.

This court meant to hold that there is nothing in any of the deeds shown in evidence in this matter which would entitle the plaintiff to maintain the cause of action brought herein, and we so hold upon the authority of the case of McBride v. Freeman and the case of Werner v. Graham. We purposely avoided any reference to the decision in the case of Gamble v. Fierman, supra, which was discussed on oral argument, as we found that in that case the deeds involved contained a *direct* and *positive* statement that the restrictions should operate for the benefit of and be enforced by any *owner of any lot in the said tract.* As was said in the case of Gamble v. Fierman, supra:

> "As already noted, the first question to be considered is whether or not the foregoing language in the deed to defendants' grantor, construed in the light of the surrounding circumstances, contains expressions from which may be inferred any intent on the part of the parties thereto to create the equitable easement sought to be invoked in this action. In the Werner and McBride cases cited above, and in the case of Berryman v. Hotel Savoy, 160 Cal. 559, 117 P. 677, 37 L. R. A. (N. S.) 5, and in [Bresee] v. Dunn, 178 Cal. 96, 172 P. 387, the deed relied upon contained no language, express or implied, referring to any general plan or scheme of building improvement, and contained no language showing that it was the intent of the parties to the deed that the restrictions in the deed should be for the benefit of the subsequent owners or holders of all the lots in a defined or designated tract of land subdivided into residence lots."

[2] An examination of all of the restrictions contained in the deeds before the court in the instant case discloses the fact that there is nothing in any language used that indicates the intention of the grantor and grantees that the restrictions were intended to be for the benefit of all the lots in the tract. If the deed in the instant case contained the language apparently claimed in the petition for a rehearing, we would certainly have had to discuss the case of Gamble v. Fierman, supra, but we find no language used in the deeds themselves which provides or which contains anything indicating in any manner that the restrictions contained therein were intended to be for the benefit of all the owners of lots in the whole tract. A reservation of a right in a grantor to use a certain lot or

lots in a certain manner does not in itself indicate that he is granting the right to every owner of lots in the tract to enjoin any use of any other property in any particular manner. Such reservation may be only an attempt of the grantor to save himself blameless from any action in damages or otherwise for any damage that might be sustained by any person by reason of the use to which the grantor reserves the right to put any property in the tract, either by himself or his grantees.

The petition for a rehearing is therefore denied.

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92 Cal. App. 428

BRAY v. SUPERIOR COURT, IN AND FOR SISKIYOU COUNTY et al. (DUKE et al., Interveners). (Civ. 3609.) ★

District Court of Appeal, Third District, California. July 6, 1928.

Hearing Denied by Supreme Court Aug. 6, 1928.

1. Prohibition 🔑28—On application for prohibition, whether trial court has jurisdiction is only question that may be considered (Code Civ. Proc. § 1102).

On application for prohibition as defined in Code Civ. Proc. § 1102, only one question can be determined, and that is whether trial court has jurisdiction to proceed.

2. Prohibition 🔑11—Prohibition will not issue to restrain exercise of jurisdiction of trial court, no matter how erroneous (Code Civ. Proc. § 1102).

Writ of prohibition, as defined by Code Civ. Proc. § 1102, will not issue to restrain exercise of jurisdiction of trial court, no matter how erroneous.

3. Prohibition 🔑3(2)—Alleged unconstitutionality of section of act held not ground for writ of prohibition; trial court not being thereby deprived of jurisdiction and remedy being afforded by appeal (Code Civ. Proc. § 1102).

When application for prohibition as defined by Code Civ. Proc. § 1102, was made on ground that section 32 of Water Commission Act (St. 1913, p. 1012) was unconstitutional and section 46 of the act (St. 1913, p. 1012) provided that unconstitutionality of some of act should not affect rest, it appearing that trial court had jurisdiction to proceed under section 36b (St. 1917, p. 236), *held* prohibition would not be granted, since question of constitutionality was immaterial; there being complete remedy in appeal from any error resulting from alleged unconstitutionality.

On petition for rehearing. Petition for rehearing denied.

For former opinion, see 268 P. 374.

Hearing denied by Supreme Court: SEAWELL, RICHARDS and CURTIS, JJ., voting for a hearing.

Horace V. Ley, of Yreka, and Wm. V. Cowan, of Oakland, for petitioner.

Allen & McNamara, of Yreka, for respondents.

Nathan Moran, of San Francisco, for interveners.

PER CURIAM. This cause is again before us for consideration upon the petition of interveners for a rehearing. The petition for rehearing is based upon the alleged unconstitutionality of section 32 of the Water Commission Act (St. 1913, p. 1012), and is urged upon our attention by reason of the fact that in the opinion herein filed (268 P. 374) upon petition for a writ of prohibition the provisions of that section were not referred to, set forth or discussed.

[1-3] Upon an application for prohibition, only one question can be considered, and that is whether the trial court has jurisdiction to proceed. See section 1102, Code Civ. Proc., and the annotations thereto, contained in Kerr's Cyc. Codes. If, under the Water Commission Act, and the provisions of section 36b (St. 1917, p. 236) thereof, the trial court has jurisdiction to proceed, it is utterly immaterial, for the purposes of the determination of the merits of the petition for prohibition, whether section 32 of the act is or is not unconstitutional. If section 32 of the Water Commission Act is void, as alleged by the interveners, then and in that case the interveners have a plain, speedy, and adequate remedy to remove any alleged cloud that might be cast upon the title to their property by reason of any acts of the water commission or by appeal from any decree or judgment of the trial court assessing any of the costs mentioned in said section 32 against the property belonging to any of the petitioners. As stated by this court in Lightner Mining Co. v. Superior Court, 14 Cal. App. 642, 112 P. 909, a writ of prohibition will not issue to restrain the exercise of jurisdiction by a trial court, no matter how erroneous. Section 46 of the Water Commission Act specifies that the intent of the Legislature is to pass the act, even though certain sections thereof may be held unconstitutional, and that such holding shall not affect the validity of the remaining portions of the act. As we read section 32 of the Water Commission Act, all its provisions may be held unconstitutional without affecting the validity of any other section of the act. Section 32 in its provisions is not so interdependent with or upon any other section of the act that the holding thereof void would affect the validity of any other section. Nor do we find, nor has our attention been called to any other section of the act which is so interdependent with or upon section 32 as to render them incapable of enforcement, or uncertain or inoperative in the event that section 32 of the Water Commission Act is finally held unconstitutional. While section 32 was referred to and mentioned in the original petition for a writ of

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★Hearing denied by Supreme Court.

prohibition herein, its provisions were not considered and set forth in the opinion of this court, for the reasons which we have herein stated.

Being of the opinion that the trial court has jurisdiction to proceed as stated in our opinion heretofore filed, no basis for the issuance of a writ of prohibition has been presented by the interveners herein, even though their contentions as to the invalidity of section 32 of the Water Commission Act be meritorious. The contentions of the interveners may properly be presented to the trial court, and, if the trial court holds adversely thereto, a plain, speedy, and adequate remedy exists for the correction of any error if such determination be erroneous.

The petition for rehearing is denied.

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92 Cal. App. 775

PEOPLE v. LAMANUZZI. (Cr. 1461.)

District Court of Appeal, First District, Division 1, California. June 27, 1928.

1. Indictment and information 🔑114—Information alleging previous plea of guilty of possessing intoxicating liquor and judgment thereon held sufficient, though not alleging "unlawful" possession (Pen. Code, § 960).

Information alleging that defendant "previously pleaded guilty to the offense of possessing intoxicating liquor," and "that the judgment upon said plea of guilty was pronounced" on certain date, *held* not insufficient in failing to allege that possession charged was unlawful; judgment of conviction being sufficiently described, and no substantial right of defendant prejudiced within Pen. Code, § 960.

2. Criminal law 🔑1202(6)—Judgment fixing punishment for "offense" of possessing intoxicating liquor held to show prior conviction, though not reciting that possession was unlawful.

Police court judgment, adjudging "as a punishment for the offense of possessing intoxicating liquor * * * as charged in the information * * * that defendant pay a fine," etc., *held* not void because not expressly reciting that possession charged was unlawful, but sufficient to show prior conviction of such offense.

3. Criminal law 🔑1202(3)—Testimony that intoxicating liquor was found on defendant's premises twice before offense charged held competent on issue of prior conviction of possessing such liquor.

In trial for unlawful possession of intoxicating liquor, and previous conviction of like offense, testimony that intoxicating liquor was found on premises in possession or control of defendant on two occasions preceding date of offense charged was competent on issue of prior conviction of like offense.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Victor Lamanuzzi was convicted of unlawful possession of intoxicating liquor and previous conviction of a like offense, and he appeals. Affirmed.

Lindsay & Gearhart, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

CASHIN, J. Defendant was charged by an information filed in the superior court of Fresno county with the unlawful possession of intoxicating liquor, and with having been previously convicted of a like offense. He was convicted on each charge, and appeals from the judgment entered thereon.

It is urged that the previous conviction was not charged by the information in the manner required by law; that the evidence was insufficient to support this charge; and that the court erred in admitting certain testimony over objection.

[1] The information alleged that the defendant "in the police court of the city of Fresno previously pleaded guilty to the offense of possessing intoxicating liquor; that the judgment upon said plea of guilty was pronounced, rendered, given, and made on the 3d day of May, 1923, and has never since been reversed, annulled, or set aside." It is contended that the information was insufficient, in that it failed to allege that the possession charged in the police court was unlawful.

[2] We find no merit in this, as the pleading sufficiently described the judgment of conviction, and no substantial right of the defendant was prejudiced by reason of the defect or omission, if any. Pen. Code, § 960. It appears from the record of the police court introduced in evidence that a plea of guilty was entered by the defendant to the charge upon which the judgment in question was based. The material portions of this judgment were as follows:

> "On the 3d day of May, 1923, said defendant Victor Lamanuzzi appeared for judgment, and thereupon the court ordered judgment as follows, to wit: Wherefore it is ordered and adjudged as a punishment for the offense of possessing intoxicating liquor committed at the city of Fresno in said county on or about April 18, 1923, as charged in the information aforesaid, that you, the said defendant Victor Lamanuzzi, do pay a fine," etc.

Defendant contends that it was not shown by the judgment of the police court or from the complaint referred to therein that the possession charged in that proceeding was unlawful, and that the evidence was consequently insufficient to support the verdict that a prior offense had been committed. Although the complaint was not offered in evidence, and the judgment fails to expressly recite that the possession charged was unlawful, it is nevertheless stated therein that such possession, as the same was charged, in the complaint, was an offense to which the defendant had entered a plea of guilty. The judgment was not void, and was sufficient to show a prior conviction of a like offense. Ex parte Murray, 43 Cal. 455; Ex parte Raye, 63 Cal. 491; People v. Kelly, 120 Cal. 271, 52 P. 587; People v. Gregory, 8 Cal. App. 738, 97 P. 912.

[3] A witness for the prosecution testified, over objection, that intoxicating liquor was found on premises in the possession or control of the defendant on two occasions which preceded the date of the offense charged. This testimony was competent for the purpose offered, and properly admitted. People v. Johnson, 63 Cal. App. 178, 218 P. 449; People v. Silva, 67 Cal. App. 351, 227 P. 976; People v. Petrovich, 67 Cal. App. 405, 227 P. 978; People v. Buttulia, 70 Cal. App. 445, 233 P. 401; People v. Mullaly, 77 Cal. App. 60, 245 P. 811.

We find no error in the record, and the evidence was sufficient to support the verdict.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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92 Cal. App. 656

GORMAN v. SACRAMENTO COUNTY.
(Civ. 3466.) ★

District Court of Appeal, Third District, California. June 21, 1928.

Hearing Denied by Supreme Court Aug. 20, 1928.

1. Appeal and error 🔑930(1)—On appeal, all reasonable inferences must be indulged in support of conclusion reached by jury.

Jury having determined that deceased met death through negligence of defendant in failing to place guard rails on bridge, all reasonable inferences must be indulged on appeal in support of conclusion reached by jury.

2. Appeal and error 🔑996—Where two or more inferences can be deduced from facts, reviewing court cannot substitute its deductions for jury's.

When two or more inferences can be reasonably deduced from certain set of facts or circumstances, reviewing court cannot substitute its deductions for those of jury.

3. Bridges 🔑46(6)—Connection between county's negligence in failing to place guard rails on bridge and deceased's death could be proved by circumstantial evidence.

Connection between county's negligence in failing to place guard rails on bridge and death of boy from drowning could be proved by circumstantial evidence, and it was unnecessary that an eyewitness be produced to testify directly to fact.

4. Death 🔑75—Presumption that deceased, falling off bridge and drowning, exercised ordinary care for his safety, constituted prima facie evidence that deceased was free from contributory negligence (Code Civ. Proc. § 1961).

Presumption that boy, falling off bridge and drowning, exercised ordinary care for his own safety, was sufficient, under Code Civ. Proc. § 1961, to constitute prima facie evidence that deceased, at time he was drowned, was free from contributory negligence.

5. Death 🔑68, 103(1)—Evidence of deceased's cautious habits held admissible to throw light on probable conduct at time of accident, where there were no eyewitnesses, weight being for jury.

In action for death of boy falling off bridge and drowning, evidence of boy's cautious habits *held* admissible as tending to throw light on his probable conduct at time of accident, where there were no eyewitnesses to accident, and weight of evidence was for jury.

6. Trial 🔑194(16)—In action against county for death of boy falling off bridge without rails, instruction regarding county's liability for failure to provide rails, and regarding evidence relating to other bridges, held not invasive of jury's province (St. 1923, p. 675, § 2).

In action against county for damages for death of boy, falling off bridge without guard rails and drowning, instruction, first part of which was almost in identical language of St. 1923, p. 675, § 2, relating to liability of county for failure to provide rails, and stating that evidence regarding other bridges in vicinity maintained by county was no evidence on question of bridge involved, *held* not to invade province of jury.

7. Trial 🔑208—In action for death of boy falling off bridge, instruction striking out evidence regarding other bridges, improperly admitted, held not error.

In action for damages for death of boy, falling off bridge without rails and drowning, instruction in effect striking out evidence, improperly admitted, to effect that other bridges over similar canals in vicinity had no guard rails thereon, *held* not error.

8. Bridges 🔑46(5)—In action for death of boy, falling off bridge, evidence regarding other accidents at bridge held admissible.

In action against county for death of boy, falling off bridge and drowning, evidence that automobiles had fallen off bridge into canal before boy was drowned *held* admissible, to show dangerous character of bridge and cause of boy's death, and as tending to bring home to defendant knowledge of dangerous condition of bridge.

9. Bridges 🔑46(5)—In action for death of boy, falling off bridge without rails, evidence that machinery could not be moved across bridge with rails held properly excluded.

In action against county for death of boy, falling off bridge without rails and drowning,

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★Hearing denied by Supreme Court.

evidence that farm machinery could not be moved across bridge, if guard rails were maintained thereon, *held* properly excluded, where bridge was on public highway, used daily and constantly by traveling public, in automobiles, by teams, and on foot, since defendant would not be excused from maintaining bridge in unsafe condition, because such condition was necessary to accommodate persons occasionally moving machinery over it.

10. Appeal and error 🔑1050(1)—In action for death of boy, falling off bridge without rails, admitting evidence that guard rails were erected after accident held harmless error.

In action against county for damages for death of boy, falling off bridge without rails and drowning, admitting evidence that guard rails were erected on bridge subsequent to accident *held* harmless error, where court made it plain to jury that evidence of subsequent repairs was not to be considered by them.

11. Bridges 🔑37—County was liable for death of boy, falling off bridge over canal, where evidence showed bridge was repaired and maintained by county.

County was liable for death of boy, falling off bridge over canal, where evidence showed bridge was repaired by county, and that it had charge of maintenance of bridge, even though there was no evidence to show whether bridge was constructed first, or whether canal was constructed first.

12. Death 🔑103(4)—Amount of damages for death is committed first to jury's discretion, and next to trial court's discretion.

Amount of damages in action for death is committed, first to sound discretion of jury, and next to discretion of judge of trial court.

13. Appeal and error 🔑1004(1)—Decision of trial court and jury on amount of damages for death cannot be set aside, unless verdict is plainly excessive.

Decision of trial court and jury on amount of damages for death cannot be set aside on appeal, unless verdict is so plainly and outrageously excessive as to suggest at first blush passion, prejudice, or corruption on part of jury.

14. Death 🔑99(3)—$7,500 for death of boy aged 10 years held not excessive.

Judgment for $7,500, reduced by court from $10,000 awarded by jury, for death of boy 10 years and 7 months old, in good physical condition, and in full possession of all his faculties, *held* not excessive.

15. Statutes 🔑65—Law presumes Legislature, in passing act, were familiar with acts of previous Legislatures (St. 1923, p. 675, § 2).

Law presumes that Legislature, in passing St. 1923, p. 675, § 2, relating to liability of counties, fully investigated all acts and matters in regard thereto, and were familiar with acts of previous Legislatures.

16. Counties 🔑143—Rule regarding proof of lack of contributory negligence, under statute relating to liability of county officers, cannot be read into statute relating to liability of counties (St. 1919, p. 756; St. 1923, p. 675, § 2).

Even though St. 1923, p. 675, § 2, relating to liability of counties, is in pari materia with St. 1919, p. 756, relating to liability of county officers, rule under latter statute as to proof of lack of contributory negligence cannot be read into section 2 of act of 1923, since section 2 is complete in itself.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action for damages for death of a minor son by Barton L. Gorman against the County of Sacramento. From a judgment for plaintiff, defendant appeals. Affirmed.

J. J. Henderson, Dist. Atty., and Wm. A. Green and J. F. O'Shea, Deputy Dist. Attys., all of Sacramento, for appellant.

J. Q. Brown, Jr., Gerald R. Johnson, and Hinsdale, Otis & Johnson, all of Sacramento, for respondent.

PRESTON, Justice pro tem. This is an appeal by defendant, county of Sacramento, from a judgment entered against it upon a verdict of a jury in the sum of $10,000 and reduced to $7,500. The plaintiff, Barton L. Gorman, brought this action to recover damages for the death of his minor son, George Andrew Gorman, charging that his son's death was caused by the negligent manner in which the defendant, county of Sacramento, maintained a certain bridge across a canal or slough near the town of Ryde. It is the claim of plaintiff and respondent that the boy, while riding his bicycle along the public highway and over this bridge, met his death by falling from the bridge into the water below and drowning, and that the fall was caused by the lack of guard rails upon the bridge.

Many contentions are made for a reversal of the judgment. Appellant first contends that the evidence is insufficient to justify the verdict of the jury.

It was stipulated at the trial that the boy met his death by drowning. The boy, at the time of his death, was of the age of 10 years and 7 months, in good physical condition, and in full possession of all his faculties. He resided with his mother near the town of Ryde, in Sacramento county. In order to reach the town of Ryde from the residence of the deceased, it was necessary to cross a wooden bridge over a canal or slough, which contained about 7 feet of water. This bridge and road leading from the residence of the deceased to Ryde was maintained and controlled by said defendant and appellant, county of Sacramento. For some time prior to his death it had been the habit and custom of the boy to ride his bicycle across this bridge to the post office at Ryde every evening between 6 and 7:30 p. m. for the purpose of getting the mail. The bridge in question is located about two-fifths of a mile from Ryde and on an "S," or double turn, and at the time of the accident was without guard rails, approach rails, warning lights, or signals of any kind.

On the evening of April 3, 1924, the boy rode his bicycle across this bridge to the post office at Ryde, called for the mail as usual, and received the daily paper; he tied the paper onto his bicycle, mounted his bicycle, and started for home. At the time he left the post office it was between 6:30 and 7 p. m., and it was getting dark. He was never seen alive after this time. Not reaching home at the usual time, a search was instituted for him, and his body was found in the middle of the canal, about midway under the bridge, and his bicycle at a point near the bridge, in the canal, and about one-third of the way across and a few feet from the body. The boy's hands were uplifted as if he had been struggling. There were no marks on the body or bicycle, and nothing at all to indicate any act of violence or injury. There was no current in the water of the canal at the time; it being practically stagnant. On both sides of the approach to the bridge along the bank of the canal was a heavy growth of willows and underbrush.

Appellant admits that the boy met his death by drowning in this canal, and also admits there were no guard rails, approach rails, or warning lights or signals on the bridge, but argues that the manner and cause of the boy's death rests in surmise and conjecture, and that the evidence fails to establish that his death was proximately caused by the negligence of the county of Sacramento. Appellant further argues that deceased might have stopped to play near the bridge on the banks of the stream and fallen into the water, or might have been forced into the stream from the road by a reckless motorist, or he might have stopped on the bank of the stream to fish and fallen in; that it is just as reasonable to assume that the boy met his death in one of these ways as it is to contend that he met his death through the negligence of appellant.

We are unable to agree with appellant upon any of its theories as to how the boy might have met his death. The foregoing argument of appellant is one that could have been more appropriately addressed to the jury that tried the case, whose duty it was to weigh the evidence, than to a reviewing court, whose duty is to pass upon the sufficiency of the evidence to support the conclusions reached by the jury.

[1, 2] The jury having determined that deceased met his death through the negligence of appellant in failing to place guard rails on said bridge, the rule of law is, of course, well settled that all reasonable inferences are to be indulged in support of the conclusion reached by the jury. Furthermore, when two or more inferences can be reasonably deduced from a certain set of facts or circumstances, a reviewing court is not permitted to substitute its deductions for those of the jury. Wilbur v. Wilbur, 197 Cal. 1, 239 P. 332.

[3] It is true, as contended by appellant, that by proving a defendant's negligence, without in some way fastening that negligence to the injury, a case is not made out. Union Investment Co. v. San Francisco Gas & Electric Co., 168 Cal. 58, 141 P. 807. This rule, however, does not require demonstration of the connection between the proved or admitted negligence and the resulting injury. It is not necessary that an eyewitness be produced to testify directly to the fact. The connection may be made by circumstantial evidence in the same way that any other fact can be proved. County of Alameda v. Tieslau, 44 Cal. App. 332, 186 P. 398; Ross v. Railways Co., 47 Cal. App. 753, 191 P. 703.

[4] There is also another well-recognized rule of law applying to accidents like the one in the case at bar, to wit, that deceased is presumed to have exercised ordinary care for his own safety. This rule is fully and clearly stated by Mr. Justice Henshaw in the case of Crabbe v. Mammoth Channel G. M. Co., 168 Cal. 500, at page 506, 143 P. 714, 716, as follows:

> "Where death is occasioned under circumstances such as this, without eyewitnesses, the law comes to the aid of the plaintiff who is pressing a suit for damages for the death, and that law is found in the presumption of the Code of Civil Procedure, namely, that a person takes ordinary care of his own concerns. Code Civ. Proc. § 1963, subd. 4. * * * This is a controvertible presumption, it is true, but until controverted it is evidence in accordance with which the jury is bound to decide."

See, also, Boyle v. Coast Imp. Co., 27 Cal. App. 714, 151 P. 25; Kreitzer v. Southern Pacific Co., 38 Cal. App. 654, 177 P. 477; section 1961, Code Civ. Proc.; Ross v. Railways Co., supra.

In applying this principle of law to personal injury cases the Supreme Court of the United States, in the case of Baltimore & P. R. Co. v. Landrigan, 191 U. S. 461, 24 S. Ct. 137, 48 L. Ed. 262, said:

> "The presumption is founded on a law of nature. We know of no more universal instinct than that of self-preservation, none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming, and death. There are few presumptions based on human feelings or experience, that have surer foundation. * * *"

When recourse must be made to this rule of human conduct in determining the question of responsibility in cases of accident like the one in the case at bar, it is fair to assume, there being no evidence in the record to the contrary, that when deceased met his death he was exercising due and proper care for the protection of his person and the preservation of his life. This presumption is sufficient to constitute prima facie evidence that the deceased at the time he was drowned was free from contributory negligence. Fleenor v. Oregon Short Line R. Co., 16 Idaho, 781, 102 P. 897; Ross v. Railways Co., supra.

This is a complete answer to most all of the theories advanced by appellant as to how the boy may have gotten into the canal, and especially the theory that the boy may have stopped to play or fish near the bridge and fallen in. There is no evidence, and not a single circumstance, that would indicate that any such thing happened, so this is a mere theory of appellant, which finds no support whatever in the evidence and therefore, amounts to nothing. The theory advanced by appellant that the boy may have been forced off of the bridge by a reckless motorist is also answered by the fact that there is no evidence, and not a single circumstance revealed by the record, to indicate that this happened. This theory is further answered by the fact that, even if the boy had been struck by an automobile, he would not have been knocked off the bridge, if proper guard rails had been maintained thereon. Furthermore, contributory negligence was not even pleaded by the appellant in this case.

We think the only reasonable inference that can be deduced from all the facts and circumstances revealed by the record is that deceased met his death by falling from the bridge into the canal and drowning, and that the fall was caused by the lack of guard rails on said bridge. In fact, we do not believe, when all the evidence in the record is carefully considered, that any reasonable person would doubt for a moment that the boy met his death by riding his bicycle off of the bridge into the water. All surrounding facts and circumstances point unerringly to this conclusion.

[5] Appellant next contends that the trial court erred in admitting evidence of the cautious habits of the deceased. There is no merit in this contention. As we have already seen, there were no eyewitnesses to the fatal accident, and respondent relied entirely upon circumstantial evidence to show that deceased met his death by reason of the negligence of the appellant. Therefore evidence of the boy's cautious habits was admissible as tending to throw light upon his probable conduct at the time of the accident. The weight to be given to this class of evidence was a question solely for the jury. Wallis v. Southern Pacific Co., 184 Cal. 662, 195 P. 408, 15 A. L. R. pages 117, 138; Starr v. Los Angeles Ry. Corp., 187 Cal. 270, at page 281, 201 P. 599.

[6, 7] Appellant next contends that the court erred in giving the jury the following instruction:

> "I instruct you that, if you find that under all the circumstances of this case the failure of the county to provide adequate guard rails or warning signals at this bridge rendered this bridge dangerous and defective, which condition was known to the county officers in authority, who failed to alter this condition within a reasonable time after obtaining such knowledge, and that this condition of said bridge was the negligence which proximately caused the death of George Gorman, then you shall render judgment for the plaintiff, and that any evidence which you may have heard regarding the construction and maintenance of other like bridges in the vicinity by the county of Sacramento is no evidence on the question of the particular bridge involved in this action."

Appellant contends that this instruction is erroneous for two reasons:

First. It invaded the province of the jury by instructing them upon a question of fact. There is no merit in this contention. The first part of the instruction which is criticized is in almost the identical language of the statute under which this action is brought (Stats. 1923, p. 675, c. 328, § 2), and when read in its entirety is not subject to the criticism made against it, and did not invade the province of the jury.

Second. The trial court permitted the appellant, over the objection of respondent, to introduce evidence to the effect that other bridges over similar canals in Sacramento and Yolo counties had no guard rails thereon. After permitting this evidence to be introduced before the jury, appellant claims that it was error for the trial court to instruct the jury to disregard all evidence relative to other Sacramento county bridges in the vicinity of the bridge in question. In the first place, the testimony referred to should not have been admitted. To permit the appellant to prove that the bridge in question was of a common design, adopted by its board of supervisors, and therefore free from all negligent construction or maintenance, because it followed the same plan, is not competent testimony. The jury would be led thereby to believe that negligence would depend upon the facts surrounding the bridge, taken in conjunction with all the Sacramento county bridges. If this were allowed, it would violate the very primary principles of the law of negligence. Negligence depends upon all the facts and circumstances surrounding the *particular case*. If appellant's theory be correct, the board of supervisors, having once adopted a common design and plan of construction and maintenance of bridges, could never be negligent, if they followed the same design and plan on other bridges. This is certainly not the law. The trial court, no doubt, realized when the evidence was concluded that this testimony should not have been admitted, and gave the instruction above quoted, the last part of which was, in effect, striking out the objectionable evidence, and this action was entirely proper. The evidence being incompetent in the first place, we cannot see how appellant could be prejudiced by the court instructing the jury to disregard it.

[8] Appellant next contends that the court erred in permitting respondent to introduce evidence that other accidents had occurred at this bridge; that is, that at least four automobiles had fallen off of this bridge into the canal prior to the time the boy was drowned. We think the evidence was properly admitted as tending to show the dangerous character of the bridge and the cause of the boy's death, and, furthermore, it tends to bring home to appellant knowledge of the dangerous condition of said bridge. Long v. John Breuner Co., 36 Cal. App. 639, 172 P. 1132; Dyas v. Southern Pacific Co., 140 Cal. 296, at page 305, 73 P. 972; Malone v. Hawley, 46 Cal. 409; 10 Cal. Juris. 827.

[9] Appellant also contends that the court erred in excluding evidence that farm machinery could not be moved across this bridge, if guard rails were maintained thereon. We think that no prejudice could have possibly resulted to appellant by the exclusion of this testimony. This bridge was on a public highway, used daily and constantly by the traveling public, both in automobiles, by teams, and on foot, and certainly should not be stripped of all guard rails, approach rails, or other means of protecting the general public against danger, simply in order to accommodate some farmer who might at some time want to move heavy machinery across this bridge.

We find a complete answer to appellant's contention in the case of Commonwealth v. Allen, 148 Pa. 364, 23 A. 1117, 16 L. R. A. 148, 33 Am. St. Rep. page 833, where this language is used:

> "As a general rule, highways and bridges are constructed for ordinary use in an ordinary manner, and not for an unusual or extraordinary use, either by crossing at great speed, or by the passing of a very large and unusual weight."

Certainly appellant would not be excused for maintaining this bridge in an unsafe and dangerous condition for use by the traveling public, simply by saying that this dangerous condition was made necessary in order to accommodate some person or persons who might occasionally want to move heavy machinery over it.

[10] Appellant further contends that the court erred in permitting evidence to be introduced that guard rails were erected on the bridge in question subsequent to the accident. The rule is well established that evidence of this character is inadmissible. Sappenfield v. Main St. & A. P. Ry. Co., 91 Cal. 62, 27 P. 590; Hager v. Southern Pacific Co., 98 Cal. 311, 33 P. 119; Turner v. Hearst, 115 Cal. 401, 47 P. 129; Limberg v. Glenwood Lumber Co., 127 Cal. 598, at page 604, 60 P. 176, 49 L. R. A. 33; Webster v. Orr, 174 Cal. 426, at page 428, 163 P. 361; Morris v. Sierra, etc. Power Co., 57 Cal. App. 281, at page 296, 207 P. 262. However, a careful examination of the record will show that the jury could not have been misled, nor could appellant's rights have been prejudiced, by the evidence admitted on this subject. Mr. Eastman, an overseer of bridges and roads for the county of Sacramento, was produced by appellant and testified, among other things, that a common plan or design for all bridges of a similar character to the one in question, had been adopted by the board of supervisors. On cross-examination these questions were asked him by one of the attorneys for respondent:

> "Q. I will ask you, Mr. Eastman, if there is any bridge that you know of that is on a curve like that? A. Not with a double curve.
>
> "Q. Not with a double curve; I will ask you, Mr. Eastman, since this is the type of bridge common to this county, why you put guard rails after this accident."

This question was objected to on the ground:

> "That it was not proper cross-examination and on the further ground that it was incompetent, irrelevant, and immaterial, and that it would go to show subsequent repairs, which was inadmissible."

This objection, in our opinion, should have been sustained. However, after considerable discussion by the court and counsel, the court overruled the objection, saying:

> "The objection, I think, should be overruled. Now, as I admonished the jury the other day or yesterday, in fact, this evidence is not for the purpose of showing any alteration in this bridge or for the purpose of admissions on the part of anyone that the original construction was faulty in any way, but this is cross-examination of Mr. Eastman, and is for the purpose of testing his knowledge of construction of bridges in this particular district, and the reason for the particular type of construction used."

After the ruling and discussion, the question was again read to the witness and the witness answered:

> "Well, we thought of putting them up at that time on all bridges.
>
> "Q. On all bridges? A. We thought of it, and the farming people did not want them; they was always moving their heavy machinery across. That will answer for all of them.
>
> "Q. Now, how long after George Gorman was drowned, Mr. Eastman, did you put side rails on this bridge?
>
> "Mr. Green (one of the attorneys for appellant): May it be understood that I am objecting to all these questions on the grounds heretofore stated? * * *
>
> "The Court: The objection will probably be good as to that. It is immaterial, I think, when they were erected. Objection sustained."

The court also sustained objections to similar questions propounded by respondent, and made it plain to the jury, it seems to us, that evidence of subsequent repairs was not to be considered by them.

[11] It is next contended by appellant that the county is not liable, because there is no evidence to show whether the bridge was constructed first, or the canal was constructed first. There is no merit whatever in this contention. The evidence shows that the bridge was repaired by the county and that it had charge of the maintenance of the bridge. Furthermore, the answer of appellant does not deny that the county had charge of the maintenance of this bridge.

[12-14] It is also contended by appellant that the verdict is excessive. The jury, as above stated, returned a verdict of $10,000. A motion for a new trial was made upon a number of grounds, among them being that the verdict was excessive. After hearing the motion, the trial court made an order to the effect that, if plaintiff would agree to a reduction of $2,500 in the amount of the judgment, the motion for a new trial would be denied. This was agreed to by plaintiff, and a written stipulation to that effect filed, the judgment was reduced to $7,500, and the court thereupon denied the motion for a new trial.

The amount of damages in this kind of an action is committed first to the sound discretion of the jury, and next to the discretion of the judge of the trial court, who, in ruling upon the motion for a new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just. Upon appeal, the decision of the trial court and the jury on the subject cannot be set aside unless the verdict is so plainly and outrageously excessive as to suggest at first blush passion, prejudice or corruption on the part of the jury. Bond v. United Railroads, 159 Cal. 270, 113 P. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50; Wiezorek v. Ferris, 176 Cal. 353, 167 P. 234; Varcoe v. Lee, 180 Cal. 338, 181 P. 223; Reneau v. Hirsch (Cal. App.) 262 P. 1100, and cases there cited. The present case does not come within this rule. The trial judge has exercised his discretion, and caused the judgment to be reduced to $7,500, and there is nothing in the record that would authorize us to disturb the judgment as it now stands.

[15, 16] Appellant, through counsel other than those who participated in the trial, has filed herein a supplemental brief, in which the question is raised for the first time, that the act of 1923 (Stats. 1923, p. 675, subd. 2), under which this action was brought, is in pari materia with the act of 1919 (Stats. 1919, p. 756), and therefore must be construed together, and that any of the provisions contained in the act of 1919, and omitted from the act of 1923, should nevertheless be read into the act of 1923. The act of 1919 is relative to the liability of public officers, etc., the title reading:

> "An act relating to the liability in damages of the officers of districts, towns, cities, cities and counties, counties and of the state of California for injuries to person or property resulting from defects and dangers in public streets, highways, bridges, buildings, work or property," etc.

The title of the 1923 act reads:

> "[Section 1] An act limiting the liability of supervisors, city trustees, city councils, boards of education and school trustees, [section 2] and making counties, municipalities and school districts liable for the negligence of their respective officers in certain instances, and [section 3] providing for the payment of costs of actions in certain instances."

As the title indicates, the act of 1923 consists of three different parts—the first part further limiting the liability of the supervisors and other officials, and further protecting them from personal actions; the second part, as the title also indicates, creates *an entirely new and different liability, to wit, the liability of the county, making the county a legal entity, liable for the negligence of its officers in certain cases.* An examination of the 1919 act shows that a person suing an officer for negligence has not only to plead, but also to prove, that the injury and damage complained of was sustained while such public street, highway, bridge, building, work, or property was being carefully used, and that due care was being exercised to avoid damage due to such condition, or, in other words, this act changes the general rule that the burden of showing contributory negligence is upon the defendant, and requires an affirmative showing on the part of the plaintiff that he was using the road, bridge, or street with due care. No such provision or requirement is found in the act of 1923, and it is reasonable to assume that the Legislature did not intend to place it therein, or to change the general rule as to the proof of contributory negligence, when a county is being sued. If the 1923 Legislature had intended that the same burden be placed upon a litigant, who was seeking recourse against the county as a legal entity, as those placed upon one seeking recourse against *its officers in their personal* capacities, it had the 1919 act before it and could have incorporated all of its provisions in the second subdivision of the 1923 act. The law presumes that the Legislature, in passing this 1923 act, fully investigated all acts and matters in regard thereto, and were familiar with the acts of previous legislators. 23 Cal. Juris. 783; Old Homestead Bakery v. Marsh, 75 Cal. App. 247, 242 P. 749.

Conceding that appellant's position is sound that the act of 1919 and section 1 of the act of 1923 are in pari materia, nevertheless we fail to see how section 2 of the act of 1923, and the one under which this action is brought, can be brought within that doctrine, for section 2 is complete in itself and needs nothing read into it to make it a complete piece of legislation. If we read into section 2 of the act of 1923 the rule relative to the proof of lack of contributory negligence, or as it is termed the "due care clause," contained in the act of 1919, we would be adding something which it is clear to our minds, the Legislature did not intend should be included therein.

Complaint is also made that other instructions given in the case were prejudicial to the rights of appellant. We have examined all the instructions with care, and we think the instructions, as a whole, were more favorable to appellant than to the respondent, and there is no prejudicial error therein.

A careful review of the entire evidence leads us to the conclusion that the judgment must be affirmed; and it is so ordered.

We concur: HART, Acting Presiding Justice; PLUMMER, J.

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93 Cal. App. 73

YOUNG v. BOARD OF MEDICAL EXAMINERS OF CALIFORNIA et al. ★

(Civ. 5309.)

District Court of Appeal, Second District, Division 1, California. July 3, 1928.

Hearing Denied by Supreme Court Aug. 30, 1928.

1. Physicians and surgeons 🔑11(3)—Sale of spurious medical diplomas held to authorize annulment of license to practice medicine; "medical business;" "business" (Medical Act, § 14, subd. 3).

Annulment of petitioner's license to practice medicine and surgery under complaint charging unprofessional conduct in advertising medical business, intended, and having a tendency, to deceive the public and impose on credulous and ignorant persons, in violation of Medical Act (St. 1913, p. 722), § 14, subd. 3, *held* sustained by proof that he conducted a medical college which issued spurious medical diplomas, conduct of medical college and issuance of diplomas being incidental to "medical business"; physician's occupation though commonly referred to as a profession being included within broader word "business."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Business.]

2. Physicians and surgeons 🔑11(3)—Order revoking license to practice medicine must be affirmed on certiorari review if sustained by any competent evidence, though hearsay evidence also admitted (Medical Act, § 14, subd. 3).

On appeal in a certiorari proceeding to review an order of the board of medical examiners revoking petitioner's license to practice medicine and surgery for unprofessional conduct violating Medical Act (St. 1913, p. 722), § 14, subd. 3, the order must be affirmed, even though it appears that hearsay and incompetent evidence was introduced on the hearing before the board, if it also satisfactorily appears that other competent evidence was introduced sufficient in itself to support the order.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Certiorari proceeding by Frank P. Young against the Board of Medical Examiners of the State of California and others to review and annul an order revoking petitioner's license to practice medicine and surgery. From a judgment in favor of respondents, petitioner appeals. Affirmed.

L. E. Dadmun, of Los Angeles, for appellant.

Otto J. Emme, of Los Angeles, for respondents.

HOUSER, J. This appeal is prosecuted from a judgment rendered in favor of respondent board of medical examiners in a certiorari proceeding instituted for the purpose of reviewing and annulling an order made by said board whereby the license of appellant to practice medicine and surgery in the state of California was revoked.

[1] The first point advanced by appellant as a reason why the judgment of the lower court should be reversed is that the complaint on which appellant was tried before the respondent board did not state facts sufficient to constitute a violation of the so-called Medical Act (Stats. 1913, p. 722, and amendments thereto). It is urged by appellant that, whereas the charge against him in substance was that he was guilty of unprofessional conduct in that "he did use and employ advertising of medical business intended, and having a tendency, to deceive the public and impose upon credulous and ignorant persons in a manner harmful and injurious to public morals and safety," as a matter of fact, as shown by the evidence, if appellant was at all guilty of the specific acts set forth in the complaint, such conduct did not constitute a violation of the provisions of the Medical Act in question. With reference thereto, appellant directs particular attention, first, to the language of the act, which inhibits "all advertising of medical business * * *" (subdivision 3, § 14, Stats. 1913, p. 722); secondly, appellant adverts to the evidence adduced before the respondent board on a hearing of the charge, which in substance was to the effect that appellant was engaged in the false and fraudulent business of selling medical diplomas and other credentials from a medical college, proposed to be used by the purchaser thereof in obtaining for his use a necessary certificate or license to enable him to practice medicine and surgery in this state. More particularly, it is contended by appellant that the act, by whatever means of falsely and fraudulently furnishing to any person a spurious medical diploma for the purpose of enabling him to obtain a license to practice medicine, did not amount to "advertising of medical business," and consequently did not come within the purview of the statute.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

That the means and method employed by appellant in procuring purchasers of spurious medical diplomas constituted "advertising" appears to be conceded; which leaves for determination the element of whether such practice was part of a "medical business."

While the occupation of a physician more commonly is referred to as a profession, nevertheless it may properly be included within the broader word of "business." Earle v. Commonwealth, 180 Mass. 579, 63 N. E. 10, 57 L. R. A. 292, 91 Am. St. Rep. 326; Semple v. Schwarz, 130 Mo. App. 65, 109 S. W. 633.

The evidence introduced at the hearing of the charge against the appellant disclosed the fact that he conducted a medical college and that the diplomas which were issued therefrom fraudulently purported to be in recognition of faithful and conscientious work and study for the prescribed period in such college by the person to whom such diploma or certificate of graduation therefrom was issued. It is apparent that the proper conduct of a medical college necessarily would deal with the physicians' art, or what might be termed the "medical business," and the issuance of a diploma from such college would be but incidental to such business. Such an act could not be said to be a part or parcel of any other occupation, profession or business; to the contrary, it related to and formed a part of the "medical business" only. That, as shown by the evidence, the acts and conduct of appellant, of which complaint is made, necessarily had a tendency to impose upon credulous and ignorant persons and be harmful and injurious to public morals and safety, is so apparent that the fact may be neither dispelled nor in any wise affected by argument or other form of disputation. This court is therefore unable to agree with appellant in the point presented by him.

[2] It is also urged by appellant that his guilt was determined on hearsay and incompetent evidence alone. While it is undoubtedly true that much of the evidence to which appellant refers was properly open to the objection that it was hearsay, it is equally satisfactorily shown that considerable additional evidence, not subject to such or any other legal infirmity, was presented to the respondent board on a hearing of the charge—in fact, so much is admitted by appellant. However, it is claimed that none of such competent evidence was sufficient to sustain the action of the respondent board in revoking the license of appellant. It would serve no useful purpose to set forth herein the facts upon which the respondent relies as sufficient to support the conclusion that appellant committed the acts particularly described in the accusation against appellant. It may be sufficient to say that, after an examination of the record herein, this court is of the opinion that the evidence adduced before the respondent board was ample in quantity and quality to justify the order of which complaint is made. In such circumstances, the rule which is applicable is to the effect that on an appeal from an order made in a certiorari proceeding to review an order of the nature of that here under consideration, made by the board of medical examiners, even though it appears that much of the evidence introduced on the hearing before the board was hearsay and incompetent, if it also satisfactorily appear that other competent evidence was introduced sufficient in itself to support the order in question, this court is powerless to interfere—with the result that the order of which complaint is made must be affirmed. It is so held in Minaker v. Adams, 55 Cal. App. 374, 203 P. 806, and cases there cited.

The judgment is affirmed.

I concur: CONREY, P. J.

Mr. Justice YORK, deeming himself disqualified, does not participate in the foregoing decision.

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93 Cal. App. 36

In re HORGAN'S ESTATE.☆

O'CONNOR v. SCHROYIER et al.

(Civ. 6213.)

District Court of Appeal, First District, Division 1, California. June 29, 1928.

Rehearing Denied July 28, 1928.

Hearing Denied by Supreme Court Aug. 27, 1928.

1. Evidence ⟹291—Declarations of deceased member of family made ante litem motam are admissible to prove "pedigree" (Code Civ. Proc. §§ 1852, 1870, subds. 4, 11).

Declarations of member of family made ante litem motam, declarant being deceased at time of giving of testimony, may be received in evidence to prove "pedigree," under Code Civ. Proc. §§ 1852, 1870, subds. 4, 11; "pedigree" being history of family, descent, which is transmitted from one generation to another by oral and written declarations.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pedigree.]

2. Evidence ⟹291—Heir's testimony, based on deceased father's statements, held of evidentiary value to prove she was cousin of decedent.

In proceeding for partial distribution of decedent's estate, heir's testimony by deposition of facts of family history, relation, descent, births, marriage, and death connected with and concerning family of herself and decedent, based on statements deceased father had made to her, *held* of evidentiary value to prove she was cousin of decedent.

3. Names ⟹18—Identity of person is presumed from identity of name (Code Civ. Proc. § 1963, subd. 25).

Under Code Civ. Proc. § 1963, subd. 25, identity of person is presumed from identity of name.

☆Rehearing denied. Hearing denied by Supreme Court.

4. Descent and distribution ⚷71(6)—Evidence held sufficient to sustain finding that petitioner was cousin of decedent.

In proceedings on petition for partial distribution of decedent's estate, evidence *held* sufficient to sustain finding that petitioner was cousin of decedent.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Mary A. Horgan, also known as Harrigan, deceased, of which J. B. Schroyier was executor. Elizabeth O'Mahoney petitioned the court for partial distribution, and the petition was opposed by Elizabeth A. O'Connor and others. From the decree granting partial distribution, Elizabeth A. O'Connor appeals. Affirmed.

Joseph Farry and John O'Gara, both of San Francisco, for appellant.

Julian D. Cohn and William A. Breen, both of San Francisco, for respondent O'Mahoney.

Stanislaus A. Riley and J. C. Quinlan, both of San Francisco, for respondent O'Connor.

William A. Kelly, of San Francisco, for respondent Schroyier.

BEAUMONT, Justice pro tem. Mary Ann Horgan died testate in San Francisco August 15, 1925, leaving certain property to charitable institutions and the remainder of her estate to her heirs at law. Elizabeth O'Mahoney, respondent, petitioned the court for partial distribution, alleging she was an heir, to wit, cousin of decedent. Elizabeth A. O'Connor, assignee of Thomas O'Connor, one of the heirs, opposed the petition, denying that petitioner was such heir, and alleging that the said petitioner was not related whatever to decedent. The court found that there were three heirs at law, to wit, Richard O'Connor, a cousin, Thomas O'Connor, a cousin, and Elizabeth O'Mahoney, a cousin. The petition for partial distribution was granted, and from the decree Elizabeth O'Connor is the only appellant. She contends that the evidence is insufficient to sustain the finding that Elizabeth O'Mahoney was the cousin of decedent.

John Horgan, a native of Ireland, came to the United States prior to 1849. He was married to Bridget O'Connor, and one child was the issue of the marriage, namely Mary Ann Horgan, decedent herein. John Horgan lived in San Francisco for many years prior to his death there in 1886. He was a blacksmith. Mary Ann Horgan was never married.

Respondent gave testimony, by deposition, of many particular facts of family history, relationship, descent, birth, marriage, and death connected with and concerning the family of herself and decedent, which, she testified, she learned from her father. Among other things, she testified that her father's name was Patrick Horgan, and his brother's name was John; that their father's name was John Horgan, and their mother's name was Johanna Horgan, née Flynn; that her uncle, John Horgan (father of decedent), was a blacksmith by trade. She testified that she based her statements as to those matters upon, to quote the witness, "talks I had from time to time with my father," "information passed on to me from my father," "family knowledge, and from information given to me by my father during his lifetime." Some of the answers, for example, given by respondent were: "The decedent never married, as my father in his lifetime always told me;" "I always heard my father say that decedent was an only child." Respondent further testified in various parts of the deposition, both in answer to interrogatories and cross-interrogatories, that she and decedent were "first cousins," that "her father and my father were brothers," and that she learned this, as she stated, "from what my father used to tell me."

No objection was made to any question, nor was there any motion made to strike out any answer or any part of the deposition. In fact, the deposition of respondent was read in evidence with the consent of counsel for appellant expressed in open court. Appellant now contends that the answers of respondent were not declarations within the meaning of the hearsay rule, that they have no evidentiary value, and should not have been considered by the trial court in determining the issue, for the reason that they were simply conclusions of the witness.

[1, 2] Declarations of a member of a family made ante litem motam, the declarant being deceased at the time of the giving of the testimony, may be received in evidence for the purpose of proving pedigree. Estate of Williams, 128 Cal. 552, 61 P. 670, 79 Am. St. Rep. 67; Estate of Hartman, 157 Cal. 206, 107 P. 105, 36 L. R. A. (N. S.) 530, 21 Ann. Cas. 1302. Section 1852 of the Code of Civil Procedure provides:

> "The declaration, act, or omission of a member of a family who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible."

It is further provided that evidence may be given of "the act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person" and of "common reputation existing previous to the controversy * * * in cases of pedigree." Code Civ. Proc. § 1870, subds. 4 and 11.

"Pedigree is the history of family descent, which is transmitted from one generation to

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

another, by both oral and written declarations, and, unless proved by hearsay evidence, not competent in general issues, it cannot in most instances be proved at all. Matters of pedigree consist of descent and relationship evidenced by *declarations of particular facts*, such as births, marriages and death." (Italics ours.) Jones' Commentaries on Evidence, vol. 2, § 312.

To the foregoing is added by Greenleaf (16th Ed.) vol. 1, p. 202:

"* * * As well as, in general, any notable fact in the life of a member or in the family history which might well be supposed to be known to the members in general."

Mr. Wigmore says:

"The evidence may be in the form of individual declarations, though it may also be in the form of family reputation. In general, the scope of the present exception has been much enlarged during the past century in this country. Occasionally a statute has attempted to define its terms."

Under this statement a reference is made to the California statutes above mentioned. Wigmore on Evidence, § 1480.

In Watson v. Brewster, 1 Pa. 381, a witness, through interrogatories, was asked:

"Are you acquainted with the age of Mrs. Watson? if so, when was she born? state how you know her age; state, is she older or younger than yourself? if so, how much?"

The defendants objected to the testimony on the ground that it appeared that the witness spoke from recollection of the contents of the family Bible. The plaintiff contended "that the witness recollected it from information received from her deceased mother." The court said:

"The witness knows the age of her sister from the declarations of her mother, who is deceased. Now, that this species of evidence must be admitted has always been held, for otherwise a person could not prove his own age; for where no family record is made, he can only show it from the declaration of his parents or others cognizant of the fact."

The question in the present case does not concern the admissibility of testimony. As heretofore pointed out, it was received into the record without objection and was before the court. Estate of Friedman, 178 Cal. 27, 172 P. 140. We find no merit in the contention that such evidence was without evidentiary value.

[3, 4] In addition to the testimony hereinbefore referred to, there were introduced in evidence on behalf of respondent certificates of baptism which stated that a certain John Horgan, born of John Horgan and Johanna Flynn, was baptized in the parish of Doneraile and Shanballymore (Ireland) on September 3, 1820; and that one Patrick Horgan, born of John Horgan and Johanna Flynn, was baptized in the same parish May 18, 1823.

Thomas O'Connor, one of the heirs at law, a witness for appellant, testified that he was born in the parish, as he called it, of "Doneraile or Shanballymore, if you will"; that he knew Mary Ann Horgan, the decedent, and her father, John Horgan; that he visited John Horgan and his family in San Francisco in 1876; that John Horgan questioned him at length about certain persons by the name of Flynn who lived in Ireland; that he (O'Connor) knew the said Flynns; that he learned that these Flynns were the first cousins of John Horgan; that he was informed of this relationship by John Horgan's wife; that his (O'Connor's) home was about one-fourth of a mile from where respondent, Elizabeth Horgan (now O'Mahoney) and her father, Patrick Horgan, resided; that "I could not say where John Horgan, the father of Mary Ann Horgan, was born, but I know he kept a blacksmith shop in a place called Carker Pike; that was one mile from where I lived, from where I was born; Carker Pike is two miles east of Doneraile; it was one mile from where I was born and lived."

Questions of fact for the trial court to determine were: Did respondent, who lived near Doneraile, county of Cork, Ireland, have an uncle named John Horgan? If so, was he the same John Horgan (father of decedent) who died in San Francisco in 1886, but who was born in Ireland, and who at one time had a blacksimth shop near Doneraile in said county of Cork? These questions were answered in favor of respondent.

Identity of person is presumed from identity of name. Code Civ. Proc. § 1963, subd. 25; Estate of Williams, 128 Cal. 552, 61 P. 670, 79 Am. St. Rep. 67. In the Estate of Williams, supra, the court, after observing that the presumption arising from identity of name is rebuttable, said:

"The question was one of fact, and there was certainly sufficient evidence to justify the court in finding that the petitioners were the nephews of the testator, and entitled to the whole of the residuary estate, if George Williams died before the testator leaving no issue. Upon this point the declarations of William Frederick Williams, deceased, as to the family understanding and belief, to the effect that he enlisted in the army, when a boy, on the federal side of the Civil War, and was believed to have been killed, and that he never married, was competent evidence and sufficient to sustain the finding of the court. * * * But it was for the trial court to determine the weight to be given to each and every particular statement, and I am satisfied with the correctness of its conclusions."

We are of the opinion, after a scrutiny of the entire record, that there was sufficient evidence to sustain the finding of which appellant complains.

Appellant makes a specification of error regarding the admission in evidence of the above-mentioned certificates of baptism. The record shows that the appellant made an objection when the certificates were first offered, on the ground that they were not properly authenticated. The court did not rule upon the objection as, apparently from the record, it was deemed withdrawn. When the certificates were again offered there was no objection.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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93 Cal. App. 27

MASKUNS v. MASKUNS. (Civ. 3528.)★

District Court of Appeal, Third District, California. June 28, 1928.

Hearing Denied by Supreme Court Aug. 27, 1928.

1. Husband and wife ⇨262(1)—Property acquired separately or jointly by husband and wife during marriage is presumed community in character.

The presumption that property acquired during marriage is community in character applies not only to property acquired by either the husband or the wife separately, but also to property acquired jointly.

2. Husband and wife ⇨262(2)—Where separate and community property are commingled so as to make tracing impossible, burden of proving separate property is on spouse asserting claim.

When separate and community property are commingled in such a manner that it is impossible to trace the funds, the whole fund will be treated as community property, and the burden of proof is on the spouse who claims that the property is separate in its nature.

3. Appeal and error ⇨1071(6)—Court having found husband's and wife's earnings were intermingled, failure to find that bank account included husband's separate funds held not prejudicial to him.

Where court found that entire earnings of husband and wife were intermingled and deposited in husband's bank account, and that balance of purchase price of certain lot purchased by husband before marriage was paid with money withdrawn from said account after marriage, court's failure to find that community bank account included some of husband's separate funds was not prejudicial to husband.

4. Appeal and error ⇨1071(1)—Clerical error in finding date of marriage held not prejudicial to husband, whose admission that he made payment on purchase price from community fund after marriage settled principal issue.

In action involving question whether half interest in lot was community property, in which action the chief issue whether a final half of purchase price was paid after marriage from community funds was settled by husband's admission that he made payment after marriage from the common bank account, husband was not prejudiced by clerical error of finding that marriage occurred June 12, 1907, instead of January 12, 1907, which was correct date.

5. Trial ⇨404(2)—Correct finding of fact lost none of its force merely because inadvertently included among conclusions of law.

Where court correctly determined ultimate fact presented by issue tendered in complaint, such finding of fact lost none of its force merely because it was inadvertently included among the conclusions of law.

6. Husband and wife ⇨270(9)—Finding that plaintiff was sole owner of undivided half interest and that remaining half was community property held sufficient finding of ownership.

Finding that plaintiff was sole owner of undivided half interest in property described in complaint as his sole and separate property, and that remaining half was community property of plaintiff and defendant, *held* sufficient finding respecting ultimate fact of ownership and relative interests of respective parties therein to support judgment that undivided half interest in lot was community property of parties.

7. Trial ⇨395(5)—Judgment supported by findings will not be disturbed merely for failure to directly pass on particular issue necessarily determined by general findings.

When findings fully support judgment, it will not be disturbed merely for failure to directly pass on some particular issue when ultimate fact therein contained is necessarily determined by general findings.

8. Trial ⇨395(7)—Judgment may be sufficiently announced as conclusions of law, where specific conclusions, if drawn, would necessarily favor prevailing party.

Judgment may be sufficiently announced as court's conclusions of law, where it is evident that specific conclusions of law, if drawn, must necessarily have been in favor of prevailing party, and their omission will not necessitate reversal.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by Adolph S. Maskuns against Maggie Maskuns. From the judgment, plaintiff appeals. Affirmed.

Martin Forrest, of Los Angeles, for appellant.

Albert E. Sherman and Sherman & Sherman, all of Los Angeles, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment determining that an undivided one-half interest in a certain Los Angeles lot is the community property of the appellant and respondent, who are husband and wife.

These litigants intermarried January 12, 1907, and lived as husband and wife until the commencement of this action. In June, 1906, appellant contracted to purchase lot 3 of Vermont place, in Los Angeles, Cal., for

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★Hearing denied by Supreme Court.

the sum of $1,400, one-half of which purchase price he paid prior to his marriage with respondent. The balance was paid after the marriage. A deed of conveyance to this lot was executed and delivered to the appellant July 18, 1908. The appellant was a tailor by occupation, and both before and after their marriage the respondent worked in his shop for wages. Prior to their marriage the appellant possessed $600 separate funds, together with some real property. The respondent also had $160 of her own separate money which she delivered to her husband. After their marriage both spouses mingled their separate funds and community earnings in a bank account, which was carried in the appellant's name. After their marriage, upon different occasions, appellant drew upon this community fund to pay the remaining $700 upon the purchase price of the lot in question.

The appellant contends that the findings are not supported by the evidence, and that the trial court failed to adopt findings upon material issues included within the pleadings.

The court found that:

> "* * * The entire earnings of the husband and wife * * * were intermingled * * * and were deposited in the bank account of the husband; * * * that the balance of the purchase price on said lot 3, Vermont place, to wit, the sum of $700, was withdrawn from the said bank account after the marriage of the parties hereto, and the balance of payments were made therefrom upon the property described in plaintiff's complaint."

[1-3] This finding is in strict accordance with the evidence. It does, however, appear that with the mingled earnings of the spouses there was also deposited several hundred dollars of the appellant's separate money. But this fact does not alter the effect of the court's findings. Even if the appellant did mingle his separate funds with the community earnings of himself and wife, the identity of the separate money would be lost in the common bank account. The presumption that property acquired during marriage is community in character applies not only to property acquired by either the husband or the wife separately, but also to property acquired jointly. 5 Cal. Jur. 313, § 22; section 164, Civ. Code; Jordan v. Fay, 98 Cal. 264, 33 P. 95. When separate and community property are commingled in such a manner that it is impossible to trace the funds, the character of the whole fund will be treated as community property, for the burden is upon the spouse who claims that the property is separate in its nature to affirmatively prove the assertion. 5 Cal. Jur. 298, § 16; McKay's Community Prop. 215, § 308; Estate of Bauer, 79 Cal. 304, 21 P. 759. The appellant was therefore not prejudiced by the court's failure to find that the community bank account, from which the balance of the purchase price of the lot in question was paid, also included some of his separate funds.

[4] The appellant was not prejudiced by the clerical error of finding that the marriage between these parties occurred June 12, 1907, instead of January 12, 1907, which was the correct date according to the undisputed evidence. The chief issue in this case was the question as to whether the final $700 of the purchase price of the lot in question was paid after marriage from the community funds of the spouses. This question was settled by the admission of the appellant himself, who testified: "I paid $700 on lot 3, after marriage," from the common bank account.

[5, 6] Finally, it is contended that the findings are fatally defective for failure to determine the issues presented by paragraphs 2, 3, and 4 of the complaint. Paragraph 2 alleged that the appellant was the owner of the lot in question. In the court's findings, under the caption of "conclusions of law," the court decreed:

> "* * * The above-named plaintiff is the sole owner of an undivided one-half interest in the property described in plaintiff's complaint as his sole and separate property; that the remaining one-half of said property is the community property of this plaintiff and defendant."

It will thus be seen that the court correctly determined the ultimate fact presented by the issue tendered in paragraph 2 of the complaint by finding that the appellant was not the sole owner of the entire lot in question, but that the respondent owned an undivided one-half community interest therein. Vieux v. Vieux, 80 Cal. App. 222, 251 P. 640. A finding of fact loses none of its force merely because it has been inadvertently included among the conclusions of law. Estate of Forrester, 162 Cal. 493, 495, 123 P. 283.

[7, 8] Moreover, when findings fully support the judgment, as they certainly do in the present case, the judgment will not be disturbed merely for failure to directly pass upon some particular issue, when the ultimate fact therein contained is necessarily determined by the general findings. 24 Cal. Jur. 974, § 207, and cases cited. Nor may it be said that, if the foregoing findings that the appellant is not the sole owner of the lot in question, and that, upon the contrary, the respondent is the owner of an undivided one-half in community with the appellant, there then remains no sufficient declaration of the court's conclusions of law. It has been held that the judgment of the court may be sufficiently announced as its conclusions of law, where it is evident that specific conclusions of law, if drawn, must necessarily have been in favor of the prevailing party. Their omission will not then

necessitate the reversal of a judgment. 24 Cal. Jur. 1002, § 222, and cases cited.

Paragraphs 3 and 4 of the complaint, upon the issues of which it is claimed specific findings were omitted, allege that the respondent claims some interest in the property in question, but that her claim is without merit, and, further, that the appellant purchased the property before their marriage, with his own separate funds. These allegations are merely the formal allegations of an ordinary suit to quiet title, and in effect were specifically refuted and fully covered by the court's finding No. IV first above quoted.

It must be conceded that the findings were carelessly prepared and might have been more specific, but we are of the opinion that the ultimate fact of the ownership of the lot in question, together with the relative interests of the respective parties therein, having been adequately found, are sufficient to support the judgment. In the case of Daly v. Sorocco, 80 Cal. 367, 22 P. 211, which was an attack upon a judgment for the omission of findings in an appeal from a suit to quiet title, the court said:

> "* * * His [appellant's] right to maintain the action was based wholly on his ownership and right of possession, and these being found against him, it was immaterial to him whether the court found as to the other facts or not, as the judgment must have been against him, whatever the other findings might have been."

The judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

MICHELL et al. v. GRASS VALLEY GOLD MINES CO. (Civ. 3464.) ★

District Court of Appeal, Third District, California. June 30, 1928.

Hearing Granted by Supreme Court Aug. 27, 1928.

1. Licenses 🔑39—Issuance and sale of capital stock of foreign corporation without permit by commissioner of corporations held void (Corporate Securities Act).

Issuance and sale by foreign corporation of capital stock or agreement for such sale without permit being issued by commissioner of corporations, as required by Corporate Securities Act (St. 1917, p. 673), *held* void.

2. Licenses 🔑39—Purchasers of stock of foreign corporation held not precluded by reason of assisting in organization from canceling stock issued without permit (Corporate Securities Act).

Purchasers of stock in consideration for conveyance of mineral rights in land, assisting in organization and incorporation of foreign corporation, and serving as directors at time of passing deeds and issuance of stock, *held* not to have taken a part therein other than investors in usual sense, so as to preclude cancellation of stock, on ground issuance was void, as being without permit by commissioner of corporations, in accordance with Corporate Securities Act (St. 1917, p. 673).

3. Licenses 🔑39—Mistake in issuing stock of foreign corporation without permit justified cancellation of conveyance to corporation (Corporate Securities Acts; Civ. Code, §§ 1689, subd. 1, 1576–1578).

Mistake of foreign corporation and purchasers of stock therein in issuing stock without permit therefor, as required by Corporate Securities Act (St. 1917, p. 673), *held* mutual mistake, justifying cancellation of purchaser's conveyance of mineral rights to corporation, in view of Civ. Code, §§ 1689, subd. 1, 1576–1578.

4. Licenses 🔑39—Notice of rescission of sale of stock 17 days after discovering mistake authorizing rescission held sufficiently prompt (Corporate Securities Act; Civ. Code, § 1691).

Notice of cancellation by purchasers of stock 17 days after discovering mistake of foreign corporation in issuing stock without having secured permit therefor, as required by Corporate Securities Act (St. 1917, p. 673), *held* sufficiently prompt to justify cancellation of purchasers' conveyance of mineral rights to corporation, in view of Civ. Code, § 1691; there having been complete offer of restoration.

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

Action by P. W. Michell and others against the Grass Valley Gold Mines Company. Judgments for plaintiffs, and defendant appeals. Affirmed.

E. H. Armstrong and Frank R. Wehe, Jr., both of Grass Valley (Frank R. Wehe, of San Francisco, of counsel), for appellant.

Nilon & Nilon, of Grass Valley, for respondents.

HUGHES, Justice pro tem. This is a proceeding in equity, seeking to rescind an agreement to convey mineral rights in certain lands and to cancel a certain deed given thereunder, and directing the defendant to reconvey to plaintiffs the said lands described in said deed. Judgment for plaintiff, and defendant appeals.

The facts as disclosed by the record are as follows: P. W. Michell and Nellie Michell, his wife, were tenants in common with W. J. Michell, a brother, in the ownership of certain lands situated in Nevada county, Cal., comprising about 108 acres, which it was claimed and believed contained valuable minerals. Contiguous to said lands were nine other parcels separately owned which likewise were considered valuable for mining purposes. All these parcels combined with that of plaintiffs constituted a tract of land of about 188.84 acres. Any one parcel was considered too small to mine to an advantage,

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★Superseded by opinion 275 P. 418.

but all combined presented an attractive mining unit. One Roy J. King, engaged as a mining engineer and promoter, conceived the idea of combining all these lands into a single mining unit, and to form a corporation for the purpose of developing and working the same as a mine. He pursued this idea over a long period of years prior to the date of the incorporation of the defendant, and at different times possessed options to purchase this very same property. Immediately prior to the organization of the defendant, King had been active in promoting the enterprise, and carried on interviews and conducted correspondence with men assisting him in "floating the properties," among them being, locally, D. E. Matteson, Oscar Coflin, and John Mulroy, and the outside associate was Charles E. Knox of San Francisco and New York. Mr. Knox was dealing with a Mr. Thompson in the East. The following telegrams were exchanged between King and Knox:

"New York, July 13, 1922.

"Roy J. King, Grass Valley, California Your Tonopah wire received yesterday, did not get to see Thompson until today. He thinks something can be done on basis our agreement June first but no chance whatever on Coflin contract of June twelfth. * * * Will allow Friday and Saturday for you discuss matter with Matteson and others and mail report to you Sunday night. [Signed] Chas. E. Knox."

"Grass Valley, California, July 15, 1922.

"Chas. E. Knox Hotel Belmont New York City Your telegram thirteenth. Owners accept our proposition of June first in principle. They agree to deed property to a corporation known as Grass Valley Gold Mines Company, to be incorporated under laws of Delaware and take stock in lieu of cash for purchase price. Thompson to be given six months option on this property purchase stock of 342,500 shares at forty (40) cents net to them. Company officers to be local people until this stock is sold and money distributed to owners. Matteson accepts presidency and I the vice presidency and general managership. Do you and Thompson agree, and if so, will you incorporate now from that end? [Signed] Roy J. King."

"New York, N. Y., July 17, 1922.

"Roy J. King Grass Valley, California. Your telegram July fifteenth submitted to Thompson today. Have also shown him our proposition of June first which as we see it is in accord with your telegram. Thompson assures me he has strong people ready to go, and we accept your proposition. Officers satisfactory, name corporation good, and either Delaware or Nevada will do. Will get figures on cost of incorporation here tomorrow but it appears to me this could be done to better advantage in Grass Valley. Advise how soon stock can be placed in escrow and contract forwarded. Every promise of quick success. [Signed] Chas. E. Knox."

"Grass Valley, California, July 18, 1922.

"Chas. E. Knox Hotel Belmont New York City. Your telegram seventeenth. Stock in escrow and contract mailed to Thompson within twenty days. Nevada selected to save time. Capitalization one and one half millions par value one dollar. Brodigan, phones incorporation fees three hundred dollars and thirty additional for three certified copies. Articles of incorporation to be mailed Carson City tomorrow night. [Signed] Roy J. King."

"New York, N. Y., July 21, 1922.

"Roy J. King Grass Valley, California. Much pleased with rapid progress on organization. Thompson thinks stock should be issued and registered here. Registration necessary if stock listed on curb. As soon as contract received will have registrar company send you instructions. Thompson leaves for Montreal tomorrow returns Wednesday.

"[Signed] Chas. E. Knox."

His plan was consummated, and on July 25, 1922, the defendant corporation was formed, under the laws of the state of Nevada, with its principal place of business at Reno, Washoe county, Nev., and having a capital stock of 1,500,000 shares of the par value of $1 each. The several landowners agreed that their lands, some in fee simple, and as to others only the mineral rights, would be conveyed to the corporation so formed, and that, in payment of the purchase price thereof, they were to receive a certain designated number of shares, and likewise King was to receive 15,000 shares for his services, the total for all being 343,090 shares, and the shares to be received by plaintiffs being 135,000. These shares were to be issued upon a previously agreed price for each parcel of land and at the rate of 40 cents a share. The agreed price to be paid plaintiffs was $54,000.

The original incorporators of defendant were D. E. Matteson, C. S. Morgan, W. J. Michell, Louis Wheeler, Roy J. King, T. M. Harris, and Oscar L. Coflin, who were the duly chosen directors to serve said corporation for the period of one year. Of these directors, D. E. Matteson, as president of the St. Johns Quartz Mining Company, a corporation, G. S. Morgan, W. J. Michell, and T. M. Harris were all owners of parcels of land to be conveyed to the corporation. The other directors, Roy J. King, Louis Wheeler, and Oscar L. Coflin, had been engaged in the promoting and interesting eastern capital in the matter of this investment. These persons continued to act as such directors until August 20, 1923, at which time they were supplanted by others, excepting D. E. Matteson and plaintiff W. J. Michell, who were retained on the board. At the first meeting of the board of directors of the defendant corporation, held on July 26, 1922—which meeting was not attended by plaintiff W. J. Michell—the minutes disclose, in substance, the following proceedings:

Roy J. King had assembled into a mining unit certain mineral properties, referring to the property of the associates hereinabove set forth, and that he had collected valuable structural and geological data concerning the possibilities of ore in said lands, and that said King had succeeded in interesting certain strong financial people in said mining property; that D. E. Matteson, at the solicitation of said King, had made two trips to New York City to meet a Mr. Thompson and a Mr. Knox for the purpose of aiding and helping the latter in the purchasing, financing, and development of this property; that Charles E. Knox and Roy J. King, who had been chief promoters of the proposition, had consulted with the said Thompson and Knox as to the terms upon which they would agree to finance the corporation, and reciting therein the different parcels of land to be taken, together with their appraised value, the stock to be issued therefor, and setting forth in full telegrams exchanged between the said Knox and the said King as to the financing of said property, the issuance of shares to the owners of the several parcels, and as to the placing of said shares in escrow in the Nevada County Bank; and that it be—

> "Resolved, that the foregoing proposition of said W. J. Michell and P. W. Michell, St. John Quartz Mining Company et al., be and the same is hereby accepted; and the president and secretary of this corporation are hereby authorized and instructed to receive from said W. J. Michell, P. W. Michell, St. John Quartz Mining Company et al., proper deeds, duly executed, conveying and transferring said mining ground to this corporation free and clear of incumbrances, as in said proposition recited and deliver to said W. J. Michell, P. W. Michell, St. John Quartz Mining Company et al. in consideration of and in payment for said mining ground, three hundred forty-three thousand and ninety (343,090) shares of the capital stock of this corporation to be issued to said W. J. Michell, P. W. Michell, St. John Quartz Mining Company, Maude Granger Stokes, Ella Granger Elliott, Alison F. Watt, Gordon S. Morgan, Thomas M. Harris et al., M. Alice Greene, Robert Ford, Elizabeth and Fred Mounday, Patrick J. Keane, L. B. Jones, Roy J. King, in accordance with the number of shares set aside for each in the above proposition; and the stockholders of this corporation are hereby requested to ratify the acquisition of said mining ground as required."

Thereafter the plaintiffs, on the 27th day of July, 1922, made, executed, acknowledged, and delivered their deed of bargain and sale conveying to defendant that portion of their property which they were to receive under said agreement, namely, all excepting the surface of said land, to a depth of 100 feet, and providing that defendant or its assigns were not to approach closer than 100 feet of the surface of said property; and which deed was, on August 8, 1922, recorded in the county of Nevada. There was expressed in said deed, as consideration therefor, "five and no one-hundredths dollars lawful money of the United States of America, and other valuable considerations." No money whatsoever was paid for said deed, none was intended to be paid, and the only thing plaintiffs were to receive therefor was 135,000 good, valid, legal, and authorized shares of the capital stock of the defendant corporation. On the 28th day of July, 1922, the defendant corporation caused to be issued and delivered to plaintiffs a certificate and paper, which purported, on its face, to be a stock certificate for 135,000 shares of the capital stock of the defendant corporation. Said plaintiffs, together with the other owners of contiguous lands, upon receiving said certificate of stock, did, on August 4, 1922, place the same with the Nevada County Bank, under an instrument reading as follows:

> "To the Nevada County Bank, Grass Valley, California—Gentlemen: We hand you herewith certificates of stock standing in the following names and amounts:

Names.	No. Shares.
Gordon S. Morgan	28,000
W. J. Michell and P. W. Michell	135,000
Ella Granger Eliott, Maude Granger Stokes, and Alison F. Watt	32,250
James O'Meara	20,140
Thomas M. Harris et al	43,000
St. John Quartz Mining Co	50,000
Robert Ford	6,000
Elizabeth Mounday and Fred Mounday	4,500
D. E. Matteson, C. H. Greene	3,600
L. B. Jones	5,600
Roy J. King	15,000

> "Making a total of 343,090 shares of the capital stock of the Grass Valley Gold Mines Company.
>
> "The stock is properly indorsed by us.
>
> "This stock is to be sold for the sum of 40 cents per share. We also appoint Leland V. Michell, an officer of your bank as trustee for us, and is hereby authorized to indorse said stock and to issue the same in certificates of any denomination if so called for by Harry E. Thompson and Chas. E. Knox, or their agents, as optioners of said stock. The proceeds from the sale of said stock shall be deposited in the name of Grass Valley Gold Mines Company, and not to be withdrawn or used for any purpose.
>
> "This escrow shall exist for a period of six months from and after the date of depositing said stock. At the expiration of six months from the date of the deposit of said stock with said trustee any and all funds derived from sales of stock by the said trustee shall be divided between the stockholders in the proportion that the shares deposited for the respective stockholders bear to the total amount of shares deposited and all unsold shares to be transferred to the depositing stockholders or their assigns in the same proportion that the proceeds from the sale of said stock are divided.
>
> "In case none of the aforesaid stock is sold within the aforesaid period, you will deliver all of said stock to the respective owners thereof.
>
> "That there shall be no escrow charges except for current expenses such as revenue stamps and telegrams which shall be paid for at Grass Valley.
>
> "Dated: Grass Valley, California, August 4, 1922. [Signed] Gordon S. Morgan. W. J. Michell. P. W. Michell. Ella G. Elliott. Maude G. Stokes. Alison F. Watt. L. B. Jones, Thomas M. Harris. St. John Quartz Mining Co., D. E. Matteson, President; E. S. Matteson, Secretary. Robert Ford. Mary C. Ford. Elizabeth Mounday. Fred Mounday. D. E. Matteson. C. G. Greene. Roy J. King."

Said escrowed stock not having been purchased within the time allowed, the board of directors of the defendant corporation attempted to extend said escrow at its meeting on February 13, 1923, under the following motion:

> "Motion made by Director Harris and seconded by Director Michell that the foregoing proposition of Mr. M. K. Harr be accepted and adopted. The motion carried unanimously. On motion duly made and carried, a one (1) year's option was given on the 343,090 shares of escrowed stock, to Mr. M. K. Harr, reading as follows:
>
> " 'This agreement made this 13th day of February, 1923, between Grass Valley Gold Mines Company, a corporation organized and existing under the laws of the state of Nevada, the party of the first part, and the Hilltop Nevada Mining Company, a corporation organized and existing under the laws of the state of Nevada, and M. K. Harr, of Philadelphia, Pennsylvania, the parties of the second part, witnesseth:
>
> " 'In consideration of one (1) dollar, the receipt whereof is hereby acknowledged, the party of the first part hereby agrees to sell to the said parties of the second part three hundred forty-three thousand and ninety (343,090) shares of the capital stock of the Grass Valley Gold Mines Company, at forty (40c) cents per share net, at any time within one (1) year from the above date.
>
> " 'In witness whereof the parties hereto have hereunto set their hand and seal, the date and year first above written. Grass Valley Gold Mines Co. [Seal]. [Signed] D. E. Matteson, Pres. [Signed] Oscar L. Coflin, Sec. Hilltop Nevada Mining Co. [Signed] M. K. Harr, Pres. [Signed] W. J. Michell. Gordon S. Morgan. P. W. Michell. Witnesseth: Louis Wheeler.' "

Said stock remained in escrow from the time it was received by plaintiffs and their associates up until the time of the trial of this action. Said options were never exercised.

On February 13, 1923, the defendant issued and sold, outside of the state of California, some 751,000 shares of the stock, and from the sum received therefor $51,000 was expended in the development of the property. This development consisted of sinking a vertical shaft 310 feet deep on a parcel of land other than plaintiffs' and distant therefrom some 350 feet. The court found, under conflicting evidence, that plaintiffs' land was not benefited or developed by the sinking of this shaft. Defendant had not, at any time, applied for or received permission of the corporation commissioner of the state of California to issue said shares or any shares of its capital stock. It was alleged in the answer, and the court found, that plaintiffs and defendant were advised by the same attorney that a foreign corporation need not secure a permit from the corporation department of the state of California to issue and sell the capital stock of such corporation; that each, relying upon said advice, consummated the transaction as above narrated; that about October 10, 1923, plaintiffs discovered the mistake in the advice of said attorney, and that the defendant discovered the same about October 25, 1923; that on October 27, 1923, plaintiffs gave their notice of rescission, and offer of restoration, which was served on defendant on November 1, 1923. The complaint was filed on November 3, 1923. Thereafter, on January 8, 1924, defendant applied to the corporation commissioner for a permit to approve this transaction and to issue the necessary shares to fulfill the same. Thereafter, on February 5, 1924, plaintiffs filed with the corporation commissioner a protest to said application. The application was never acted upon.

The Corporate Securities Act (Stats. 1917, p. 673), and as subsequently amended, provides that no corporation shall sell its capital stock, except for a delinquent assessment, until it has secured from the commissioner of corporations a permit authorizing it to do so. Section 3.

The word "security" as defined in section 2, includes shares of the capital stock of a corporation which makes such sale. The act also provides that every corporation "which shall directly or indirectly issue or cause to be issued any security contrary to the provisions of this act * * * shall be punishable by a fine not exceeding ten thousand dollars." Section 13. Also that any agent of such company who does the like is guilty of a felony. Section 14.

[1] The issuance and sale by defendant of the capital stock, or an agreement for such sale, without a permit being issued by the commissioner of corporations therefor, is illegal and void. Such a contract is not voidable, but is void, being in contravention of the statute providing a punishment for the act complained of. Reno v. American Ice Machine Co., 72 Cal. App. 409, 237 P. 784; Nannizzi v. Caprile, 43 Cal. App. 498, 185 P. 673; Reilly v. Clyne, 27 Ariz. 432, 234 P. 35, 40 A. L. R. 1005; Smith v. Bach, 183 Cal. 259, 191 P. 14.

Since the issuing of the stock was unauthorized, and the act in so doing void, it results that plaintiffs have received nothing whatsoever for the lands conveyed by them to the defendant. There has been a total failure of consideration. Counsel for appellant in its opening brief asserts:

> "If it had been true, as assumed by plaintiffs and the court at the trial of the case, that defendant had induced the plaintiffs to consummate a conveyance of their property for shares of its capital stock to be thereafter issued, that the same was issued to plaintiffs without a permit of the corporation commissioner of this state, in obedience to the provisions of the Corporate Securities Act, and that plaintiffs had no part therein, other than as investors in the usual sense, this appeal would not have been taken; it being assumed that the case of Reilly

v. Clyne, 27 Ariz. 432, 234 P. 35, 40 A. L. R. 1005, would control."

[2] Counsels' contention is that plaintiffs had a "part therein other than as investors in the usual sense." This is based on the facts that plaintiffs W. J. Michell and three other associate landowners were organizers and incorporators of the defendant, and served as directors at the time of the passing of deeds and the issuance of stock, and that the real consideration in the transaction was the interest that each landowner had in the assets of the corporation, as evidenced by the stock certificates; that such a connection with defendant, and the conditions attending the conveyance and issuance of shares, transferred plaintiffs into a different class from that of the ordinary investor.

As above stated, the evidence clearly shows that the idea of combining the properties into one unit and forming the defendant corporation to take them over and operate and develop the same was not the conception of the property owners, but was, instead, that of Roy J. King. It is true that they acted upon the suggestion and assisted in carrying it out, but it was upon an agreed basis of value per acre of each parcel of land, and that stock was to be issued to meet that value at the rate of 40 cents a share. Almost immediately after the issuance of this stock, it was placed in escrow to be sold at the said agreed price, and so remained in escrow until the time of the trial of this action. Had the lands so conveyed to defendant proved to be fabulously rich in minerals, yet plaintiffs and their associates would not have profited in excess of the agreed value of the land, because their stock at all times was subject to be taken over at the previously agreed price. To them, the value of the land was fixed and determined, and the facts do not bear out the statement that the real consideration was their prospective interests in the corporation. It thus becomes patent that the associate landowners were not engaged in a mining venture, but had adopted this means as a way of selling and disposing of their lands. It is difficult to differentiate, in legal contemplation, between one who furnishes money to finance the operation of a corporation and one who furnishes to that corporation the necessary mining ground with which to pursue its declared purposes. In one case he furnishes money for his shares of stock; in the other he supplies the land at an agreed money value which the corporation expects to work at a profit. We cannot subscribe to the doctrine that a corporation may take a person's real property and pay for it in worthless stock, without being amenable to the laws, yet, if it accepts money instead, and gives him the same character of stock, it would have to respond, under the law. We are not able to see wherein a proper legal distinction can be drawn between "investors in the usual sense," and the plaintiffs in this case.

But the facts of this case justify the consideration of other reasons than those above given. A party to a contract may rescind the same if his consent thereto was given by mistake. Civ. Code, § 1689, subd. 1. Mistake may be either of fact or law. Civ. Code, § 1576. Unconscious ignorance of a fact material to the contract, or belief in the present existence of a thing material to the contract, constitutes a mistake of fact. Civ. Code, § 1577. And a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law, constitutes a mistake of law. Civ. Code, § 1578.

[3] The answer alleged, and the court found, that plaintiffs and defendant were advised by the same attorney that it was not necessary for a foreign corporation to secure a permit from the corporation department to issue and sell the capital stock of such corporation. It is therefore clear that there is a mutual mistake either of fact or of law, and as to which it is we deem it unimportant to determine. Except for this mistake, plaintiffs undoubtedly would not have consented to the making of the conveyance. The evidence clearly shows that each of the parties negotiated and acted upon the assumption that shares of stock could be issued for the land so conveyed, without the necessity of first obtaining a permit so to do; that plaintiffs thought they were receiving legal stock; and that the defendant thought it was issuing legal stock. This is conceded by appellant. The stock being invalid, it is of no value to plaintiffs, and they obtained nothing for their lands. We therefore conclude that the mistake was material to the contract, as that expression is used in the Codes.

In the case of Hannah v. Steinman, 159 Cal. 142, 112 P. 1094, while the facts are entirely different from the case at bar, the reasoning and language of that decision, as well as the authorities therein cited, are almost as appropriate as though written especially for the instant case, and furnish ample authority to sustain the foregoing conclusions. The case uses this significant language:

> "We cannot believe that the equitable rules relative to mistake should be so narrowly construed as to require us to hold that this mistake did not go to the very essence of the contract between these parties."

The following authorities support the right to rescind for mistake: Mosher v. Lack, 41 Cal. App. 23, 181 P. 813; Tetenman v. Epstein, 66 Cal. App. 745, 226 P. 966; Johnson v. Withers, 9 Cal. App. 52, 98 P. 42; Butte Creek, etc., Co. v. Olney, 173 Cal. 697, 161 P. 260.

[4] Appellant complains that plaintiffs did not rescind promptly. Section 1691 of the Civil Code provides that, except where ef-

fected by consent, rescission can be accomplished only by the use on the part of the party rescinding of reasonable diligence to comply with the following:

> "1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,
>
> "2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

We can see no merit in appellant's contention. The evidence discloses and the court found that plaintiffs first discovered the mistake and became aware of the facts which entitled them to rescind on October 10, 1923; that on October 27, some 17 days later, they gave their notice of rescission, and made offer of restoration, and 8 days thereafter actually commenced the action in the present case. This fully meets the requirements of the Code. There is not the slightest evidence to indicate that the defendant was injured by the delay or that the proceedings were delayed because of any uncertainty as to whether it would be to plaintiffs' benefit or otherwise to prolong the existing situation. Plaintiffs' offer of restoration was full and complete.

In view of our conclusions herein expressed, it becomes unnecessary to consider other points advanced by appellant. The facts support the findings, and the findings, in turn, are sufficient to support the judgment.

The judgment appealed from is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

MEMORANDUM DECISIONS

204 Cal. 423

Minnie Mabelle WING and E. P. Wing (Her Husband), Plaintiffs and Appellants, v. Maude DENNIS (also known as Maude Dennis Brown), Defendant and Respondent. (L. A. 9293.) Supreme Court of California. June 25, 1928. Department 2. Appeal by plaintiffs from a judgment of the Superior Court of Los Angeles County, Albert Lee Stephens, Judge, in an action to establish and enforce trust. Fred N. Arnoldy, of Los Angeles, for appellants. Gilbert F. Wyvell, of Los Angeles, for respondent.

SHENK, J. This is an action to establish and enforce a trust in a renewal lease of a hotel in favor of a partnership existing between the plaintiff Minnie Mabelle Wing and the defendant. The partnership was formed on May 25, 1921, solely for the purpose of conducting the hotel under said lease. The lease, by its terms, would expire on May 31, 1925. On March 1, 1925, the defendant procured in her own name a renewal of said lease for a term of six years, commencing June 1, 1925. This action was instituted on April 8, 1925. Judgment went for the defendant and this appeal is taken therefrom. The principal contention on the appeal is that the evidence was insufficient to support the finding that the renewal of the lease taken in the name of the defendant and for her sole use was so taken with the consent, express or implied, of the plaintiff Minnie Mabelle Wing. The record has been examined. We are of the opinion that the evidence is sufficient to support said finding. No other points require comment. The judgment is affirmed.

We concur: RICHARDS, J.; TYLER, Justice pro tem.